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THE

ALL INDIA REPORTER

1926 LAHORE

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables :—

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No I.

Showing seriatim the pages of INDIAN LAW REPORTS, LAHORE SERIES for the yea 1926 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 7 LAHORE.

Column No. 2 denotes corresponding references of the ALL INIDA REPORTER.

I. L. R. 7 Lahore=All India Reportor.

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
1	1926	*L*	165	80	1926	*L*	72	159	1926	*L*	411	270	1926	*L*	352	365	1926	*L*	532
4	"	"	171	84	"	"	88	161	"	"	379	273	1921	"	137	368	"	"	529
10	"	"	192	91	"	"	310	168	"	"	248	275	1926	"	100	370	"	"	575
12	"	"	167	99	"	"	131	171	"	"	383	297	"	"	494	376	"	"	264
15	"	"	195	102	"	"	186	173	"	"	244	303	"	"	301	390	"	"	688
17	"	"	183	104	"	"	326	179	"	"	65	306	"	"	300	393	"	"	604
21	"	"	74	108	"	"	305	201	"	"	161	310	"	"	459	396	"	"	582
30	"	"	206	113	"	"	328	206	"	"	356	313	"	"	480	399	"	"	607
32	"	"	166	117	"	"	207	210	"	"	437	315	"	"	498	403	"	"	616
35	"	"	170	121	"	"	298	212	"	"	430	319	"	"	341	406	"	"	606
40	"	"	162	122	"	"	304	215	"	"	408	327	"	"	519	408	"	"	481
42	"	"	125	124	"	"	210	218	"	"	297	332	"	"	338	412	"	"	631
50	"	"	232	129	"	"	289	223	"	"	421	337	"	"	442	416	"	"	401
55	"	"	108	134	"	"	205	226	"	"	400	341	"	"	517	420	1927	"	9
61	"	"	277	138	"	"	201	227	"	"	373	344	"	"	424	423	"	"	1
65	"	"	262	141	"	"	428	232	"	"	488	346	"	"	533	438	"	"	6
70	"	"	271	148	"	"	309	235	"	"	348	348	"	"	357	442	1926	"	318
73	"	"	234	152	"	"	427	238	"	"	253	357	"	"	405	447	"	"	458
77	1927	"	54	155	"	"	423	264	"	"	367	359	"	"	406				

I. L. R. 7 Lahore=All India Reporter—(*Concld.*)

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
451	1926	*L*	502	471	1926	*L*	483	488	1926	"	598	539	1927	"	49	561	"	"	691
456	1927	"	67	476	"	"	468	491	1927	"	20	543	1926	"	673	564	"	"	551
460	"	"	8	479	"	"	578	507	1926	"	447	552	1927	"	82	568	"	"	518
463	"	"	18	482	"	"	683	522	"	"	395	555	"	"	86	570	"	"	376
468	1926	"	609	484	1927	"	88					559	1926	"	624				

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Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

8 Lahore Law Journal=All India Reporter.

LLJ	A. I. R.			LLJ	A. I. R.			LLJ	A. I. R.			LLJ	A. I. R.			LLJ	A. I. R.		
1	1926	*J*	102	140	1926	*L*	301	275	1926	*J*	89	391	1926	*L*	586	509	1926	*J*	138
3	"	*L*	328	143	"	*J*	132	277	"	*L*	549	393	"	"	622	512	"	"	184
7	"	*J*	106	144	"	"	117	281	1927	"	8	397	"	"	626	515	"	"	180
10	"	*L*	214	146	"	*L*	336	283	1926	"	468	398	"	*J*	140	518	1927	*L*	66
13	"	"	65	148	"	*J*	111	286	"	"	489	400	"	*L*	615	519	1926	*J*	140
32	"	"	186	150	"	*L*	486	289	"	"	504	402	"	"	636	521	"	*L*	458
35	"	"	174	152	"	*J*	125	291	"	"	471	404	"	*J*	139	524	1927	"	30
39	"	"	244	156	"	*L*	372	295	"	*J*	125	406	"	"	145	532	"	"	48
43	"	"	641	158	"	*J*	101	296	"	*L*	496	410	"	"	141	535	1926	*J*	192
47	"	*J*	113	162	"	"	122	301	"	*J*	176	414	"	*L*	665	537	1927	*L*	45
51	"	"	115	164	"	*L*	433	303	"	*L*	470	416	"	"	442	539	"	"	24
55	1927	*L*	29	166	"	"	417	305	"	*J*	96	419	"	"	533	546	"	"	36
58	1926	*J*	86	170	"	"	344	309	"	*L*	437	422	"	*J*	139	548	"	"	57
60	"	*L*	346	174	"	"	367	310	"	"	547	423	"	*L*	612	551	"	"	37
66	"	"	542	180	"	"	375	313	"	"	506	425	"	"	338	555	"	"	41
67	"	*J*	121	183	"	*J*	113	319	"	"	408	430	"	*J*	129	557	1926	*J*	189
70	"	*L*	237	186	"	"	116	322	"	*J*	105	432	"	*L*	624	559	1927	*L*	51
73	"	"	220	188	"	*L*	361	324	"	*L*	513	434	"	"	645	562	"	"	69
76	"	"	304	194	"	"	392	327	"	"	572	447	"	"	529	564	"	"	58
78	"	"	242	198	"	*J*	97	331	"	*J*	91	449	"	"	467	566	"	"	52
80	"	"	248	201	"	"	124	333	"	*L*	499	451	"	"	422	569	1926	"	681
82	"	"	412	206	"	*L*	253	338	"	"	488	453	"	*J*	136	572	"	*J*	182
87	"	"	131	228	1927	"	67	341	"	"	431	455	"	"	184	575	192	*L*	87
90	"	"	553	231	1926	"	425	346	"	"	527	457	"	"	117	578	"	"	14
93	"	"	219	235	"	"	457	347	"	"	540	460	"	*L*	519	581	"	"	67
97	"	"	278	238	"	"	514	350	"	"	348	464	"	"	490	584	1926	"	502
99	"	"	320	239	"	*J*	101	352	1927	"	49	473	"	"	689	589	1927	"	60
101	1927	"	92	240	"	*L*	414	355	1926	"	539	476	"	"	481	594	"	"	75
106	1926	"	161	242	"	"	357	358	"	"	205	479	"	"	693	600	1926	*J*	190
111	"	"	340	251	"	"	406	361	"	"	688	482	"	*J*	149	604	1927	*L*	72
114	"	"	292	255	"	"	405	363	"	"	618	485	"	*L*	659	608	1926	"	662
125	"	"	330	257	"	"	410	374	"	*J*	88	489	"	"	688	610	1927	"	78
129	"	*J*	129	261	"	*J*	131	376	"	*L*	624	492	"	*J*	90	613	1926	"	517
132	"	*L*	303	264	"	*L*	512	381	"	"	559	501	"	*L*	613	616	1927	"	10
134	"	"	332	267	"	"	379	385	"	"	569	504	"	"	575	618	1926	*J*	197
136	1927	"	98	273	1927	"	55	389	"	*J*	89								

27 Punjab Law Reporter=All India Reporter.

PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
1	1925	*PC*	290	13	1926	*J*	102	24	1926	*L*	128	32	1926	*L*	152	49	1926	*L*	285
6	1926	*J*	115	15	"	"	114	26	"	"	252	35	1925	*PC*	293	50	"	"	65
9	"	*L*	183	18	"	*L*	223	27	"	*J*	85	43	1926	*L*	108	65	"	"	288
11	"	"	284	22	"	*J*	113	29	"	"	95	47	"	"	221	67	"	"	236

27 Punjab Law Reporter=All India Reporter—(*Concld.*)

PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.			PLR	A. I. R.		
68	1926	*L*	285	223	1926	*L*	443	398	1926	*L*	503	562	1926	*L*	604	710	1926	*L*	344
70	,,	,,	244	225	,,	,,	199	400	,,	,,	488	564	1927	,,	71	712	1927	,,	8
73	,,	,,	542	228	,,	*J*	86	402	,,	,,	549	565	1926	,,	506	714	1926	*J*	189
74	,,	,,	250	229	,,	,,	128	405	,,	,,	421	570	,,	,,	470	716	,,	,,	138
75	1926	*L*	328	231	,,	,,	119	407	,,	*J*	125	572	,,	,,	575	719	,,	,,	116
78	,,	,,	229	232	,,	,,	109	408	,,	*L*	348	576	,,	,,	499	721	,,	*L*	659
80	,,	,,	156	233	,,	*L*	536	410	,,	*J*	146	580	,,	*J*	140	724	,,	,,	569
82	,,	,,	444	235	,,	*J*	125	411	,,	*L*	400	581	,,	*L*	471	727	,,	*J*	149
85	,,	,,	155	238	,,	*L*	320	412	,,	,,	408	583	,,	,,	88	729	,,	*L*	665
87	,,	,,	139	239	1927	,,	92	414	1927	,,	8	588	,,	,,	489	731	,,	,,	689
89	,,	,,	482	244	1926	,,	361	416	1926	,,	373	590	,,	,,	512	734	1927	,,	27
91	,,	,,	343	249	,,	,,	303	419	,,	*J*	111	592	1926	*J*	197	735	1926	,,	513
95	,,	,,	214	250	,,	,,	332	422	,,	,,	143	594	1926	*L*	481	738	,,	,,	356
98	,,	*J*	106	252	,,	*J*	129	424	1927	*L*	67	596	,,	*J*	89	740	1927	,,	18
100	,,	*L*	641	254	,,	*L*	464	426	1926	*J*	89	598	,,	*L*	616	743	1926	,,	392
102	,,	*J*	113	256	,,	,,	372	427	,,	*L*	551	599	,,	,,	695	745	,,	,,	540
106	,,	*L*	186	257	,,	,,	464	430	,,	*J*	184	601	,,	,,	606	747	,,	*J*	184
109	,,	,,	174	258	,,	,,	165	431	,,	,,	139	602	,,	,,	631	749	,,	*L*	437
112	1927	,,	34	260	,,	,,	415	432	,,	*L*	511	604	1927	,,	16	750	,,	*J*	181
115	1926	,,	100	264	,,	*J*	110	439	,,	*J*	131	605	1926	,,	376	752	,,	,,	145
131	,,	,,	304	265	,,	*L*	301	441	,,	,,	116	611	,,	,,	691	755	,,	*L*	430
132	,,	,,	219	267	,,	,,	336	444	,,	*L*	468	612	,,	*J*	117	757	,,	,,	433
135	,,	*J*	104	268	,,	*J*	101	446	,,	*J*	176	615	1927	*L*	10	759	,,	,,	431
136	,,	,,	121	271	,,	*L*	688	447	,,	*L*	582	617	1926	,,	668	762	,,	*J*	192
138	1927	*L*	65	273	,,	,,	340	453	,,	,,	504	620	,,	,,	559	764	,,	,,	189
140	1926	,,	220	276	,,	,,	439	454	,,	,,	498	623	,,	,,	693	765	,,	,,	180
142	,,	,,	237	280	,,	,,	74	456	1921	,,	137	626	,,	,,	467	767	1927	*L*	41
144	,,	,,	330	287	,,	,,	125	458	1927	,,	55	627	,,	*J*	136	768	1926	*J*	193
147	,,	*J*	120	292	,,	,,	438	460	1926	,,	300	628	,,	,,	129	771	1927	*L*	36
150	,,	,,	133	294	,,	,,	232	462	,,	,,	480	630	,,	*L*	479	775	1926	*J*	179
151	,,	*L*	275	298	,,	,,	326	463	,,	,,	494	632	,,	*J*	141	777	1927	*L*	57
154	,,	,,	210	301	,,	,,	292	466	,,	,,	459	635	,,	*L*	683	779	,,	,,	30
158	,,	*J*	126	310*a*	,,	,,	298	469	,,	,,	590	638	,,	,,	422	783	,,	,,	53
160	,,	*L*	299	310*b*	,,	,,	289	484	,,	,,	496	641	,,	,,	692	784	,,	,,	69
162	1927	,,	90	314	,,	,,	305	488	,,	*J*	119	642	1927	,,	91	786	,,	,,	58
164	1926	,,	460	317	,,	,,	472	489	,,	,,	96	643	1926	,,	624	788	1926	,,	483
165	1927	,,	29	318	,,	,,	383	491	,,	*L*	470	644	,,	,,	612	791	,,	,,	447
168	1926	,,	453	319	,,	,,	411	493	,,	,,	424	646	,,	,,	636	801	1927	,,	101
171	,,	,,	278	321	,,	,,	379	494	,,	,,	490	648	,,	*J*	140	802	,,	,,	88
172	,,	,,	346	325	,,	,,	201	501	,,	*J*	145	649	,,	*L*	586	805	1926	,,	598
176	,,	,,	412	327	,,	,,	309	502	,,	*L*	517	651	,,	*J*	139	807	1927	,,	113
180	,,	,,	534	330	,,	,,	393	504	,,	,,	603	652	,,	*L*	626	810	1926	,,	683
181	,,	,,	131	332	,,	,,	428	507	,,	,,	341	653	,,	,,	622	812	1927	,,	20
183	,,	,,	553	337	,,	,,	423	512	,,	,,	533	656	,,	,,	401	823	,,	,,	52
185	,,	,,	304	339	,,	,,	427	513	,,	,,	621	659	1927	,,	9	825	1926	,,	662
187	,,	,,	242	341	,,	,,	205	514	,,	,,	72	660	1926	,,	458	827	,,	,,	681
188	,,	,,	248	344	,,	,,	417	517	,,	,,	277	663	1927	,,	1	829	1927	,,	48
190	,,	,,	297	347	,,	*J*	97	519	,,	,,	338	674	1926	*J*	88	831	,,	,,	14
194	,,	,,	202	351	,,	*L*	486	523	,,	,,	262	676	,,	*L*	624	833	1926	,,	425
197	,,	*J*	187	353	,,	,,	375	526	,,	,,	234	679	,,	,,	618	836	,,	,,	161
198	,,	*L*	452	355	,,	,,	514	529	,,	,,	405	688	,,	,,	607	840	,,	,,	518
199	,,	*J*	132	356	,,	,,	253	531	,,	,,	529	691	,,	,,	539	841	,,	*J*	101
200	,,	*L*	207	375	,,	,,	473	532	,,	,,	442	693	,,	,,	672	842	,,	*L*	414
203	1927	,,	98	377	,,	,,	545	534	,,	,,	271	695	,,	,,	502	843	,,	,,	410
206	1926	,,	192	379	,,	,,	367	537	,,	,,	613	698	1927	,,	49	846	,,	,,	395
207	,,	,,	195	384	,,	,,	352	539	,,	,,	532	700	1926	*J*	105	857	1927	,,	82
209	,,	,,	162	385	,,	,,	600	541	,,	,,	519	701	,,	*L*	638	859	1926	,,	673
210	,,	,,	170	387	,,	*J*	104	544	,,	*J*	90	702	,,	,,	572	864	1927	,,	86
214	,,	,,	171	391	,,	,,	119	551	,,	*L*	406	705	1927	,,	66	867	1926	*J*	184
218	,,	,,	206	393	1925	*L*	535	555	,,	,,	357	706	1926	,,	547	869	,,	,,	122
219	,,	,,	167	397	1926	*J*	135	561	,,	,,	615	708	,,	,,	609	870	,,	*L*	451
221	,,	,,	166																

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CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.			CrLJ	A. I. R.		
1	1925	*L*	650	5	1926	*A*	251	8	1926	*A*	187	15	1926	*A*	143	19	1926	*A*	27
2	,,	*A*	670	6	,,	*A*	159	9	,,	*P*	170	17	1925	*A*	673	21*a*	,,	*O*	269
4	,,	*R*	321	7	,,	*L*	516	11	,,	*A*	147	18	,,	*M*	879	21*b*	,,	*A*	167

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CrLJ	A. I. R.	CrLJ	A. I. R.	CrLJ	A. I. R.	CrLJ	A. I. R.	CrLJ	A. I. R.
22	1925 *N* 462	137	1925 *P* 689	280	1926 *M* 238	402	1926 *O* 255	542*a*	1926 *C* 663
23	1926 *L* 196	139	1926 *B* 118	283	" *L* 221	405	" *A* 358	542*b*	" *S* 192
24	" *A* 264	140	1925 *L* 578	284	" *A* 304	406	" *C* 537	543	" *L* 454
26	1925 *L* 633	142*a*	1926 *J* 108	285	" *J* 107	408	" *L* 155	544	" *L* 369
27	1926 *A* 157	142*b*	" *P* 196	266	" *S* 174	409	" *C* 531	545	" *C* 590
29	1925 *L* 621	143	" *A* 261	287	" *A* 225	411	" *L* 156	547	" *L* 419
30	" *M* 1218	145	" *C* 307	289	1925 *L* 483	412	" *C* 161	549	" *C* 614
32	1926 *S* 129	146	" *A* 247	296	1926 *A* 306	413	" *R* 46	550	" *A* 425
33	1925 *M* 1153	147	" *C* 345	297	" *A* 302	414	" *S* 159	551	1925 *O* 731
35	1926 *A* 165	150	" *B* 77	299	1925 *L* 495	415	" *R* 13	552	1926 *L* 498
37	" *S* 126	152	" *A* 227	300*a*	1926 *A* 141	417	" *O* 194	553	" *C* 605
38	" *L* 28	153	" *C* 300	300*b*	" *S* 176	418	" *P* 237	554	" *L* 384
40	" *S* 137	158	" *A* 246	301	" *J* 110	421	1925 *L* 446	555*a*	" *L* 378
48	" *J* 138	159	" *C* 339	302*a*	" *S* 198	423	1926 *B* 141	555*b*	" *B* 227
44*a*	1925 *P* 435	160	" *B* 80	302*b*	1925 *L* 510	426	" *A* 321	556*a*	" *L* 480
44*b*	1926 *J* 153	161	" *N* 1	303*a*	1926 *A* 226	429	1927 *A* 125	556*b*	" *L* 195
46	1925 *M* 1238	165	" *B* 57	303*b*	" *A* 288	430*a*	1926 *B* 225	557	" *B* 256
49	" *P* 797	170	1925 *L* 19	305	" *B* 110	430*b*	1927 *L* 85	558	" *J* 114
57	1926 *O* 245	175	1926 *A* 160	309	" *S* 101	431	1926 *B* 226	559	" *A* 685
60	1925 *N* 407	176	" *M* 370	310	" *A* 237	433	" *B* 144	560	" *A* 421
62	1926 *O* 148	177	" *C* 89	311	" *M* 570	438	1925 *L* 399	561	" *L* 166
64	*Too old*	181	1927 *N* 71	313*a*	" *A* 276	440	1926 *B* 218	562	" *L* 350
65	1926 *O* 272	182	1926 *C* 258	313*b*	1925 *P* 755	445	" *A* 334	563*a*	" *L* 206
66	1925 *N* 403	184	" *M* 420	318	" *R* 353	448	" *B* 163	563*b*	" *L* 493
68	1926 *N* 371	185	" *N* 228	319	1926 *N* 279	449	" *A* 318	564	" *A* 332
69	1925 *B* 433	186*a*	" *L* 239	321	1925 *R* 345	452	" *B* 149	565*a*	" *L* 347
71	1926 *N* 285	186*b*	" *N* 229	325	1926 *A* 325	454	" *A* 307	565*b*	" *J* 135
73	*Too old*	190	" *L* 190	326	" *S* 180	455	" *B* 159	566	" *L* 361
74	1926 *N* 127	191	" *O* 280	327	" *J* 107	456	" *S* 151	568	" *J* 147
75	*Too old*	192	" *L* 176	328	" *O* 202	459	" *L* 219	569	" *L* 426
76	1926 *M* 361	193	1924 *A* 233	330	" *J* 115	460	" *O* 234	570	" *L* 427
77	*Too old*	210	1926 *N* 98	331	" *J* 99	463*a*	" *L* 304	571*a*	" *L* 675
80	1926 *C* 149	211	" *J* 105	332	" *S* 158	463*b*	" *L* 309	571*b*	*Too old*
81	1925 *M* 1093	212	" *N* 286	333	" *L* 227	465	" *L* 248	572*a*	1926 *L* 407
83	" *O* 713	215	" *L* 310	334*a*	" *M* 296	466*a*	" *A* 242	572*b*	" *L* 485
84	" *M* 1122	217	1925 *N* 154	334*b*	" *S* 150	466*b*	" *B* 151	573	" *L* 368
87	" *L* 288	218	" *L* 185	336	1925 *R* 363	468	" *L* 297	574*a*	" *J* 122
88	1926 *M* 349	220	1924 *P* 589	337	" *R* 362	470	" *A* 389	574*b*	" *L* 487
89	" *S* 124	222	1926 *C* 550	338	1926 *L* 212	471	" *J* 113	575	" *L* 366
90*a*	" *M* 354	223	" *J* 197	339	" *N* 323	473	" *A* 390	576	" *L* 424
90*b*	" *S* 144	225	" " 176	342	1925 *R* 375	474	1925 *L* 210	577	" *J* 110
91	1925 *M* 911	228	1925 *PC* 305	343*a*	1926 *M* 210	475	1926 *N* 348	588	" *J* 121
95	" *M* 1252	229	" *L* 614	343*b*	" *S* 275	476	" *L* 199	589	" *O* 398
97	" *M* 1015	230	1924 *M* 479	344	" *O* 290	477	" *M* 722	593	" *L* 375
98	" *L* 312	231	1925 *L* 599	345	" *A* 271	478	" *L* 317	594	" *P* 440
100	1926 *M* 183	232	" *C* 217	350	" *M* 346	479	" *B* 251	600	" *L* 439
101	" *A* 189	233	1926 *L* 4	351	" *A* 277	480	" *J* 132	602	" *C* 586
104	" *L* 151	235	" *P* 176	353	1925 *P* 696	481	" *B* 238	605	" *J* 117
105	" *M* 165	238	" *L* 143	358	1926 *A* 368	484	" *P* 232	606	" *C* 581
107*a*	" *A* 263	239	" *C* 437	359	1925 *P* 623	491	" *B* 178	607	" *L* 365
107*b*	" *M* 288	240	" *A* 168	361	1926 *M* 480	492	" *J* 112	609	" *P* 267
108	1925 *M* 1213	241	" *J* 103	362	" *P* 20	494	" *S* 188	610	" *L* 532
109	1926 *L* 209	243	" *S* 171	370	" *A* 614	495	" *J* 123	611	" *P* 299
110	" *C* 692	247	" *L* 83	371	1925 *P* 677	496	" *B* 255	614	" *L* 363
111	" *B* 62	248	" *S* 143	373	" *P* 678	497	" *C* 648	615	" *J* 149
112	" *L* 272	249	" *J* 99	375	1926 *C* 157	498	" *J* 134	617*a*	" *J* 104
118	" *B* 64	250	" A 122	377*a*	" *L* 250	499	" *P* 214	617*b*	" *C* 925
114*a*	" *J* 93	251	1925 *B* 467	377*b*	" *A* 297	503	" *B* 195	619	" *J* 123
114*b*	" *B* 71	252	1926 *L* 240	378	" *J* 196	507	" *L* 353	621*a*	" *L* 336
121	" *L* 179	253	" *A* 287	380	1927 *L* 34	509	" *C* 528	621*b*	" *C* 742
123	" *B* 46	254	1925 *R* 219	382*a*	1926 *C* 174	510	" *L* 382	624	" *J* 132
125	" *C* 584	257	" *S* 233	382*b*	" *L* 236	512	" *P* 253	625	" *L* 262
126	" *M* 189	263	1926 *C* 320	383	" *A* 298	514	1925 *L* 605	626	" *O* 329
127	1925 *C* 1021	265	" *A* 188	384	" *M* 1044	522	1926 *P* 173	627	" *L* 271
128	1926 *A* 241	266	" *C* 139	385	" *C* 470	523	" *A* 402	628	" *S* 190
129	1925 *C* 1017	274	" *J* 151	392	" *P* 244	524	1925 *P* 450	630	" *L* 232
132	" *L* 539	275	" " 107	394	" *M* 688	527	1926 *L* 394	632	" *N* 300
133	" *C* 1020	276	" *A* 193	398	" *C* 728	528	" *B* 230	633	" *J* 123
134	" *L* 557	277	" *C* 147	400	" *L* 139	529	" *O* 120	633*b*	" *S* 193
136	1926 *A* 255	278	" *A* 229	401	" *R* 51	541	" *A* 461		

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635	1926	*M*	576	771	1926	*J*	119	874	1926	*A*	340	1004	1926	*L*	691	1134	1926	*B*	518
636	"	*R*	107	772	"	*L*	326	876	"	*S*	270	1005	"	*M*	1097	1139	"	*C*	1090
638	"	*L*	72	773	"	*N*	308	878	"	*J*	98	1007	"	*L*	551	1140	"	*B*	513
639	"	*L*	301	775	"	*J*	132	879	"	*A*	705	1009	"	*L*	663	1144	1927	*N*	40
641*a*	"	*C*	793	776	"	*L*	305	881	"	*R*	116	1010	"	*N*	485	1145	1926	*B*	517
641*b*	"	*P*	81	777	"	*S*	213	888	"	*L*	447	1011	"	*J*	144	1146	"	*C*	1138
648*a*	"	*C*	788	779	"	*L*	469	894	"	*M*	741	1011	"	*J*	149	1148	1927	*B*	67
648*b*	1925	*R*	360	780	"	*S*	215	896	1927	*C*	289	1013	"	*L*	640	1149	1926	*M*	1008
650	1926	*B*	134	782	"	*L*	410	897	1926	*L*	598	1013	"	*J*	146	1151	"	*B*	534
651	1925	*R*	328	783	"	*A*	428	898	"	*A*	704	1014	"	*A*	613	1152	"	*L*	636
652	1926	*B*	103	784	"	*J*	183	899*a*	"	*L*	278	1015	"	*L*	600	1153	"	*B*	512
656	"	*R*	82	785	"	*A*	429	899*b*	"	*A*	566	1016	"	*L*	651	1154	"	*C*	1133
657	"	*P*	316	788	"	*C*	795	900	"	*L*	119	1017	"	*P*	393	1158	"	*B*	544
658	"	*R*	112	792	"	*P*	493	901	"	*A*	700	1018	"	*L*	677	1159	"	*J*	139
659	"	*M*	815	793	"	*L*	193	903	"	*L*	496	1019	"	*L*	639	1160	"	*B*	535
660	1925	*R*	270	796	"	*P*	362	905	"	*S*	254	1020	"	*O*	414	1161	"	*J*	145
661*a*	1926	*L*	130	801	"	*L*	550	907	"	*L*	406	1021	"	*L*	684	1163	"	*B*	545
661*b*	"	*B*	91	802	"	*S*	253	909	"	*P*	347	1021	"	*A*	577	1164	1927	*M*	56
666	"	*P*	296	803	"	*L*	367	911	"	*L*	405	1022	"	*L*	628	1167	1926	*B*	548
669	"	*R*	53	805	"	*C*	922	912	"	*L*	518	1023	"	*L*	683	1168	"	*L*	582
688	"	*C*	563	807*a*	"	*L*	528	913	"	*L*	357	1025	"	*L*	662	1169	"	*B*	551
689	"	*B*	122	807*b*	"	*N*	426	916	1925	*R*	247	1026	"	*M*	906	1172	"	*J*	155
696	"	*L*	412	812	"	*L*	543	918	1926	*J*	137	1030	"	*S*	276	1173	"	*B*	555
697	"	*A*	474	813	1921	*A*	215	920	"	*C*	966	1031	"	*M*	865	1177	"	*S*	278
698	"	*P*	292	815	1926	*L*	479	926*a*	"	*B*	416	1037	"	*L*	627	1179	"	*B*	546
700	"	*M*	380	816	"	*J*	141	926*b*	"	*C*	895	1038	"	*C*	996	1180	"	*J*	110
701	"	*C*	502	817	"	*L*	392	929	"	*L*	74	1041	"	*P*	566	1182	"	*B*	530
702	"	*A*	295	818*a*	"	*R*	106	932	"	*L*	213	1061	"	*B*	404	1185	"	*J*	190
704	"	*P*	400	818*b*	"	*J*	97	933	"	*J*	151	1062	1927	*N*	48	1187	"	*M*	1068
705	"	*A*	231	820	"	*O*	268	934*a*	"	*J*	176	1063	1926	*L*	683	1188	"	*C*	1173
707	"	*N*	304	821	"	*J*	113	934*b*	"	*L*	611	1063	1927	*N*	53	1190	"	*O*	604
709	"	*L*	88	822*a*	"	*O*	448	935	"	*S*	288	1066	1926	*C*	944	1191	"	*M*	1121
711	"	*S*	194	822*b*	"	*J*	116	938*a*	"	*J*	146	1067	"	*J*	148	1191	"	*O*	556
715	"	*C*	1208	823	1921	*O*	99	938*b*	"	*N*	504	1068	"	*A*	737	1192	"	*J*	94
717	"	*J*	137	824*a*	1926	*L*	521	939	"	*L*	470	1071	"	*L*	656	1193	"	*O*	557
719*a*	"	*L*	445	824*b*	"	*M*	806	940*a*	"	*B*	419	1072	"	*P*	446	1195	1927	*C*	93
719*b*	"	*J*	137	827*a*	"	*J*	140	940*b*	"	*J*	96	1075	"	*R*	169	1198	"	*M*	97
720	"	*L*	434	827*b*	"	*J*	118	942	"	*L*	609	1078	1927	*P*	27	1200	1926	*O*	560
721	"	*B*	332	830	"	*N*	459	944	"	*L*	617	1083	1926	*C*	1049	1201	"	*C*	1121
724	"	*L*	131	833	"	*S*	244	945	"	*A*	403	1084	"	*R*	180	1213	"	*B*	564
725	"	*R*	88	834	"	*L*	581	946	"	*J*	117	1086	"	*C*	1054	1214	1927	*P*	59
726	"	*B*	305	835	"	*N*	448	947	1927	*S*	58	1088	"	*R*	171	1216	1926	*J*	146
727	"	*L*	553	836*a*	"	*L*	570	948	1926	*M*	763	1089	"	*C*	1051	1217	1927	*S*	28
728	"	*N*	374	836*b*	1925	*A*	223	949*a*	"	*J*	136	1090	"	*P*	499	1229	"	*N*	49
730	"	*B*	288	840	1926	*L*	567	949*b*	"	*J*	136	1094	"	*L*	695	1230	1926	*R*	202
731	"	*N*	368	841*a*	"	*C*	1088	951	"	*L*	290	1095	"	*M*	1130	1233	1927	*S*	39
733	"	*C*	585	841*b*	"	*P*	348	953	"	*P*	517	1097	"	*J*	155	1240	"	*P*	47
734	"	*B*	313	844	"	*P*	464	955	"	*N*	461	1098	"	*J*	184	1241	1926	*R*	188
735	1925	*L*	435	845	"	*A*	562	957	"	*P*	279	1099	1927	*N*	22	1244	1927	*P*	89
737	1926	*R*	76	846*a*	"	*L*	575	969	"	*O*	485	1100	"	*P*	13	1247	1926	*M*	1143
740	"	*B*	284	846*b*	1927	*O*	102	970	"	*P*	520	1103	1926	*A*	590	1247	1927	*O*	51
743	"	*R*	127	848	1926	*J*	142	974	"	*J*	148	1104	1927	*A*	69	1249	"	*S*	89
744	"	*B*	314	849	"	*P*	302	975	"	*C*	945	1105	"	*S*	10	1251	"	*Too old*	
746	"	*A*	377	851	"	*L*	547	976	"	*P*	367	1111	"	*P*	52	1253	1927	*S*	45
751	"	*C*	691	852	"	*O*	424	977	"	*L*	313	1111	"	*L*	15	1254	"	*O*	26
752	"	*L*	298	853	"	*C*	1048	981	"	*A*	658	1112	"	*P*	37	1254	1926	*J*	105
753	"	*P*	211	854	1925	*O*	321	983	"	*J*	104	1114	"	*L*	17	1256	1927	*S*	53
755*a*	"	*L*	411	855	1926	*P*	358	984	"	*C*	786	1116	"	*A*	50	1258	"	*O*	17
755*b*	"	*R*	134	857	"	*R*	78	986	"	*J*	135	1118	"	*A*	35	1261	"	*S*	59
756	"	*J*	184	858	"	*A*	603	987	"	*P*	368	1119	"	*N*	17	1263	"	*P*	87
757	"	*J*	150	859	"	*S*	257	988	"	*M*	1009	1120	"	*A*	131	1265	"	*S*	85
760	"	*L*	478	860	"	*A*	382	990	"	*L*	459	1121	"	*S*	16	1268	"	*C*	119
761	"	*L*	205	863	"	*M*	727	991	1927	*A*	80	1123	1926	*M*	989	1276	"	*S*	54
763	"	*O*	367	864	1922	*A*	265	992	1926	*A*	466	1125	1927	*P*	5	1280	"	*S*	77
764	"	*L*	428	865	1926	*S*	273	993	"	*J*	134	1127	"	*S*	23	1281	1926	*R*	193
766	"	*J*	144	867	"	*P*	346	994	"	*M*	1072	1128	1926	*P*	569	1282	"	*O*	618
767	"	*A*	405	868	"	*S*	258	1000	"	*L*	667	1130	1927	*A*	38	1284	1927	*R*	67
768	"	*J*	132	871	"	*J*	150	1001	"	*N*	503	1131	1926	*C*	1109	1285	1926	*J*	185
769	1925	*L*	631	872	"	*Too old*		1002	"	*L*	689	1132	"	*A*	767	1285	"	*R*	207
770	1926	*S*	230	873	1926	*B*	382	1003	1927	*N*	47	1133	"	*C*	1120				

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CrLJ)	A.I.R.			CrLJ)	A.I.R.			CrLJ)	A.I.R.			CrLJ)	A.I.R.			CrLJ)	A.I.R.		
1287	1926	C	1012	1313	1926	J	134	1344	1926	J	179	1363	1927	A	99	1390	1926	A	711
1289	"	B	245	1314	"	C	1059	1345	1927	A	107	1364	"	R	19	1391	1927	M	139
1290	"	S	281	1316	"	M	1131	1346	1926	J	134	1365	1926	J	185	1391	"	P	86
1291	1927	P	96	1319	"	L	536	1347	1927	S	92	1367	1927	A	111	1392	"	A	105
1292	"	S	97	1320	"	P	425	1351	"	A	52	1368	"	M	243	1393	1926	R	154
1293	1926	C	1224	1321	1927	L	54	1351	"	A	75	1369	"	A	90	1395	1927	A	119
1294	1927	L	10	1322	1926	P	433	1352	1926	M	670	1371	"	R	80	1396	1926	R	164
1295	1926	C	1202	1327	1927	M	162	1354	1927	A	112	1372	1926	J	180	1400	1927	A	104
1297	"	J	151	1328	1926	B	526	1355	"	A	108	1373	1927	A	45	1402	1926	R	182
1304	"	C	1203	1329	"	C	1163	1357	1926	M	1165	1377	"	A	97	1402	"	C	1107
1306	"	O	622	1333	1927	S	98	1358	1927	A	163	1378	1926	J	179	1404	1927	N	88
1308	"	P	535	1335	1926	B	231	1360	"	R	32	1381	1927	M	177	1406	"	A	101
1310	"	P	424	1341	"	C	1034	1361	"	A	116	1383	1926	L	385	1407	"	A	193
1311	"	L	517																

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I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
1	1926	M	314	82b	1925	M	1134	209	1926	O	241	312	1926	C	696	419	1926	B	82
4	"	L	307	87	1926	S	145	211	1925	P	692	313	1925	M	1209	423	"	J	162
6a	"	O	201	93a	"	O	17	213a	1926	L	204	314	1926	B	52	425	"	J	195
6b	"	L	84	93b	"	R	85	213b	1925	P	435	316	"	M	143	426	"	B	33
7	"	M	281	96	"	O	204	216	"	N	447	317	"	O	195	432	1925	PC	261
8	"	L	215	97a	"	S	120	217	"	P	525	318	"	B	49	436	1926	C	596
9	"	C	378	97b	"	O	198	218	1926	N	68	319	"	M	156	437	"	S	102
10	"	L	191	98	"	M	128	221	1925	P	484	320	1925	C	1087	441	"	J	87
11	"	M	179	99	"	S	58	223	1926	J	196	330	1926	B	107	442	"	J	157
12	"	C	283	106	*Too old*			225	1925	P	797	334a	"	J	161	443a	"	L	239
16	"	M	78	108	1926	O	272	233	1926	O	245	334b	"	B	28	443b	"	M	12
19	"	O	263	109	"	M	162	236	1925	N	407	338	1925	M	1260	449	"	J	91
20	1925	B	231	111	1925	O	699	238	1926	O	148	342	1926	B	66	450	"	M	1043
29	1926	O	223	112	1926	J	160	240	*Too old*			345	"	N	296	451	"	C	645
30	"	L	32	113	1927	C	270	241	1926	O	272	347	"	B	55	452	"	M	362
31	1925	M	915	119	1926	O	192	242	1925	N	403	348	"	C	647	454	"	M	181
32	1926	L	189	120	1925	M	1125	244	1926	N	371	349	"	B	40	455	1925	PC	267
33	1925	L	650	121	"	O	732	245	1925	B	433	351	"	L	184	459	1926	J	90
34	"	A	670	125	1926	J	128	247	1926	N	285	352	"	C	583	460	1925	M	1246
36	"	R	321	126	1925	M	243	249	*Too old*			353	"	B	115	461	1926	C	686
37	1926	A	251	127	"	M	1249	250	1926	N	127	355	"	M	401	462	"	M	475
38	"	A	159	130a	1926	J	117	251	*Too old*			357	"	B	47	465	"	L	273
39	"	L	516	130b	1925	M	780	252	1926	M	361	358	"	C	557	467	"	S	94
40	"	A	187	137	"	M	1242	253	*Too old*			359	"	M	254	471	1925	PC	264
41	"	P	170	140	"	O	652	256	1926	C	149	360	"	B	97	474	1926	J	163
43	"	A	147	142	"	C	1084	257	1925	M	1232	366	"	O	158	476a	"	L	198
47	"	A	143	144	1926	M	123	258	1926	O	113	368	"	M	408	476b	"	P	109
49	1925	A	673	145	"	S	9	264	"	M	161	370	1925	PC	272	478	"	C	545
50	"	M	879	151	1925	M	1255	265	1925	B	294	377	1926	M	193	479	"	L	208
51	1926	A	27	153	1926	B	18	270	1926	M	29	379	"	J	95	480	"	C	536
58a	"	O	269	159	"	O	262	272	1925	B	390	380	"	C	767	482	"	L	163
58b	"	A	167	160	1925	B	543	280a	1926	M	140	385	1925	M	1093	483	"	P	27
54	1925	N	462	165	"	M	726	280b	1925	PC	55	387	"	O	713	485a	1925	L	297
55	1926	L	196	166a	1926	L	181	285	1926	M	388	388	"	M	1122	486b	1926	M	385
56	"	A	264	166b	"	M	146	287	"	C	509	391	"	L	288	487	"	L	200
58	1925	L	633	167	1925	P	534	288	1925	P	581	392	1926	M	349	488	"	C	504
59	1926	A	157	168	*Too old*			290	1927	N	110	393	"	S	124	489	1925	M	682
61	1925	L	621	169	1926	P	130	292	1925	M	1268	394a	"	M	354	493	1926	C	751
62	"	M	1218	176	1925	O	737	294	1926	B	39	394b	"	S	144	494	1925	M	1215
64	1926	S	129	178	1926	J	142	295	"	N	90	395	1925	M	911	495	"	O	743
65	1925	M	1153	179	"	M	125	297	"	M	152	399	"	M	1252	497	"	M	1270
67	1926	A	165	181a	*Too old*			299	"	B	51	401	"	M	1267	501	1927	C	100
69	"	S	126	181b	1926	M	120	300a	1925	M	1212	402	1926	N	252	503	1925	M	1021
70	"	L	28	183	1927	C	96	300b	1926	B	44	403	1925	M	1120	506	1926	L	227
72	"	S	187	184	1925	P	441	302	"	M	159	406	1926	S	114	507	"	O	209
75	"	J	138	186	1926	C	486	303	1925	M	1235	407	"	C	577	509	1925	R	314
76a	1925	P	435	189	"	O	266	304	1926	J	168	409	"	S	111	512	1926	O	136
76b	1926	J	153	191	"	C	772	305	"	B	26	411	"	C	552	514	"	M	255
78	1925	M	1238	193	"	M	289	307	1925	M	896	414	"	M	355	516	1925	M	1234
81	"	M	1254	200	"	N	245	308	"	P	585	416	"	J	165	517	1926	C	744
82a	1926	L	218	202	1925	M	922	310	"	M	469	417	"	C	250				

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I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
519	1926	*M*	631	622	1926	*R*	3	726	1926	*C*	515	819	1926	*C*	610	975	1926	*C*	260
521	"	*J*	195	624	"	*C*	519	727	"	*M*	119	820	"	*M*	244	976	"	*O*	77
522	1925	*M*	1089	627	"	*R*	33	728	"	*C*	549	822	1925	*P*	125	978	"	*B*	31
525	1926	*M*	57	638	"	*M*	150	729	"	*M*	96	824	1926	*C*	271	979	"	*O*	620
528	"	*L*	178	639	"	*R*	19	734	"	*C*	661	833	1925	*M*	675	980	"	*N*	180
529	1925	*M*	1015	642	"	*C*	665	735	1925	*P*	725	839	1926	*C*	530	984*a*	"	*B*	117
530	"	*L*	312	644	"	*R*	17	737	1926	*M*	339	841	"	*A*	256	984*b*	"	*O*	254
532	1926	*M*	183	647*a*	1925	*O*	666	738	"	*C*	513	846	"	*C*	541	985	"	*M*	216
533	"	*A*	189	647*b*	1926	*R*	45	740	1925	*S*	288	847	"	*B*	1	987	"	*O*	237
536	"	*L*	151	649	"	*C*	533	741	1926	*J*	108	859	"	*A*	234	989	"	*N*	218
537	"	*M*	165	651	"	*M*	166	742	1925	*M*	1285	862	"	*C*	355	990	"	*B*	81
539*a*	"	*A*	263	653	"	*R*	23	745	1926	*M*	201	863	"	*A*	248	991	"	*M*	379
539*b*	"	*M*	288	656	"	*C*	764	748	"	*C*	517	865	"	*A*	252	993	"	*C*	89
540	1925	*M*	1213	657	"	*C*	737	751	1925	*M*	1216	867	"	*O*	206	997	1927	*N*	71
541	1926	*L*	209	659*a*	"	*M*	320	752	1926	*J*	91	868	"	*M*	241	998	1926	*C*	258
542	"	*C*	692	659*b*	1925	*R*	383	754	"	*M*	343	871	"	*A*	308	1000	"	*M*	420
543	"	*B*	62	660	1926	*M*	234	757	"	*C*	170	874	"	*M*	206	1001	"	*N*	228
544	"	*L*	272	662	"	*C*	540	758	1925	*M*	1288	878	"	*J*	171	1002	"	*L*	239
545	1925	*M*	1274	663	"	*R*	10	760	1926	*C*	529	879	"	*M*	447	1002	"	*N*	229
546	"	*M*	1162	666	1925	*M*	1046	761	"	*C*	559	880	"	*M*	272	1003	"	*L*	190
550	1926	*R*	25	668	1926	*C*	734	762	1925	*L*	580	881	"	*C*	307	1007	"	*O*	280
556	"	*J*	196	669	"	*C*	720	763	1926	*C*	616	882	"	*A*	247	1008	"	*L*	176
558	"	*L*	216	671	"	*M*	109	765	"	*M*	117	883	"	*C*	345	1009	"	*O*	230
559	"	*M*	359	675	"	*C*	979	766	1925	*S*	265	886	"	*B*	77	1010	"	*N*	214
560	"	*J*	158	676	"	*R*	31	768*a*	"	*P*	712	888	"	*A*	227	1011	"	*C*	305
561	"	*M*	37	677	"	*C*	555	768*b*	1926	*C*	297	889	"	*C*	300	1014	"	*J*	94
563	"	*N*	236	679	1925	*R*	310	771	"	*M*	62	894	"	*A*	246	1015	"	*O*	1
565	1925	*M*	1279	681	1926	*C*	361	772	1925	*L*	552	895	"	*C*	339	1016	"	*C*	172
566*a*	1926	*L*	187	683	"	*C*	511	776	"	*M*	1016	896	"	*B*	80	1017	"	*M*	177
566*b*	"	*M*	64	684	"	*R*	4	778*a*	"	*L*	575	897	"	*C*	121	1018	"	*N*	93
567	"	*C*	741	686	"	*J*	170	778*b*	"	*R*	317	914	"	*M*	284	1020	1927	*O*	124
568	1925	*M*	1258	688	"	*C*	479	780	1926	*M*	175	917	"	*O*	81	1021	1923	*R*	230
571*a*	1926	*L*	185	689	"	*B*	64	782	1925	*L*	564	924	"	*M*	267	1021	1926	*O*	139
571*b*	1925	*M*	1197	690	"	*J*	93	783	1926	*A*	254	927	"	*O*	98	1023	"	*A*	243
572	"	*M*	1223	690*b*	"	*B*	71	784	1925	*L*	571	930	"	*A*	238	1024	"	*M*	187
573	1926	*S*	81	697	"	*L*	179	785	1926	*A*	220	933	"	*M*	448	1026	"	*C*	603
576	"	*M*	149	699	"	*B*	46	790*a*	"	*C*	318	934	"	*A*	127	1027	"	*M*	136
577	1925	*M*	1219	701	"	*C*	584	790*b*	"	*A*	278	935	"	*J*	164	1029	"	*N*	259
580	"	*M*	1290	702	"	*M*	139	794	"	*M*	659	938	"	*O*	177	1031	"	*J*	153
583	1926	*O*	101	703	1925	*C*	1021	796	"	*C*	107	940	"	*M*	287	1032	1925	*B*	519
595	"	*M*	336	704	1926	*A*	241	798	1925	*L*	577	942	"	*O*	143	1033	"	*PC*	280
597	"	*M*	20	705	"	*C*	643	799	1926	*P*	164	943	"	*M*	405	1043	1927	*O*	112
605	*Too old*			709	1925	*M*	1248	801	1925	*C*	1017	945	"	*N*	1	1044	1926	*N*	255
608*a*	1926	*M*	152	711	1926	*C*	539	804	"	*L*	539	949	"	*B*	57	1046	"	*O*	257
608*b*	"	*J*	171	712	"	*C*	507	805	"	*C*	1020	954	1925	*L*	19	1047	1927	*L*	32
610*a*	1925	*M*	1281	714	"	*M*	164	806	"	*L*	557	959	1926	*A*	160	1047	1926	*O*	189
610*b*	1926	*C*	524	715	"	*C*	660	808	1926	*A*	255	960	"	*M*	370	1049	"	*N*	250
612	"	*M*	35	717	1925	*M*	792	809	1925	*P*	689	961	"	*M*	232	1050	"	*J*	139
614	"	*J*	166	718	1926	*C*	523	811	1926	*B*	118	962	"	*N*	193	1051	"	*M*	184
615	"	*M*	270	719	"	*C*	560	812	1925	*L*	578	963	"	*L*	217	1053	1925	*O*	630
617	"	*O*	12	720	"	*M*	113	814*a*	1926	*J*	108	965	"	*C*	327	1054	1926	*L*	197
618	1925	*M*	1149	722	"	*C*	1016	814*b*	"	*P*	196	971	"	*N*	6	1055	"	*O*	265
620	1926	*C*	512	724	"	*M*	146	815	"	*A*	261	973	"	*M*	236	1056	"	*M*	411
622	1926	*R*	3	725	"	*C*	480	817	"	*B*	24								

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I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.IR.		
1	1926	*A*	216	19	1926	*O*	253	36	1926	*N*	251	58	1926	*N*	253	85*b*	1925	*PC*	249
2	"	*P*	146	20	"	*M*	18	37	"	*C*	693	61	"	*M*	353	94	1926	*O*	248
3	"	*A*	233	23	"	*O*	199	40	"	*N*	257	62	"	*N*	61	98	"	*M*	419
4	"	*B*	90	25	"	*N*	262	42	"	*J*	102	63	1925	*A*	707	99	"	*O*	141
5	"	*S*	140	29	"	*O*	193	44	"	*N*	246	74	1926	*N*	155	100	"	*M*	396
9	1925	*B*	314	30	*Too old*			46*a*	"	*J*	94	75	"	*N*	260	102	"	*N*	139
14	1926	*A*	244	31	1925	*PC*	234	46*b*	"	*J*	103	78	"	*M*	832	104	"	*C*	727
16	1925	*B*	431	33	1926	*N*	162	47	"	*N*	200	80	"	*N*	239	106	"	*M*	224
17	1926	*O*	207	34	1927	*O*	100	48	"	*C*	736	82	"	*O*	231	107	"	*C*	710
18	"	*M*	235	35	1926	*J*	93	50	"	*O*	153	85*a*	"	*M*	428				

92 Indian Cases=All India Reporter

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
109	1926	*M*	260	262	1926	*J*	190	394	1926	*S*	6	526*a*	1926	*M*	509	626*b*	1926	*M*	452
110	1925	*B*	365	263	"	*J*	98	396	"	*M*	909	526*b*	"	*J*	100	628	1925	*B*	514
112	1926	*M*	218	264*a*	"	*A*	304	398	"	*M*	350	527	"	*B*	131	629	1926	*P*	141
118	"	*N*	84	264*b*	"	*L*	211	400	"	*J*	168	530	1925	*N*	298	631	1925	*R*	266
119	"	*M*	319	265	"	*O*	186	401	"	*A*	283	531	1926	*L*	120	633	"	*PC*	293
121	"	*N*	81	268	"	*L*	14	402	"	*M*	157	532	"	*A*	296	637	1926	*O*	277
124	"	*M*	367	270	1925	*R*	275	403	1925	*L*	16	533	"	*M*	412	640	"	*N*	241
125	"	*R*	9	272	"	*L*	639	405	1926	*M*	66	535	"	*A*	293	644	"	*A*	268
126	"	*O*	211	273	1926	*L*	287	411	"	*C*	312	537	"	*B*	86	646	1927	*N*	65
131	1927	*L*	112	274	1925	*PC*	257	412	"	*M*	190	541	"	*M*	494	651	1926	*L*	108
133*a*	1925	*P*	138	278	1926	*L*	279	414	"	*A*	62	542	"	*B*	119	653	"	*M*	114
133*b*	1927	*P*	141	282	"	*A*	113	415	"	*M*	135	544	"	*C*	985	656	"	*L*	225
134	"	*A*	232	289*a*	"	*L*	243	416	1927	*M*	342	545	"	*B*	43	657	"	*O*	332
138	1924	*L*	493	289*b*	1925	*PC*	244	417	1926	*J*	103	546	"	*A*	657	661	"	*M*	864
139	1925	*M*	297	294	1926	*L*	188	419	"	*S*	171	548	"	*B*	138	663	1925	*N*	299
142	1926	*R*	2	295	"	*J*	164	423	"	*L*	83	549*a*	"	*O*	288	665	1926	*J*	112
143	*Too old*			296	"	*L*	231	424	"	*S*	143	549*b*	"	*B*	69	667*a*	1925	*R*	374
144	1925	*O*	483	297	"	*L*	175	425	"	*J*	99	551	"	*A*	285	667*b*	1926	*S*	156
145	1924	*A*	233	298	"	*C*	1017	426	"	*A*	122	552	"	*B*	136	669	"	*L*	249
162	1926	*N*	98	299	"	*J*	97	427	1925	*B*	467	553	"	*N*	238	670	"	*J*	125
168	"	*J*	105	300	1925	*M*	1201	428	1926	*L*	240	554	"	*B*	140	672	"	*M*	543
164	"	*N*	286	305	1926	*N*	209	429	"	*A*	287	555*a*	"	*A*	604	673	1927	*O*	22
167	"	*L*	310	308	"	*M*	138	430	1925	*R*	219	555*b*	"	*B*	63	674	"	*L*	283
169	1925	*N*	154	309	"	*A*	262	433	"	*S*	233	556	"	*M*	130	675	"	*O*	228
170	"	*L*	185	311	"	*M*	341	439	1926	*C*	320	558	"	*A*	294	677	1925	*R*	349
172	1924	*P*	589	313	"	*L*	182	441	"	*A*	188	559	1925	*O*	613	678	1926	*J*	154
174	1926	*C*	550	314	"	*M*	305	442	"	*C*	139	562	1926	*S*	119	679	"	*J*	105
175	"	*J*	197	316	"	*A*	250	450	"	*J*	151	563	1925	*C*	291	681*a*	1925	*PC*	297
177	"	*P*	192	317	"	*L*	177	451	"	*J*	107	566	1926	*M*	65	681*b*	1926	*O*	306
178	1925	*L*	627	319	"	*L*	509	452	"	*A*	193	567	"	*A*	305	683	"	*N*	174
179	1926	*P*	73	321	"	*M*	154	453	"	*C*	147	569	1925	*L*	504	684	1925	*P*	760
183	"	*J*	176	322	"	*L*	96	454	"	*A*	229	570	1926	*M*	148	685	1926	*O*	258
184	"	*P*	180	326	1924	*P*	628	456	"	*M*	238	571	"	*A*	274	687	"	*M*	183
191	1925	*B*	18	327	"	*N*	91	459	"	*L*	221	573	"	*M*	363	688	1925	*R*	366
195	"	*L*	603	330*a*	1925	*A*	77	460	"	*A*	304	575	"	*S*	113	689	1926	*B*	110
196	"	*S*	269	330*b*	1926	*M*	128	461	"	*J*	107	577	1925	*L*	483	693	"	*S*	101
198	"	*L*	596	332*a*	1925	*A*	96	462	"	*S*	174	584	1926	*A*	306	694	"	*A*	237
200	"	*PC*	298	332*b*	1926	*L*	116	463	"	*A*	225	585	"	*A*	302	695	"	*M*	570
206	"	*S*	221	333	"	*M*	118	465	"	*M*	625	587	1925	*L*	495	697*a*	"	*A*	276
208	1926	*R*	50	334	"	*N*	229	468	1925	*A*	342	588*a*	1926	*A*	141	697*b*	1925	*P*	755
209	"	*J*	176	335	1925	*A*	44	470	1926	*M*	191	588*b*	"	*S*	176	702	"	*R*	353
212	1925	*PC*	305	338	"	*P*	313	471	"	*A*	102	589	"	*J*	110	703	1926	*N*	279
213	"	*L*	614	342	1926	*M*	81	472	"	*M*	227	590*a*	"	*S*	198	705	"	*L*	91
214	1924	*M*	479	345	1924	*A*	799	473	"	*A*	290	590*b*	1925	*L*	510	708	"	*N*	289
215	1925	*L*	599	346	*Too old*			474	1925	*P*	577	591*a*	1926	*A*	226	709*a*	1925	*L*	429
216	"	*C*	217	348	1925	*A*	60	478	1926	*A*	300	591*b*	"	*A*	288	709*b*	1926	*M*	321
217	1926	*L*	4	350	1926	*P*	140	479*a*	"	*J*	106	593*a*	"	*C*	690	712	"	*L*	125
219	"	*P*	176	351	"	*B*	50	479*b*	"	*L*	286	593*b*	1925	*M*	1214	714	"	*C*	582
222	"	*L*	143	352	"	*M*	378	481	"	*M*	249	594	1926	*M*	282	715	"	*M*	597
223	"	*C*	437	353	"	*J*	152	482	"	*A*	301	595	"	*L*	152	719	1925	*R*	350
224	"	*A*	168	354*a*	1925	*M*	1279	483	"	*M*	112	597*a*	"	*M*	217	720	1926	*M*	406
225	1924	*B*	473	354*b*	1926	*B*	139	484	"	*L*	321	597*b*	"	*L*	128	721	"	*J*	96
233	1926	*R*	14	355	1927	*M*	115	489	1925	*R*	228	599	"	*M*	155	722	1927	*O*	33
235	"	*L*	24	361	1926	*S*	130	491	1926	*M*	259	600	"	*J*	129	723	1926	*L*	523
237	"	*J*	103	364	"	*N*	248	492	"	*A*	477	601	"	*C*	684	724	"	*J*	87
241*a*	1927	*L*	96	366	"	*M*	243	493	"	*S*	181	602	1925	*L*	505	725	"	*L*	247
241*b*	1926	*N*	267	367	"	*B*	139	496	"	*A*	284	603*a*	1926	*M*	133	726	"	*M*	338
245	"	*M*	849	368*a*	1925	*R*	320	497	"	*M*	194	603*b*	"	*O*	218	727	"	*C*	653
247	"	*O*	226	368*b*	1926	*B*	65	503	"	*A*	270	608	"	*A*	291	730	"	*M*	591
249*a*	"	*M*	360	370	1925	*R*	303	504	"	*M*	72	610	"	*M*	251	731	"	*L*	228
249*b*	"	*L*	168	371	*Too old*			510	"	*A*	266	612	"	*O*	337	732	"	*O*	311
251	1927	*M*	294	373	1926	*M*	178	512	1925	*R*	221	615	"	*M*	258	735	"	*N*	276
252	1926	*L*	203	374	"	*S*	169	514	1926	*A*	289	616	"	*C*	667	736	1925	*R*	373
253	"	*R*	49	377	"	*M*	536	516	"	*M*	250	617	"	*P*	122	737	"	*R*	345
254	1925	*L*	640	378	"	*S*	184	517	"	*B*	129	620	1925	*M*	736	741	1926	*A*	325
257	1926	*O*	191	385	"	*M*	490	520	"	*M*	540	621*a*	1926	*S*	157	742	"	*S*	180
258	"	*L*	10	387	"	*S*	167	522	"	*A*	602	621*b*	"	*M*	365	743	"	*J*	107
259	1925	*L*	618	390	"	*M*	189	523	"	*M*	233	622	"	*A*	299	744	"	*J*	202
260	1926	*A*	20	392	"	*C*	697	524	"	*J*	86	624	"	*M*	225	746	"	*O*	115
261	1925	*L*	651	393	"	*M*	537	525	"	*N*	306	626*a*	"	*P*	147				

92 Indian Cases=All India Reporter—(*Concld.*)

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
747	1926	*J*	99	796	1926	*N*	281	855*b*	1926	*S*	275	905	1926	*C*	679	986	1926	*L*	346
748	,,	*S*	158	800	,,	*M*	133	856	,,	*O*	290	906	,,	*O*	318	989	,,	*M*	464
749	,,	*L*	227	802	,,	*M*	325	857	,,	*A*	271	908	,,	*C*	589	990	,,	*L*	229
750*a*	,,	*M*	296	803	,,	*N*	298	862	,,	*M*	346	909	,,	*N*	274	991	,,	*L*	343
750*b*	,,	*S*	150	805	,,	*M*	390	863	,,	*A*	277	913	,,	*N*	234	993	,,	*A*	228
752	1925	*R*	363	810	,,	*N*	293	865	1925	*P*	696	915	,,	*M*	427	994	,,	*L*	242
753	1926	*M*	853	813	,,	*L*	240	870	1926	*A*	368	916	,,	*N*	277	995	,,	*A*	312
757	,,	*O*	196	814	,,	*M*	526	871	1925	*P*	623	918	,,	*M*	297	1001	,,	*C*	481
759	,,	*L*	230	818	,,	*N*	383	873	1926	*M*	430	926	,,	*N*	265	1006	,,	*J*	121
760	1925	*PC*	290	819	,,	*M*	894	874	,,	*P*	20	928	,,	*M*	84	1007	,,	*J*	152
762	1926	*L*	530	822	,,	*N*	280	882	,,	*A*	614	940	,,	*C*	593	1008	,,	*C*	152
764	,,	*O*	293	823	,,	*M*	280	883	1925	*P*	677	943	,,	*M*	368	1012	,,	*L*	244
765	,,	*J*	99	824	,,	*N*	387	885	,,	*P*	678	946	,,	*C*	1015	1013	,,	*J*	159
766	1925	*R*	372	825	,,	*O*	313	887	1926	*C*	157	947	,,	*L*	183	1015	,,	*L*	328
768	1926	*A*	404	827	,,	*M*	457	889*a*	,,	*L*	250	948	,,	*C*	637	1016	1925	*S*	259
769	,,	*L*	251	832	,,	*O*	491	889*b*	,,	*A*	297	949	,,	*J*	120	1017	1926	*A*	324
770	,,	*M*	431	833	,,	*M*	211	890	,,	*J*	196	950	,,	*M*	466	1019	1925	*S*	260
771	1925	*R*	376	838	1927	*M*	122	892	1927	*L*	34	960	,,	*C*	981	1021	1926	*M*	371
772	1926	*A*	506	839	1926	*J*	109	894*a*	1926	*C*	174	961	,,	*J*	169	1027	,,	*A*	311
775	1925	*R*	381	840	,,	*A*	327	894*b*	,,	*L*	236	962	,,	*M*	410	1028	,,	*M*	402
776	1926	*M*	256	841	,,	*N*	79	895	,,	*A*	298	963	,,	*C*	634	1030	,,	*J*	157
777	1925	*R*	382	843	,,	*C*	580	896	,,	*M*	1044	966	,,	*L*	223	1031	,,	*C*	677
779	1926	*L*	276	844	,,	*M*	384	897*a*	,,	*J*	169	968	,,	*M*	168	1034	1925	*P*	787
780	1925	*R*	367	845	,,	*C*	991	897*b*	,,	*A*	286	973	,,	*M*	417	1045	1926	*J*	102
782	1926	*M*	453	846	,,	*M*	954	898	,,	*L*	236	976	,,	*M*	352	1046	,,	*J*	196
785	,,	*N*	273	847	,,	*M*	366	899*a*	,,	*M*	656	977	,,	*M*	323	1046	,,	*A*	282
786	1925	*R*	361	849	1925	*R*	362	899*b*	,,	*C*	592	980	,,	*L*	238	1047	,,	*M*	635
787	1926	*O*	301	850	1926	*L*	212	900	,,	*P*	209	981	,,	*C*	163	1051	,,	*M*	462
790	,,	*M*	246	851	,,	*N*	323	902	,,	*J*	156	982	,,	*L*	275	1053	,,	*M*	381
791	,,	*J*	98	854	1925	*R*	375	903	,,	*O*	309	984	,,	*C*	542	1055	,,	*M*	186
792	1925	*M*	145	855*a*	1926	*M*	210												

93 Indian Cases=All India Reporter

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
1*a*	1926	*A*	342	69	1926	*A*	358	123	1926	*B*	166	219	1926	*PC*	13	295	1926	*A*	329
1*b*	,,	*J*	170	70	,,	*C*	537	124	,,	*R*	1	222	,,	*B*	150	297	,,	*O*	224
3	,,	*M*	510	72	,,	*L*	155	125	,,	*N*	328	223	,,	*A*	343	299	,,	*J*	118
4	,,	*J*	139	73	,,	*C*	531	127	,,	*B*	161	225	,,	*B*	144	300	,,	*P*	241
5	,,	*M*	648	75	,,	*L*	156	129	1925	*P*	765	230	1925	*L*	399	302	,,	*O*	315
7	,,	*O*	344	76	,,	*C*	161	135	1926	*B*	153	232	1926	*B*	218	303	,,	*P*	239
8	,,	*M*	521	77	,,	*R*	46	141	,,	*M*	621	237	,,	*A*	334	305	,,	*M*	577
13	,,	*O*	362	78	,,	*S*	159	142	,,	*B*	223	240	,,	*B*	163	306	,,	*S*	178
14*a*	,,	*M*	539	79	,,	*R*	13	144	,,	*A*	351	241	,,	*A*	318	307	,,	*M*	652
14*b*	,,	*A*	378	81	,,	*C*	546	145	,,	*O*	194	244	,,	*B*	149	309	,,	*L*	299
16	,,	*M*	347	84	,,	*M*	950	146	,,	*P*	237	246	,,	*A*	307	310	,,	*O*	270
18	,,	*C*	685	85	,,	*O*	369	149	1925	*L*	446	247	,,	*B*	159	313	,,	*A*	217
20	,,	*M*	398	86	,,	*J*	93	151	1926	*B*	141	248	,,	*S*	151	317*a*	,,	*J*	130
22	,,	*J*	114	87	,,	*R*	69	154	,,	*A*	321	251	,,	*L*	219	317*b*	,,	*M*	628
24	,,	*A*	204	89	,,	*O*	341	157	1927	*A*	125	252	,,	*O*	234	321	,,	*S*	161
30	,,	*L*	134	90	,,	*A*	214	158*a*	1926	*B*	225	255*a*	,,	*L*	304	328	,,	*J*	126
32	,,	*J*	156	91	,,	*R*	73	158*b*	1927	*L*	85	255*b*	,,	*L*	309	329	,,	*O*	356
33	,,	*C*	470	93	,,	*A*	397	159	1926	*B*	226	257	1925	*P*	807	331	,,	*S*	133
40	,,	*P*	244	94	,,	*R*	74	161	,,	*J*	158	259	1926	*M*	404	332	,,	*O*	352
42	,,	*M*	688	95	,,	*N*	321	169	,,	*M*	326	261	1925	*P*	810	334	,,	*J*	102
46	,,	*C*	728	98	,,	*J*	122	184	,,	*B*	209	269	1926	*O*	365	335	,,	*M*	593
48	,,	*L*	139	99	,,	*M*	415	193	,,	*N*	301	271	,,	*M*	357	337	,,	*J*	106
49	,,	*M*	517	101	,,	*C*	752	195	,,	*B*	167	272	,,	*O*	370	338	,,	*M*	386
53	,,	*O*	482	103	,,	*N*	313	196	1927	*N*	62	273	,,	*J*	88	340	,,	*L*	214
54	,,	*L*	110	105	,,	*R*	48	197	1926	*R*	71	276	,,	*M*	311	341	,,	*M*	657
56	,,	*C*	708	106	,,	*N*	310	199	,,	*N*	225	279	,,	*O*	361	344	,,	*L*	65
57	,,	*O*	377	108	,,	*O*	264	211*a*	,,	*J*	167	280	,,	*PC*	9	351	,,	*L*	174
58	,,	*M*	623	110	,,	*N*	305	211*b*	,,	*R*	64	285	,,	*A*	212	353	,,	*S*	135
60	,,	*C*	713	111	,,	*M*	645	212	,,	*N*	359	287	,,	*O*	358	355	,,	*L*	186
62	,,	*O*	205	114	,,	*O*	368	213	,,	*B*	160	289	,,	*J*	138	356	,,	*M*	429
63	,,	*A*	359	115	,,	*C*	705	214	,,	*S*	4	290	,,	*A*	326	358*a*	,,	*J*	133
64	,,	*N*	312	118	,,	*N*	315	215	,,	*B*	168	291	,,	*J*	106	358*b*	,,	*A*	350
65	,,	*R*	51	119	,,	*R*	7	216	,,	*PC*	16	292	,,	*A*	345	359	,,	*L*	220
66	,,	*O*	255	121	,,	*N*	318	218	,,	*B*	165	293	,,	*M*	316				

Comparative Tables

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I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.		
360	1926	*M*	407	647	1926	*C*	755	841*a*	1926	*J*	133	928	1926	*L*	417	1004	1926	*J*	113
361	"	*L*	330	649	"	*M*	691	841*b*	"	*O*	411	930	"	*B*	54	1005	"	*A*	412
363	"	*A*	215	650	"	*N*	339	843	1927	*L*	90	932*a*	"	*J*	108	1006	"	*J*	127
364	1925	*C*	1135	651	"	*M*	492	844	1926	*S*	231	932*b*	"	*P*	207	1007	"	*L*	165
366	1926	*S*	177	652	"	*A*	392	848	"	*L*	435	934	"	*J*	125	1008	"	*A*	419
367	"	*L*	329	655	"	*O*	321	850	1925	*N*	414	935	"	*P*	202	1009	"	*L*	171
369*a*	"	*A*	376	657	"	*N*	148	851*a*	1926	*L*	534	938	"	*L*	402	1011	"	*J*	127
369*b*	"	*L*	641	658	"	*M*	204	851*b*	"	*A*	211	939	"	*P*	218	1011	"	*L*	192
371	"	*O*	350	660	"	*S*	88	852*a*	"	*O*	410	950	"	*A*	469	1012	"	*L*	337
372	"	*S*	123	662	"	*M*	273	852*b*	"	*B*	242	951	"	*O*	239	1013	"	*L*	167
374	"	*O*	348	669	"	*R*	81	855	"	*L*	355	953*a*	"	*L*	508	1014	1927	*L*	98
375	"	*L*	237	670	"	*M*	173	856	"	*O*	396	953*b*	"	*A*	754	1015	1926	*C*	986
376	"	*A*	387	673	"	*M*	778	857	"	*B*	200	954	"	*L*	488	1017	1927	*L*	155
378	"	*O*	338	677	"	*O*	294	868	"	*J*	112	955	"	*M*	377	1018	1926	C	1144
380	"	*S*	154	684	"	*M*	247	870	"	C	829	956	1927	*L*	154	1020	"	*A*	339
382	"	*N*	337	685	"	*N*	350	871	"	*L*	453	958	1926	*O*	378	1021	"	*C*	983
385*a*	"	*A*	338	686	"	*M*	534	873	"	*O*	330	959	"	*J*	92	1023	"	*J*	195
385*b*	"	*C*	1	688	"	*L*	302	876	"	*J*	196	960	"	*A*	478	1023	1927	*O*	69
444	1927	*S*	115	689	"	*L*	248	877	"	*M*	432	961	"	C	648	1024	1926	*L*	501
446*a*	1926	*M*	345	690*a*	"	*A*	242	879	1925	*R*	253	962	"	*J*	134	1025	"	*O*	120
446*b*	"	*O*	307	690*b*	"	*B*	151	881	1926	*B*	238	963	"	*P*	214	1037	"	*A*	461
448	"	*S*	90	692	"	*L*	297	884	"	*P*	232	967	"	*B*	195	1038	"	*C*	663
453	"	*O*	343	694	"	*A*	389	891	"	*B*	178	971	"	*L*	353	1038	"	*S*	192
454	1925	*P*	68	695	"	*J*	113	892	"	*J*	112	973	"	C	528	1039	"	*L*	454
612	1926	*L*	264	697	"	*A*	390	894	"	*S*	188	974	"	*L*	382	1040	"	*L*	369
619	"	*B*	262	698	1925	*L*	210	895	"	*J*	123	976	"	*P*	253	1041	"	*C*	590
621	"	*L*	327	699	1926	*N*	348	896	"	*B*	255	978	1925	*L*	605	1042	"	*L*	419
622	"	*B*	253	700	"	*L*	199	897*a*	1927	*A*	118	986	1926	*P*	173	1045	"	*C*	614
624	"	*N*	342	701	"	*M*	722	897*b*	1926	*L*	463	987	"	*A*	402	1046	"	*A*	426
625	"	*M*	487	702	"	*L*	317	898	"	*C*	618	988	1925	*P*	450	1047	1925	*O*	731
628	1925	*P*	477	703	"	*B*	251	903	"	*L*	360	991	1926	*L*	394	1048	1926	*L*	498
631	1926	*O*	289	704	"	*J*	132	904	1921	*C*	335	992	"	*B*	230	1049	"	*C*	605
632	"	*J*	104	705	1925	*M*	497	909*a*	1926	*O*	397	993	"	*L*	207	1050	"	*L*	384
633	"	*N*	335	825	"	*S*	318	909	"	C	638	994	1925	*P*	737	1051	"	*L*	378
634	"	*L*	333	806	1926	*A*	344	911	"	*L*	436	996*a*	1926	*L*	381	1051	"	*B*	227
639	"	*M*	345	827	"	*L*	461	912	"	*O*	519	996*b*	1925	*A*	777	1052	"	*L*	480
640	1927	*O*	86	829	"	*L*	351	914	"	*M*	228	997	1926	*L*	348	1052	"	*L*	195
641	1926	*M*	926	830	"	C	817	918	"	*B*	247	998	"	*A*	427	1053	"	*B*	256
642	"	*L*	423	831	"	*M*	573	921	"	*L*	202	999	"	*P*	256	1054	"	*J*	114
643	*Too old*			833	"	*O*	291	923	"	*M*	245	1000	"	*A*	422	1055	"	*A*	685
644	1926	*M*	538	834	"	*C*	597	924	1925	*B*	501	1001	"	*P*	259	1056	"	*A*	421
645	"	*O*	316	840	1925	*S*	287	927	1926	*O*	260	1001	"	*P*	263				

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C.I.	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.			I.C.)	A. I. R.		
1	1926	*A*	401	38	1926	*C*	881	96	1926	*B*	273	133*a*	1926	*L*	347	156*a*	1926	*L*	283
2	"	*L*	404	39	1927	*L*	65	103*a*	"	*L*	520	133*b*	"	*J*	135	156*b*	"	*C*	763
3	"	*O*	422	40	1926	*N*	379	103*b*	"	*P*	334	134	"	*L*	361	157	"	*A*	439
5	1967	*C*	97	42	"	*M*	668	104	"	*B*	291	136	"	*J*	147	158	"	*L*	484
7*a*	1926	*J*	151	44	"	*C*	879	114	"	*L*	409	137	"	*L*	426	159	"	*C*	657
7*b*	"	*L*	372	45	"	*M*	656	115	"	C	1018	138	"	*L*	427	162	"	*O*	383
8	"	*M*	755	46	"	*C*	827	116	"	*B*	278	139*a*	"	*L*	675	163	"	*J*	100
9	"	*B*	250	47	"	*B*	179	117	"	*L*	344	139*b*	*Too old*			164	"	*M*	480
10	"	*P*	258	56	"	*N*	388	118	"	C	847	140*a*	1926	*L*	407	168	"	*L*	354
11	"	*B*	228	58	"	*L*	364	119	"	*L*	433	140*b*	"	*L*	485	169	"	*A*	445
13	"	*P*	255	59	"	*B*	169	120	"	*J*	101	141	"	*L*	368	170	"	*C*	853
15	"	*B*	208	68	"	*M*	851	121*a*	"	*J*	159	142*a*	"	*J*	122	171	"	*J*	172
19	"	*P*	251	70	"	*N*	290	121*b*	"	*L*	371	142*b*	"	*L*	487	172*a*	"	*L*	518
21*a*	"	*L*	450	72	"	*B*	237	123	"	*M*	687	143	"	*L*	366	172*b*	"	*C*	735
21*b*	"	*B*	241	73	"	*M*	605	125*a*	"	*L*	452	144	"	*L*	424	173	"	*L*	614
22	"	*P*	249	75	"	*L*	415	125*b*	"	*J*	86	145	1925	*L*	438	175	"	*A*	447
25	"	*L*	170	76	"	*B*	246	126	"	*M*	606	146	1926	*B*	271	177	"	*C*	730
26	"	*C*	858	77	"	*M*	622	127	"	*L*	542	147	"	*C*	844	179	"	*O*	380
27	"	*L*	162	78*a*	"	*A*	492	128	"	*L*	446	148	"	*L*	440	180	"	*J*	109
28	"	*P*	501	78*b*	"	*L*	472	129	"	*L*	165	149	"	*B*	272	181	"	*L*	241
30	"	*J*	122	79	"	*M*	825	130	"	*L*	350	150	"	*L*	201	182	"	*C*	722
31	"	*P*	266	80	"	*J*	98	131*a*	"	*L*	206	151	"	*M*	654	188	"	*O*	427
33	"	*C*	850	81	"	*N*	353	131*b*	"	*L*	493	152	"	*L*	430	190	"	*A*	465
36	"	*P*	274	83	"	*M*	434	132	"	*A*	332	153	"	*B*	289	192	"	*J*	122

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			IC.	A. I. R.			I.C.	A. I. R		
193	1926	*J*	110	353	1926	*P*	267	487	1926	*M*	492	642	1926	*M*	556	811	1926	*C*	765
204	"	*J*	121	354	"	*L*	532	489	"	*M*	496	644	"	*O*	468	813	"	*PC*	31
205	"	*O*	398	355	"	*P*	299	492	"	*L*	395	645	"	*B*	565	814	1925	*P*	442
209	"	*P*	276	358	"	*L*	363	501	"	*PC*	18	646*a*	"	*L*	403	817	"	*B*	451
210	"	*A*	563	359	"	*J*	149	505	"	*A*	449	646*b*	"	*B*	343	824	1926	*PC*	38
212*a*	"	*J*	119	361*a*	"	*J*	104	506	"	*P*	291	647	1925	*N*	451	826	"	*P*	205
212*b*	"	*C*	490	361*b*	"	*C*	925	508	"	*M*	810	649	1926	*B*	259	829	"	*N*	343
224	"	*A*	615	363	"	*J*	123	510	"	*P*	273	650	"	*L*	242	830	"	*PC*	2
226	"	*M*	830	365*a*	"	*L*	336	512	"	*M*	584	651	"	*B*	280	837	"	*C*	650
228	"	*C*	845	365*b*	"	*C*	742	514	"	*L*	418	653	"	*O*	591	840	"	*S*	201
229	"	*P*	277	368	"	*J*	132	515	"	*M*	615	654	"	*B*	42	841	"	*P*	246
231	"	*C*	607	369	"	*O*	417	521	1925	*L*	624	655	1925	*N*	421	844	"	*C*	672
234	"	*L*	370	371	"	*S*	202	522	1926	*M*	674	656	1926	*B*	258	849	"	*A*	493
235	"	*C*	568	377	"	*L*	277	525	1925	*L*	458	657	"	*C*	510	853	"	*M*	607
243	"	*L*	422	378	"	*O*	475	526	1926	*M*	484	658	"	*B*	337	855	"	*J*	102
244	"	*C*	578	380	"	*N*	303	528	"	*C*	703	660*a*	"	*L*	696	857	"	*C*	624
245	"	*L*	401	381	"	*C*	745	530	"	*L*	564	660*b*	"	*B*	344	860	"	*M*	841
246	"	*A*	450	384	"	*M*	792	531	1925	*R*	245	661	"	*C*	882	869	"	*A*	510
249	"	*L*	442	389	"	*A*	436	582	1926	*C*	701	662	"	*B*	257	871	"	*C*	604
250	"	*J*	140	390	"	*J*	153	534	"	*M*	592	664	"	*S*	56	872	"	*A*	424
251	"	*L*	451	391	"	*C*	859	535*a*	1925	*PC*	306	665	1925	*B*	153	873	"	*C*	749
253*a*	"	*J*	89	392	"	*O*	474	535*b*	1926	*M*	672	672	1926	*O*	16	875	"	*O*	508
253*b*	"	*L*	300	393	"	*C*	897	538	"	*C*	204	673	"	*B*	328	877	"	*A*	384
254	"	*M*	565	394*a*	"	*L*	345	546	"	*M*	798	677	"	*M*	449	880	"	*C*	855
255	"	*C*	860	394*b*	"	*N*	334	547	1925	*S*	103	681	"	*B*	341	881	"	*B*	122
257	"	*L*	375	395	"	*J*	162	550*a*	1926	*M*	679	684	"	*C*	558	888	"	*L*	412
258	"	*P*	440	396	"	*L*	445	550*b*	"	*J*	129	686*a*	"	*L*	441	889	"	*A*	474
264	"	*L*	439	397*a*	"	*O*	478	551	1925	*B*	360	686*b*	1925	*B*	406	890	"	*P*	292
266	"	*C*	586	397*b*	"	*A*	467	553	1926	*P*	288	693	1926	*O*	462	892	"	*M*	380
269	"	*J*	117	398	"	*L*	688	554*a*	"	*L*	416	695	"	*L*	100	893	"	*C*	502
270	"	*C*	581	399	"	*J*	118	554*b*	"	*M*	557	703	"	*N*	351	894	"	*A*	295
271	"	*L*	365	400	"	*C*	845	556	"	*P*	423	704	"	*B*	381	896	"	*P*	400
273	"	*P*	330	401	"	*L*	262	557*a*	"	*L*	303	705	"	*P*	316	897	"	*A*	231
279*a*	"	*J*	128	402	"	*O*	329	557*b*	"	*M*	542	706	"	*R*	112	899	"	*N*	304
279*b*	"	*J*	167	403	"	*L*	271	558	"	*P*	295	707	"	*M*	815	901	"	*L*	88
282	"	*N*	355	404	"	*S*	190	559	1925	*L*	525	708	1925	*R*	270	903	"	*S*	194
284	"	*P*	337	406	"	*L*	232	560	1926	*B*	137	709*a*	1926	*L*	130	907	"	*C*	1208
287	"	*S*	238	408	"	*N*	300	561	"	*M*	569	709*b*	"	*B*	91	909	"	*J*	137
292	"	*C*	738	409*a*	"	*J*	123	563	"	*L*	332	714	"	*P*	296	911*a*	"	*L*	445
294	"	*O*	324	409*b*	"	*S*	193	564	1925	*B*	516	717	"	*R*	53	911*b*	"	*J*	137
300	"	*L*	474	411	"	*M*	576	567	"	*R*	291	736	"	*C*	563	912	"	*L*	434
302	"	*M*	495	412	"	*R*	107	570	1926	*B*	13	737	"	*B*	316	913	"	*M*	680
304	"	*L*	318	414	"	*L*	72	573	1925	*N*	390	740	1927	*C*	174	914	"	*O*	541
306	"	*M*	642	415	"	*L*	301	575	"	*B*	547	741	1926	*N*	314	916	"	*PC*	29
307	"	*J*	159	417*b*	"	*J*	125	588	1926	*C*	779	742	"	*B*	266	918	"	*N*	354
308	"	*M*	566	417*b*	"	*J*	193	590	"	*R*	44	747	"	*S*	211	920	"	*C*	662
310	"	*C*	887	418	"	*C*	908	591	"	*B*	121	750	"	*P*	356	921	"	*J*	147
313	"	*O*	420	420*a*	"	*M*	558	593*a*	"	*C*	793	752	"	*B*	325	922	"	*J*	126
315	"	*A*	425	420*b*	"	*O*	469	593*b*	"	*P*	81	754	"	*N*	307	923*a*	1925	*B*	302
317	"	*O*	385	422	"	*L*	234	600*a*	"	*C*	788	755	"	*B*	265	923*b*	1926	*N*	376
320	"	*A*	468	423	"	*S*	236	600*b*	1925	*R*	360	756	"	*J*	86	926	1925	*L*	574
321	"	*C*	854	425	"	*A*	695	602	1926	*B*	134	759	"	*O*	357	927	1926	*O*	501
322	"	*PC*	22	427	"	*M*	743	603	1925	*R*	328	760	"	*B*	308	929*a*	1925	*C*	684
326	"	*N*	326	429	"	*A*	470	604	1926	*B*	103	761	"	*L*	413	929*b*	1926	*P*	187
329	"	*L*	352	433	"	*P*	321	608	"	*R*	82	762	"	*C*	612	932	"	*O*	401
330	"	*C*	816	442	"	*A*	463	609	"	*B*	261	765	"	*P*	289	941	"	*N*	345
331	"	*PC*	27	444	"	*C*	757	610	"	*M*	799	767	"	*PC*	34	944	"	*A*	453
332	"	*C*	826	453	"	*M*	516	611	1925	*R*	313	777	"	*B*	315	948	"	*N*	360
334	"	*M*	485	454	"	*A*	681	613	1926	*A*	331	779	"	*O*	353	949	"	*A*	456
336	"	*A*	462	456	"	*M*	554	614	"	*L*	161	782	"	*PC*	1	950	"	*M*	641
337	"	*M*	567	457	"	*L*	511	616	"	*C*	627	783	"	*B*	283	951	"	*A*	423
338	"	*J*	116	458	"	*M*	511	624	"	*P*	260	784	"	*O*	346	952	"	*O*	319
340	"	*A*	437	463	"	*A*	420	627	"	*L*	320	786	"	*C*	525	955	"	*M*	500
342	"	*C*	910	464	"	*R*	111	628	1925	*R*	304	788	"	*O*	349	959	"	*L*	458
343	"	*O*	428	465	"	*J*	126	629	1927	*L*	92	790	"	*A*	554	961	"	*A*	440
347	1927	*A*	37	466	"	*R*	97	631	1925	*B*	167	791	"	*N*	291	966	"	*M*	748
348	1926	*J*	126	482	"	*A*	478	633	1926	*L*	340	793	"	*C*	640	967	"	*J*	141
349	"	*O*	458	483	"	*L*	505	634	"	*M*	535	796	"	*O*	342	969	1925	*B*	494
351	1927	*M*	175	484	"	*A*	446	635	"	*L*	292	797	1925	*R*	329	971	1926	*N*	363
352	1926	*C*	830	486	"	*L*	644	639	"	*M*	594	808	"	*P*	444	973	"	*O*	481

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
974	1926	*PC*	41	991	1926	*L*	483	999	1927	*N*	75	1007	1926	*P*	369	1046	1926	*M*	633
983	"	*M*	863	992	"	*A*	535	1000	1926	*L*	431	1034	"	*O*	393	1048	"	*L*	383
985	"	*O*	489	994	1925	*C*	606	1002	"	*N*	341	1037	"	*L*	481	1048	"	*A*	352
986	1925	*C*	627	995	1926	*L*	506	1003	"	*A*	411	1039	"	*O*	493	1054	"	*B*	304
987	1926	*O*	460	997	"	*C*	505	1005	"	*A*	409	1046	"	*L*	456	1055	"	*L*	455

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
1	1927	*A*	225	108	1926	*M*	601	240*a*	1926	*L*	541	312	1926	*L*	305	444*b*	1926	*J*	101
3	1926	*M*	650	113	"	*J*	140	240*b*	"	*J*	95	313	"	*S*	213	446*a*	"	*M*	946
4	"	*J*	143	117	"	*C*	782	243	"	*L*	465	315	"	*L*	469	446*b*	"	*J*	156
5	"	*M*	655	121	"	*L*	545	245	"	*C*	688	316	"	*S*	215	447	"	*M*	903
6	"	*C*	978	122*a*	"	*O*	413	247	"	*L*	502	318	"	*L*	410	449	"	*J*	129
7	"	*O*	477	122*b*	"	*M*	634	249	"	*J*	87	319	"	*A*	428	450	"	*A*	565
9	"	*L*	549	123*a*	"	*L*	551	250	"	*M*	756	320	"	*J*	183	452	"	*J*	125
10	"	*C*	960	123*b*	"	*C*	954	252*a*	"	*L*	414	321	1927	*P*	135	453	"	*S*	246
12	"	*M*	421	124	"	*L*	379	252*b*	"	*C*	950	325	1926	*M*	695	456	"	*N*	431
18	"	*J*	157	127	"	*O*	479	254	"	*O*	406	329	"	*PC*	46	458	"	*J*	130
19	"	*A*	522	128*a*	"	*M*	620	256	"	*L*	540	334	"	*C*	822	459	"	*C*	1000
21	"	*C*	938	128*b*	"	*N*	407	257	"	*C*	664	337	"	*L*	210	463*a*	"	*J*	159
25	"	*J*	105	130*a*	"	*L*	383	258	"	*L*	527	339	"	*M*	705	463*b*	"	*C*	982
26*a*	"	*M*	667	130*b*	"	*C*	698	259*a*	"	*B*	287	342	"	*L*	289	465	"	*L*	550
26*b*	"	*A*	660	134	"	*J*	128	259*b*	1925	*C*	1006	343	"	*A*	415	466	"	*S*	253
27	"	*O*	444	135	"	*A*	532	260	1926	*N*	409	348*a*	"	*P*	432	467	"	*L*	367
31	"	*J*	104	137	"	*J*	128	261	"	*A*	537	348*b*	"	*J*	154	469	"	*C*	922
33	"	*M*	681	138	"	*A*	549	262*a*	"	*M*	624	353	"	*C*	866	471*a*	"	*L*	528
35	"	*N*	365	139	"	*L*	544	262*b*	"	*B*	347	358	"	*S*	225	471*b*	"	*N*	426
39*a*	"	*R*	80	140	1927	*A*	228	264	"	*M*	808	363	"	*L*	548	476	"	*L*	543
39*b*	"	*B*	306	143	1926	*O*	492	265	"	*N*	384	364	"	*O*	412	477	1921	*A*	215
42	"	*C*	963	144	"	*C*	959	266	"	*B*	336	366	"	*N*	406	479	1926	*L*	479
44	"	*R*	83	145	"	*B*	355	267*a*	"	*M*	754	367	"	*P*	404	480	"	*J*	141
46	"	*A*	509	146	"	*C*	956	267*b*	"	*B*	368	371	1925	*N*	251	481	"	*S*	86
47	"	*C*	951	147	"	*A*	475	268	"	*A*	479	377	1926	*R*	128	483	"	*C*	877
48	"	*A*	544	149	"	*S*	208	269	"	*L*	522	378	"	*S*	242	486	"	*O*	336
49	"	*B*	332	150	"	*A*	689	270	"	*B*	362	380	"	*R*	137	487	"	*S*	109
52	"	*L*	131	151	"	*L*	538	271	"	*O*	521	381	"	*N*	373	489	"	*M*	586
53	"	*R*	88	152	"	*A*	337	273	"	*P*	211	382	"	*J*	186	494	"	*C*	798
54	"	*B*	305	153		*Too old.*		275*a*	"	*L*	411	384	"	*R*	133	506	"	*N*	414
55	"	*L*	553	154	1926	*M*	544	275*b*	"	*R*	134	385	"	*A*	429	511	"	*B*	363
56	"	*N*	374	169	"	*L*	537	276	"	*J*	184	388	"	*C*	795	512	"	*R*	94
58	"	*B*	288	170*a*	"	*C*	912	277	"	*J*	150	392	"	*P*	493	513	"	*B*	365
59	"	*N*	368	170*b*	"	*B*	282	280	"	*L*	478	393	"	*L*	193	514	"	*R*	95
61	"	*C*	585	171	"	*N*	393	281	"	*L*	205	396	"	*P*	362	515	"	*B*	367
62	"	*B*	313	175	"	*O*	514	283	"	*O*	367	401	"	*M*	723	516	"	*C*	714
63	1925	*L*	435	178	"	*A*	573	284	"	*L*	428	405		*Too old.*		521	"	*R*	109
65	1926	*R*	76	179	"	*C*	975	286	"	*J*	144	406*a*	1926	*J*	89	522	"	*C*	794
68	"	*B*	284	181	"	*B*	463	287	"	*A*	405	406*b*	"	*A*	650	523	"	*R*	110
71	"	*R*	127	183	"	*N*	389	288	"	*J*	132	409	"	*C*	818	524	"	*B*	374
72	"	*B*	314	187	"	*P*	89	289	"	*C*	681	410	1923	*B*	253	525	"	*C*	1169
74	"	*A*	377	188	"	*N*	410	291	"	*A*	519	411	1926	*A*	587	528	"	*B*	364
79	"	*C*	691	193	"	*O*	381	293	"	*P*	210	413	1921	*L*	176	529	1925	*C*	1201
80	"	*L*	298	196*a*	"	*M*	747	294*a*	1927	*L*	44	416	1926	*A*	501	533	1926	*S*	249
81	"	*B*	493	196*b*	"	*M*	574	294*b*	1926	*N*	385	421		*Too old.*		536	"	*J*	169
83	"	*R*	79	199	"	*J*	111	296	"	*J*	160	424*a*	1926	*M*	768	538	"	*B*	366
84	"	*J*	145	200	1925	*O*	661	297	"	*C*	955	424*b*	"	*N*	444	539	"	*C*	819
85	"	*B*	309	203	1926	*C*	976	298	"	*L*	535	426	"	*C*	813	541	"	*R*	89
87	"	*C*	980	204	"	*L*	489	299	1927	*O*	48	430	1927	*L*	8	543	"	*A*	413
88	"	*L*	522	205	"	*N*	380	300*a*	1926	*M*	826	431	1926	*N*	372	545	"	*C*	1031
89	"	*N*	405	208	"	*A*	521	300*b*	"	*C*	941	432	"	*O*	497	547	"	*B*	312
90	"	*O*	363	209	"	*M*	683	302	"	*L*	529	433	"	*L*	515	548	"	*P*	399
92	"	*M*	661	213	"	*J*	142	303	"	*P*	213	435	"	*O*	484	549*a*	"	*B*	335
98	"	*R*	124	214	"	*M*	836	304	"	*M*	690	436	"	*M*	879	549*b*	1927	*L*	28
100	"	*A*	551	220	"	*O*	360	305	1925	*L*	631	438	"	*O*	500	550	1926	*S*	121
101	"	*C*	952	222	"	*M*	578	306	1926	*S*	230	439	"	*M*	676	552	"	*B*	516
103	"	*A*	584	226	"	*S*	115	307	"	*J*	119	441	"	*P*	335	553	"	*N*	332
104	"	*R*	122	229	1925	*B*	282	308	"	*L*	326	442	"	*M*	878	556*a*	"	*J*	133
105	1927	*L*	33	234	1926	*O*	243	309	"	*N*	308	443	"	*O*	483	556*b*	"	*B*	302
106	1926	*J*	115	236	"	*J*	150	311	"	*J*	132	444*a*	"	*M*	689	558	"	*L*	393

95 Indian Cases=All India Reporter (*Concld.*)

IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.		
559	1926	*A*	398	644	1926	*C*	913	761*a*	1926	*C*	1088	857*b*	1926	*O*	470	945*b*	1926	*A*	641
561	"	*O*	504	648	"	*P*	392	761*b*	"	*P*	348	863	"	*J*	124	950	"	*B*	467
563	"	*N*	446	649*a*	"	*J*	133	764	"	*P*	464	864	"	*B*	356	956*a*	"	*L*	544
565	"	*L*	542	649*b*	"	*C*	893	765	"	*A*	562	865*a*	"	*L*	577	956*b*	1925	*M*	586
566	"	*P C*	54	651	"	*M*	881	766*a*	"	*L*	575	865*b*	"	*M*	739	957	1926	*O*	304
570	"	*A*	524	667	"	*C*	837	766*b*	1927	*O*	102	867	"	*P*	353	959	"	*A*	555
573	"	*J*	99	675	1925	*L*	544	768	1926	*J*	142	869	"	*A*	645	961	"	*C*	1040
574	"	*O*	425	679	1926	*J*	131	769	1925	*C*	648	874	"	*L*	579	963	"	*M*	760
576	"	*L*	530	680	"	*O*	169	772	1926	*O*	520	875	"	*P*	472	965	"	*J*	171
577	"	*J*	141	687	1925	*B*	309	773	1925	*C*	924	877	"	*R*	126	966	"	*P*	436
578	"	*A*	575	689*a*	1926	*J*	150	774	1926	*O*	511	878	"	*B*	351	968	"	*M*	829
581	"	*M*	762	689*b*	1922	*M*	441	777	1925	*C*	619	879	"	*R*	131	970*a*	"	*A*	638
582	"	*A*	542	691	1926	*M*	692	786	1926	*O*	467	881*a*	1925	*B*	430	970*b*	1923	*P C*	54
584*a*	"	*J*	131	695	"	*O*	513	788	"	*C*	1058	881*b*	1926	*R*	129	971	1926	*C*	849
584*b*	"	*M*	812	696	"	*B*	279	789	"	*M*	921	883	"	*M*	732	972	"	*M*	261
585	"	*O*	506	698	"	*A*	609	798*a*	"	*J*	155	892	"	*R*	123	979	"	*N*	21
587	"	*M*	812	699	"	*J*	88	798*b*	"	*O*	449	893	"	*A*	578	984	"	*J*	170
589	"	*N*	433	700	"	*C*	1041	808*a*	*Too old.*			898	"	*P C*	68	985	*Too old.*		
593	"	*L*	392	701	1925	*L*	403	808*b*	1926	*L*	253	902	"	*A*	360	987	1926	*N*	188
594*a*	"	*R*	106	704	1927	*L*	89	817	"	*B*	358	904	"	*J*	164	991	"	*P*	427
594*b*	"	*J*	97	705	1926	*N*	488	824	"	*N*	466	905	"	*L*	477	995	1927	*O*	92
596	"	*O*	268	706	"	*L*	666	826	"	*J*	152	906	"	*N*	361	998	1926	*A*	653
597	"	*J*	113	707*a*	"	*M*	905	828	"	*A*	406	908	"	*C*	889	1002	1925	*M*	796
598*a*	"	*O*	448	707*b*	"	*N*	449	831	"	*C*	1065	913	"	*A*	605	1004	1926	*J*	100
598*b*	"	*J*	116	717	"	*J*	154	833	"	*J*	178	918	"	*R*	113	1005	"	*L*	524
599	1921	*O*	99	718	"	*M*	698	834	"	*B*	348	924	"	*L*	534	1005	"	*M*	985
600*a*	1926	*L*	521	720	"	*M*	559	838	"	*J*	112	925	1927	*O*	95	1007	"	*L*	553
600*b*	"	*M*	806	726	"	*C*	1073	839	"	*P C*	56	927	1926	*A*	550	1008	"	*B*	417
603*a*	"	*J*	140	730	"	*N*	457	843	"	*C*	1069	929	"	*P*	302	1011	"	*C*	1003
603*b*	"	*J*	118	731	"	*M*	749	844	"	*A*	639	931	"	*L*	547	1014	"	*M*	782
606	"	*N*	459	734	"	*N*	453	845*a*	1924	*M*	827	932	"	*O*	424	1017	"	*B*	389
609	"	*L*	572	739	"	*L*	599	845*b*	1926	*J*	145	933	"	*C*	1048	1019	"	*O*	273
610	"	*M*	785	740	"	*M*	752	846	"	*A*	664	934	1925	*O*	321	1025	"	*P C*	79
614	"	*N*	435	743	"	*A*	497	847	"	*B*	357	935	1926	*P*	358	1030	"	*A*	538
622	"	*C*	883	747	1927	*O*	40	848	"	*C*	1061	937	"	*R*	78	1033	"	"	379
626*a*	"	*A*	541	750	1926	*S*	209	849	"	*O*	517	938	"	*A*	603	1036	"	*P*	269
626*b*	"	*N*	367	753	"	*S*	244	851	"	*B*	345	939	"	*S*	257	1042	"	*C*	564
628	"	*J*	155	754	"	*L*	581	853	"	*C*	1062	940	"	*A*	382	1048	"	*A*	432
629	"	"	161	755	"	*N*	448	854	"	*A*	574	943	"	*M*	727	1051	"	*P*	364
630	1927	*M*	353	756*a*	"	*L*	570	855	"	*L*	568								
632	1926	*C*	1006	756*b*	1925	*A*	223	856	"	*M*	809	944	1922	*A*	265	1055	"	*C*	848
636	"	*N*	416	760	1926	*L*	567	857*a*	"	*J*	172	945*a*	*Too old.*			1055	1927	*L*	95

96 Indian Cases=All India Reporter.

IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.			IC	A. I. R.		
1	1926	*A*	565	67	1926	*A*	582	119	1926	*J*	150	166	1926	*B*	399	206	1926	*P*	336
3	"	*P*	411	69	"	*C*	846	120	*Too old.*			171	1927	*L*	67	207	"	*L*	562
5*a*	"	*J*	92	70	"	*J*	89	121	1926	*B*	382	172	1926	*J*	168	209	"	*L*	598
5*b*	"	*A*	517	71	"	*O*	545	122	"	*A*	340	173*a*	"	*J*	118	210	"	*A*	704
7	"	*M*	505	72	"	*C*	856	124	"	*S*	270	173*b*	"	*J*	152	211*a*	"	*L*	278
11*a*	"	*J*	140	75	"	*O*	509	126	"	*J*	98	175*a*	"	*M*	958	211*b*	"	*A*	566
11*b*	"	*C*	906	77	"	*M*	765	127	"	*A*	705	175*b*	"	*L*	580	212	"	*L*	119
14	"	*O*	522	79	"	*S*	264	129	"	*M*	678	176	"	*J*	165	213	"	*A*	700
16	"	*A*	559	86	"	*M*	643	130	"	*A*	679	177	"	*L*	569	215	"	*L*	496
17	"	*J*	162	89*a*	"	*J*	168	131	"	*C*	1011	179	"	*P C*	64	217	"	*S*	254
19	"	*M*	647	89*b*	"	*A*	672	132	"	*M*	508	182	"	*C*	842	219	"	*L*	406
20	"	*P C*	73	91	"	*M*	772	134	"	*A*	676	184	"	*J*	166	221	"	*P*	347
24	"	*A*	682	93	"	*A*	667	135	"	*L*	558	186	"	*L*	588	223	"	*L*	405
26	"	*M*	744	94	"	*M*	898	136	"	*C*	992	187	"	*A*	678	224	"	*L*	518
30	"	*C*	1092	97	"	*C*	831	137	"	*A*	457	188	"	*P*	340	225*a*	"	*L*	602
36	"	*A*	531	105	"	*M*	861	142	"	*P C*	77	193	"	*A*	552	225*b*	"	*O*	528
37	"	*C*	781	107	"	*R*	138	144	"	*L*	572	194	"	*M*	797	227	"	*L*	586
39	"	*A*	527	108	"	*L*	584	145	"	*R*	116	195*a*	"	*A*	680	228	"	*O*	487
42	1927	*M*	352	110	"	*R*	135	152	"	*L*	447	195*b*	"	*C*	1100	231	"	*P*	490
44	1926	*J*	142	112	"	*M*	474	158	"	*M*	741	196	"	*L*	587	234	"	*S*	105
45	"	*C*	561	113	"	*S*	273	160	1927	*C*	289	197	"	*J*	87	242	"	*P*	351
47	"	*O*	431	115	"	*P*	346	161	1926	*P*	481	199*a*	"	*L*	682	244	"	*C*	1117
64	"	*C*	971	116	"	*S*	258	164	"	*M*	720	199*b*	"	*C*	916	245*a*	"	*J*	108

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I C	A. I. R.			I C	A. I. R.			I C	A. I. R.			I C	A. I. R.			I C	A. I. R.		
245*b*	1926	*B*	425	357	1926	*O*	614	452	1926	*J*	166	593	1926	*A*	712	757	1926	*A*	557
247	"	*L*	566	358	"	*B*	301	454	"	*L*	512	594	"	*C*	789	762	"	*R*	90
248	"	*B*	465	359	"	*L*	612	455	"	*O*	464	595	"	*A*	715	765	"	*J*	88
251	"	*N*	472	360	"	*C*	1206	459	"	*C*	898	604	"	*A*	686	768	*Too old.*		
253*a*	"	*L*	567	361	"	*B*	303	467	"	*L*	457	605	"	*P*	384	771	1926	*A*	730
253*b*	"	*O*	546	362	"	*L*	601	468	"	*P*	539	606	"	*A*	673	773	"	*R*	140
255	"	*L*	539	363*a*	"	*B*	335	473	"	*L*	408	607	"	*M*	816	775	"	*A*	725
256	"	*J*	151	363*b*	"	*C*	934	474	"	*C*	1042	616	"	*C*	946	777	"	*J*	89
257	"	*L*	357	367	"	*N*	329	477	"	*L*	624	617	"	*A*	687	778	1927	*A*	225
260	1925	*R*	247	368	"	*L*	421	478	1927	*A*	227	620	"	*C*	1070	779	1926	*L*	658
262	1926	*J*	137	370	"	*R*	142	479	1926	*L*	613	623	"	*P*	318	780	"	*A*	670
264	"	*C*	966	371	"	*M*	769	480	"	*A*	548	625	"	*J*	123	782	"	*L*	637
270*a*	"	*B*	416	375	"	*C*	977	481	"	*C*	1172	627	"	*P*	359	783	"	*J*	164
270*b*	"	*C*	895	376*a*	"	*N*	331	483	"	*M*	609	630	"	*L*	494	784	"	*L*	632
273*a*	"	*J*	170	376*b*	"	*L*	252	491	"	*N*	484	632	"	*P*	421	785	"	*A*	724
273*b*	"	*P*	489	377*a*	"	*C*	1152	492	"	*M*	834	635	"	*N*	86	786	"	*J*	148
275*a*	"	*P C*	84	377*b*	"	*L*	639	494	"	*L*	285	639	"	*A*	586	787	"	*A*	747
275*b*	"	*L*	578	378	"	*C*	957	495	"	*P*	532	640	"	*J*	148	788	"	*L*	630
276	"	*J*	122	380	"	*L*	373	497	"	*A*	403	641	"	*L*	313	789	"	*A*	708
277	"	*L*	563	382*a*	"	*L*	400	498	"	*J*	117	645	"	*A*	658	791	"	*P*	305
278	"	*A*	702	382*b*	"	*N*	473	499	1927	*S*	58	647	"	*J*	104	804	"	*L*	685
279	"	*M*	961	383	"	*O*	592	500	1926	*M*	763	648	"	*C*	786	807	"	*P*	549
281	"	*B*	414	384	"	*C*	943	501*a*	"	*J*	136	650	"	*J*	135	820	"	*L*	653
283*a*	"	*J*	147	385	"	*L*	74	501*b*	"	*J*	136	651	"	*P*	368	821	"	*L*	650
283*b*	"	*J*	149	388	"	*L*	213	503	"	*L*	290	652	"	*M*	1009	822	"	*J*	144
284	"	*B*	433	389	"	*J*	151	505	"	*P*	517	654	"	*L*	459	823	"	*M*	1066
286	"	*L*	589	390*a*	"	*J*	176	507	"	*N*	461	655	1927	*A*	80	825	"	*L*	629
287	"	*P*	474	390*b*	"	*L*	611	509	"	*P*	279	656	1926	*A*	466	826	"	*L*	467
290	"	*M*	757	391	"	*S*	288	521	"	*O*	485	657	"	*M*	857	827	"	*B*	384
293	"	*B*	390	394*a*	"	*J*	146	522	"	*P*	520	659	"	*J*	85	830	"	*L*	642
302	"	*J*	146	394*b*	"	*N*	504	526	"	*J*	148	664	"	*J*	136	832	"	*L*	655
303	"	*B*	373	395	"	*L*	470	527	"	*C*	945	665	"	*C*	1201	833	"	*B*	406
304	"	*J*	160	396*a*	"	*B*	419	528	"	*P*	367	666	"	*A*	669	835	"	*L*	635
305	"	*B*	338	396*b*	"	*J*	96	529	"	*P*	401	667	"	*C*	1118	836	"	*P C*	91
308	"	*L*	574	398	"	*L*	609	531	"	*A*	567	668	"	*A*	684	837	"	*L*	678
309*a*	"	*J*	165	400	"	*L*	617	536	"	*M*	859	669	"	*C*	790	839	"	*C*	668
309*b*	"	*B*	327	401	"	*N*	482	538	"	*O*	502	671	"	*A*	690	844	"	*L*	633
310	"	*J*	86	402	"	*J*	139	540	"	*L*	284	672	"	*O*	371	846	"	*C*	1009
311	"	*B*	423	403	"	*N*	271	541	"	*C*	1199	681	"	*A*	703	848	"	*B*	522
312	"	*L*	571	404	"	*J*	172	543	"	*N*	471	682	"	*C*	792	849	"	*J*	134
313	"	*B*	431	406	"	*S*	282	544*a*	"	*J*	101	684	1927	*A*	44	850	"	*M*	1072
315	"	*J*	96	410	"	*O*	609	544*b*	"	*J*	163	685	1926	*M*	568	856	"	*L*	667
316	"	*B*	372	411	"	*B*	377	546	"	*N*	474	686	"	*C*	1179	857	"	*N*	503
317*a*	"	*J*	157	413	"	*O*	408	548	"	*C*	1116	687	"	*A*	697	858	"	*L*	689
317*b*	"	*M*	788	415*a*	"	*L*	514	549	"	*A*	661	689	"	*C*	733	859	1927	*N*	47
321	"	*B*	353	415*b*	"	*B*	478	551	"	*J*	161	690	"	*M*	800	860	1926	*L*	691
323	"	*L*	575	416*a*	"	*J*	101	553	"	*A*	675	691	"	*L*	503	861	"	*M*	1097
325*a*	"	*O*	419	416*b*	"	*L*	605	554	"	*C*	1146	692	"	*C*	811	863	"	*L*	551
325*b*	"	*J*	115	417	"	*B*	427	555	"	*J*	98	694	"	*J*	144	865	"	*L*	663
326	"	*B*	424	420	1927	*L*	55	557	"	*C*	1148	695	"	*C*	825	866	"	*N*	485
327	"	*P*	462	421	1926	*B*	378	558	"	*P*	508	697	"	*M*	952	867*a*	"	*J*	144
328	"	*L*	565	424	"	*L*	638	562	"	*C*	1019	698	"	*C*	1192	867*b*	"	*J*	149
329	"	*B*	369	425	"	*B*	420	564	"	*A*	729	700	"	*M*	827	869*a*	"	*L*	640
332	"	*A*	674	429	"	*M*	955	565	"	*C*	1177	702	"	*C*	998	869*b*	"	*J*	146
333	"	*L*	586	432	"	*B*	387	567	"	*C*	1184	705	"	*C*	773	870	"	*A*	613
334	"	*B*	375	433	"	*J*	163	568	"	*J*	186	710	"	*A*	537	871	"	*L*	600
336	"	*J*	137	435	"	*B*	405	569	"	*P*	503	711	"	*C*	1159	872	"	*L*	651
337	"	*L*	561	437*a*	"	*L*	623	570	"	*C*	1182	712	"	*B*	435	873	"	*P*	393
338	"	*A*	692	437*b*	"	*P*	528	571	"	*P*	529	744	"	*A*	749	874	"	*L*	677
339	"	*N*	357	439	"	*L*	504	574	"	*C*	1158	747	"	*J*	155	875	"	*L*	639
341	"	*O*	525	440*a*	"	*P*	516	575	"	*P*	416	748	"	*L*	665	876	"	*O*	414
346	"	*S*	261	440*b*	"	*L*	471	581	"	*J*	171	749	"	*L*	654	877*a*	"	*L*	684
349*a*	"	*J*	90	442	"	*P*	498	582	"	*A*	589	750	"	*M*	897	877*b*	"	*A*	577
349*b*	"	*J*	153	443	"	*L*	468	584	"	*J*	163	751*a*	"	*L*	677	878	"	*L*	628
350	"	*B*	352	444	"	*P*	547	585	"	*P*	513	751*b*	1927	*N*	63	879	"	*L*	683
351*a*	"	*A*	585	445	"	*L*	356	586	"	*C*	1181	752	1926	*L*	660	881*a*	"	*L*	634
351*b*	"	*N*	463	446	"	*P*	320	587	"	*P*	524	753*a*	"	*C*	666	881*b*	"	*M*	1040
353*a*	"	*N*	432	447	"	*L*	437	588	"	*C*	1160	753*b*	"	*A*	649	884	"	*C*	1222
353*b*	"	*O*	601	448	"	*P*	545	591	"	*A*	691	754	"	*A*	733	886	"	*L*	676
356	"	*N*	494	450	"	*J*	131	592	"	"	722	755	"	*L*	246	887	"	*P C*	88

96 Indian Cases=All India Reporter.—(*Concld.*)

I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.			I. C.)	A. I. R.		
890	1926	*L*	376	915*a*	1926	*L*	650	956	1926	*S*	223	989	1926	*L*	627	1011	1926	*M*	706
892	,,	*L*	466	915*b*	,,	*M*	1052	957	,,	*M*	949	990	,,	*C*	996	1027	,,	*N*	352
893	,,	*N*	491	927*a*	,,	*J*	135	958	,,	*L*	692	993	,,	*M*	774	1027	,,	*P*	385
895	,,	*L*	673	927*b*	,,	*S*	291	959	,,	*C*	862	997	,,	*S*	18	1035	,,	*L*	671
898	,,	*N*	465	932*a*	,,	*J*	121	961	,,	*N*	495	998	,,	*J*	90	1 36	,,	*P*	363
900	,,	*M*	932	932*b*	,,	*C*	864	962	,,	*M*	875	1002	,,	*L*	603	1037	,,	*P*	395
902	,,	*J*	143	934	,,	*L*	425	963	,,	*N*	476	1003	,,	*S*	272	1039	,,	*A*	369
904	,,	*L*	631	936	,,	*P C*	110	968	,,	*M*	728	1004	,,	*N*	469	1046	,,	*A*	394
905	,,	*N*	499	937	,,	*P*	485	973	,,	*N*	496	1005	,,	*J*	127	1049	,,	*S*	279
907	,,	*J*	111	939	,,	*O*	415	977	,,	*L*	662	1006	,,	*N*	486	1051	,,	*M*	963
909	,,	*J*	166	942	,,	*P*	409	978	,,	*M*	906	1008	,,	*L*	681	1054	,,	*M*	1007
910	,,	*L*	670	944	,,	*M*	801	982	,,	*S*	276	1009	,,	*L*	545	1054	,,	*A*	744
912	,,	*M*	877	949	,,	*N*	493	983	,,	*M*	865	1010	,,	*P*	460	1056	,,	*C*	1205
913	,,	*L*	473	950	,,	*M*	916												

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I C	A. I. R.			I C	A. I. R.			I C	A. I. R.			I C	A. I. R.			I C	A. I. R.		
1	1926	*P*	514	154	1927	*P*	20	277	1926	*A*	757	369	1927	*L*	11	470	1926	*C*	1240
2	1925	*O*	522	157	1926	*A*	755	279	,,	*J*	92	372	,,	*C*	62	471	,,	*M*	1099
4*a*	1926	*M*	948	159	,,	*P*	572	280	,,	*L*	657	373	,,	*P*	2	474	,,	*A*	698
4*b*	,,	*A*	480	162	,,	*A*	693	282	,,	*P*	577	375	1926	*M*	1198	475	,,	*M*	1213
17	,,	*P*	566	163	,,	*M*	936	285	,,	*L*	661	376	,,	*C*	927	476	,,	*P*	430
37	,,	*B*	404	169	,,	*J*	120	286	,,	*C*	1030	384	,,	*M*	902	478	,,	*M*	1158
38*a*	1927	*N*	48	170	,,	*L*	668	287	,,	*J*	92	385	1927	*C*	15	479	1927	*C*	72
39*b*	1926	*L*	683	172*a*	,,	*M*	1147	288*a*	,,	*J*	146	386	,,	*P*	25	480	,,	*M*	338
39	1927	*N*	53	172*b*	,,	*C*	1221	288*b*	,,	*L*	547	389	1926	*M*	1015	483	,,	*A*	63
42	1926	*C*	944	174	,,	*L*	679	289	,,	*P*	537	390	1927	*L*	14	486	1926	*M*	1214
43	,,	*J*	148	175	,,	*P*	403	291	,,	*C*	1228	391	,,	*P*	41	487	1927	*A*	59
44	,,	*A*	737	176	,,	*A*	710	292	1927	*A*	231	393	1926	*M*	976	488	1926	*M*	1020
47	,,	*L*	656	178	,,	*N*	423	293	1926	*L*	672	394	,,	*L*	694	489	1927	*C*	81
48	,,	*P*	446	181	,,	*L*	490	294	,,	*C*	1033	395*a*	1927	*C*	16	491	1926	*M*	1035
51	,,	*R*	169	184	,,	*A*	753	295	1921	*M*	286	395*b*	1926	*M*	767	494	,,	*P*	605
54	1927	*P*	27	185	,,	*N*	429	302	1926	*J*	100	396	,,	*L*	559	496	,,	*M*	307
59	1926	*C*	1049	187	1927	*L*	49	306	,,	*C*	1236	398	1927	*S*	1	500	,,	*A*	764
60	,,	*R*	180	188	1926	*C*	1076	307	,,	*N*	349	407	1926	*M*	1019	502	,,	*M*	941
62	,,	*C*	1054	189	,,	*N*	396	309	1927	*P*	53	408	1927	*P*	17	503	1927	*A*	60
64	,,	*R*	171	192	,,	*L*	513	313	1926	*C*	1232	411	1926	*M*	899	505	1926	*S*	216
65	,,	*J*	162	194	,,	*C*	1068	314	,,	*M*	1163	412	,,	*C*	1239	511	*Too old*		
66	,,	*L*	664	195	,,	*N*	399	316	1927	*P*	142	413	,,	*M*	958	513	1927	*C*	48
67	,,	*M*	1137	200	,,	*C*	988	318	1926	*L*	651	414	,,	*J*	158	514	1926	*A*	540
68	,,	*P*	580	205	,,	*P*	478	319	,,	*A*	745	415	1927	*P*	45	517	,,	*M*	971
70	,,	*J*	167	209	,,	*C*	1053	321	1927	*S*	66	416	1926	*J*	143	520	,,	*O*	530
71*a*	,,	*L*	692	210	,,	*P*	444	331	1926	*N*	320	417	1927	*S*	10	537	,,	*L*	349
71*b*	,,	*A*	746	212	,,	*M*	911	332	1927	*P*	7	423*a*	,,	*P*	52	538	,,	*J*	147
72	1925	*R*	41	217	,,	*PC*	60	335	1926	*P*	575	423*b*	,,	*L*	15	539	1927	*C*	65
73	1926	*C*	1022	221	,,	*R*	179	337	,,	*A*	714	424	,,	*P*	37	543	1926	*PC*	109
82	,,	*A*	741	223	,,	*L*	689	338	,,	*L*	499	426	,,	*L*	17	544	1927	*A*	113
84	,,	*S*	295	224	,,	*R*	157	340	,,	*A*	722	428	,,	*A*	50	545	1926	*M*	1083
86	,,	*M*	872	232	,,	*M*	1093	341	,,	*C*	1225	430	,,	*A*	35	546	1927	*C*	75
90	,,	*A*	591	236	,,	*C*	1211	342	,,	*A*	707	431	,,	*N*	17	547	1926	*J*	97
102	,,	*A*	734	238	,,	*R*	177	343	,,	*P*	518	432	,,	*A*	131	548	,,	*M*	978
105	,,	*P*	457	241*a*	,,	*A*	725	344	,,	*A*	718	433	1926	*M*	1199	550	1927	*A*	26
108	,,	*A*	623	241*b*	,,	*L*	659	346	,,	*M*	974	435	1927	*L*	97	551	1926	*M*	991
123	1927	*P*	57	243	,,	*R*	183	347	,,	*A*	656	436	1926	*P*	461	554	1927	*N*	28
124	,,	*S*	62	245	,,	*A*	663	348	,,	*P*	512	437	,,	*M*	1012	556*a*	1926	*C*	1230
128	1926	*P*	462	246	,,	*J*	131	349	,,	*M*	1160	441	1927	*C*	54	556*b*	,,	*A*	361
129	,,	*A*	760	247*a*	,,	*C*	1056	350	,,	*A*	728	443	1926	*M*	934	564	1927	*C*	13
133	,,	*B*	596	247*b*	,,	*R*	175	351	,,	*J*	111	444	1927	*C*	79	566	1926	*A*	766
135	,,	*J*	161	248	,,	*S*	98	353	,,	*C*	1051	446	,,	*S*	18	567	1927	*M*	71
138	,,	*C*	1229	253	,,	*M*	1155	354	,,	*P*	499	450	1926	*M*	947	569*a*	,,	*P*	44
139	,,	*A*	748	255	1927	*P*	51	358	,,	*L*	695	452	1927	*P*	22	569	1926	*J*	136
140	1927	*C*	45	256	1926	*J*	160	359	,,	*M*	1130	453	,,	*M*	47	570	1927	*M*	185
142*a*	1926	*J*	91	257	1927	*S*	78	361	,,	*J*	155	455	1926	*A*	617	573	1926	*C*	1231
142*b*	,,	*C*	1037	263	1926	*L*	622	362	,,	*J*	184	462	,,	*M*	970	574	,,	*M*	959
145	,,	M	1203	265	,,	*C*	948	363	1927	*N*	22	463	1927	*C*	69	576	,,	*J*	156
149	,,	*C*	1046	267	,,	*J*	167	364	,,	*P*	13	465	1926	*M*	1211	577	1927	*S*	24
152	,,	*P*	564	268	,,	*A*	721	367	1926	*A*	590	467	1927	*A*	41	578	1926	*M*	977
153	,,	*J*	97	269	1927	*S*	49	368	1927	*A*	69	469	1926	*M*	951	580	,,	*M*	1208

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I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
581*a*	1926	*O*	544	666	1926	*C*	1138	754	1926	*M*	1129	819	1926	*L*	444	950	1926	*O*	604
581*b*	,,	*M*	1001	668	1927	*B*	67	755	1927	*C*	25	820	,,	*B*	408	951*a*	,,	*M*	1121
584	,,	*N*	480	669	1926	*M*	1008	757*a*	,,	*M*	68	822	,,	*P*	408	951*b*	,,	*O*	556
586	,,	*M*	1031	671	,,	*B*	534	757*b*	,,	*C*	82	823	,,	*L*	438	952	,,	*J*	94
587	1927	*A*	53	672	,,	*L*	636	759	1926	*M*	1122	824	,,	*M*	1183	953	,,	*O*	557
588	1926	*J*	165	673	,,	*B*	527	760	1927	*C*	323	825	,,	*M*	994	955	1927	*C*	93
590*a*	,,	*J*	138	676	,,	*M*	1060	761	1926	*PC*	96	832	1927	*M*	144	958	,,	*M*	97
590*b*	,,	*M*	1159	673	,,	*C*	1185	762	,,	*C*	1091	836	1926	*M*	986	960	1926	*O*	560
591	1927	*A*	54	684	,,	*M*	962	763	,,	*B*	523	838	1927	*C*	89	961	,,	*C*	1121
592	1926	*M*	1024	685	,,	*C*	1175	765*a*	,,	*M*	1145	842	1926	*M*	1045	973	,,	*B*	564
594	1927	*A*	28	687	,,	*M*	1210	765*b*	,,	*L*	606	845	1927	*C*	11	974	1927	*P*	59
601	1926	*M*	1144	688	,,	*B*	525	766	,,	*B*	578	847	1926	*M*	1084	976	1926	*J*	146
603	1927	*C*	148	690.	,,	*C*	1190	767	,,	*M*	975	850	,,	*M*	1032	977	1927	*N*	38
604*a*	1926	*M*	1017	691	,,	*B*	545	768	1927	*N*	31	852	,,	*J*	116	979	,,	*C*	87
604*b*	1927	*C*	51	692	,,	*C*	1193	769	1926	*L*	604	853	,,	*O*	578	980	,,	*N*	16
605	1926	*M*	1127	694	1927	*N*	19	770	,,	*C*	1101	866	1927	*M*	62	981	1926	*M*	1106
606	,,	*C*	1089	697	,,	*C*	57	773	,,	*L*	626	871	1926	*M*	1021	983	1927	*N*	25
608*a*	,,	*M*	945	700	1926	*B*	599	774	,,	*M*	1078	874	,,	*O*	547	986	1926	*M*	1109
608*b*	,,	*P*	561	702	,,	*C*	1180	775	,,	*L*	618	876	,,	*R*	172	988	1927	*N*	41
611	,,	*J*	186	703	,,	*M*	1146	780*a*	,,	*M*	1011	879	1927	*C*	84	989	1926	*M*	1069
612	,,	*P*	519	704	,,	*J*	121	780*b*	,,	*L*	638	882	1926	*O*	549	992	,,	*J*	113
613	,,	*M*	644	705*a*	,,	*L*	615	781*a*	,,	*M*	1080	885	,,	*C*	1195	993	,,	*M*	1038
614	,,	*C*	1106	705*b*	1927	*N*	36	781*b*	,,	*J*	88	888	,,	*O*	576	995	1927	*N*	44
615	,,	*M*	1184	706	1926	*M*	942	783*a*	1927	*M*	61	893*a*	,,	*M*	953	998	,,	*M*	90
618	,,	*P*	542	708	1927	*P*	32	783*b*	1926	*L*	624	893*b*	,,	*O*	555	1001	,,	*N*	23
621	,,	*J*	94	710	1926	*C*	1140	785	,,	*M*	1003	895	,,	*M*	944	1003	1926	*C*	1166
622	,,	*M*	1018	714	1927	*P*	9	787	,,	*M*	1005	896	,,	*O*	605	1006	1927	*N*	37
623	1927	*S*	25	718	1926	*M*	966	789	,,	*P*	527	897	,,	*O*	561	1007	1926	*C*	1214
625	,,	*C*	34	721	1927	*N*	15	790	,,	*M*	900	916	1927	*N*	74	1008	,,	*M*	980
629	,,	*P*	43	722	1926	*M*	1026	792	1927	*C*	32	917	1926	*O*	553	1013	,,	*C*	1210
630	1926	*M*	1029	725	1927	*S*	46	794	1926	*L*	464	918	1927	*M*	58	1015	1927	*N*	30
632	1927	*M*	38	727	1926	*M*	988	795*a*	,,	*M*	1059	919	1926	*O*	552	1016	1926	*C*	1215
635	,,	*C*	30	728	,,	*J*	95	795*b*	,,	*L*	464	920	,,	*M*	1146	1019	1927	*N*	18
637	,,	*P*	49	730	1927	*N*	107	796*a*	,,	*M*	1142	921	,,	*M*	1047	1020	1926	*M*	1104
641	,,	*S*	16	731	,,	*C*	21	796*b*	,,	*L*	460	922	,,	*O*	594	1023	1927	*N*	32
643	1926	*M*	989	735	1926	*M*	1087	797	,,	*B*	533	932	,,	*M*	1082	1025	1926	*R*	205
645	1927	*P*	5	737	,,	*B*	512	798	,,	*P*	397	933*a*	,,	*M*	1016	1027	,,	*M*	1207
647	,,	*S*	23	738	,,	*C*	1133	800	,,	*L*	472	933*b*	,,	*M*	1071	1028	1927	*N*	9
648	1926	*P*	569	742	,,	*B*	544	801	,,	*B*	551	934	,,	*J*	130	1029	1926	*R*	214
650	1927	*A*	38	743	,,	*J*	139	804	,,	*J*	155	936*a*	,,	*J*	109	1031	,,	*M*	968
651	1926	*C*	1109	744	,,	*B*	535	805	,,	*B*	555	936*b*	,,	*M*	1124	1032	,,	*R*	198
652	,,	*A*	767	745	,,	*J*	145	809	,,	*S*	278	938	,,	*M*	1126	1036	,,	*O*	612
653	,,	*C*	1120	747	,,	*B*	545	811	,,	*B*	546	940	1927	*N*	34	1037	,,	*R*	192
654	,,	*B*	518	748	1927	*M*	56	812	,,	*J*	110	941	1926	*M*	1061	1038	,,	*C*	1113
659	,,	*C*	1090	751	1926	*B*	548	814	,,	*B*	530	945	,,	*J*	190	1041	1927	*S*	28
660	,,	*B*	513	752	,,	*L*	582	817*a*	,,	*L*	443	947	,,	*M*	1068	1053	,,	*N*	49
664	1927	*N*	40	753	,,	*C*	1207	817*b*	1927	*C*	39	948	,,	*C*	1173	1054	1926	*R*	202
665	1926	*B*	517																

98 Indian Cases=All India Reporter.

I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.			I.C.	A. I. R.		
1	1926	*M*	1048	43	1927	*C*	177	81	1926	*J*	114	124	1927	*S*	54	164*b*	1926	*J*	154
4	,,	*R*	211	46	,,	*C*	41	85	1927	*C*	189	128	,,	*S*	77	165	,,	*L*	514
6	1927	*N*	57	49	,,	*S*	39	86	,,	*A*	92	129	,,	*C*	140	166*a*	,,	*R*	204
11	1926	*R*	208	56	,,	*P*	47	89	,,	*C*	114	136	1926	*S*	294	166*b*	,,	*C*	1077
14	,,	*M*	1081	57	1926	*R*	188	92	,,	*A*	78	137	1927	*C*	126	172	,,	*M*	1177
15	,,	*R*	215	60	1927	*P*	89	94	1926	*J*	181	140	,,	*C*	109	173	,,	*C*	993
16	1927	*N*	50	63*a*	1926	*M*	1143	97	1927	*S*	98	146	,,	*A*	109	176	1927	*M*	96
19	1926	*R*	195	63*b*	1927	*O*	51	99	*Too old*			147	,,	*C*	102	177	1926	*R*	193
21	,,	*M*	1159	65	1926	*M*	1089	101	1927	*S*	45	151	1926	*S*	286	178	,,	*O*	618
22	1927	*N*	10	69	1927	*O*	23	102*a*	,,	*O*	26	154	,,	*C*	1014	180	1927	*R*	67
26*a*	1926	*R*	200	70	,,	*C*	158	102*b*	1926	*J*	105	155	1927	*R*	31	181*a*	1926	*J*	185
26*b*	,,	*M*	1141	72	,,	*S*	60	104	1927	*S*	53	156	1926	*M*	1178	181*b*	,,	*R*	207
28	,,	*O*	606	74	1926	*O*	621	106	,,	*O*	17	160	,,	*R*	197	183	,,	*C*	1012
31	,,	*M*	1190	75	,,	*M*	1148	109	,,	*S*	59	161	,,	*L*	482	185	,,	*B*	245
33	,,	*O*	616	77	1927	*O*	32	111	,,	*P*	87	162	,,	*M*	1176	186	,,	*S*	281
37	1927	*N*	55	78	,,	*S*	90	113	,,	*S*	85	163	,,	*M*	1197	187	1927	*P*	96
39	1926	*M*	1117	80	,,	*O*	6	116	,,	*C*	149	164*a*	,,	*R*	191	188	,,	*S*	97

98 Indian Cases=All India Reporter—(*Contd.*)

I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
189	1926	*C*	1224	373	1926	*L*	533	501	1927	*M*	227	665	1927	*A*	23	807	1927	*P*	46
190	1927	*L*	10	374*a*	"	*C*	1057	503	"	*A*	106	669	"	*N*	68	809*a*	1926	*J*	174
191	1926	*C*	1202	374*b*	"	*P*	487	504	"	*C*	195	671	"	*M*	206	809*b*	"	*J*	124
193	"	*C*	1237	376	"	*A*	346	505	1926	*J*	188	673	"	*L*	18	811	1927	*A*	148
194	"	*R*	201	381	1927	*C*	193	506	"	*PC*	32	674	"	*N*	99	812	"	*M*	69
195	1927	*M*	92	383	"	*B*	128	508*a*	1927	*A*	188	675	"	*M*	160	814	"	*A*	197
196	1926	*R*	184	384	1926	*M*	1196	508*b*	1926	*PC*	94	677	"	*O*	18	816	"	*A*	213
198	"	*C*	1233	385	"	*J*	134	511*a*	1927	*A*	103	679	"	*N*	85	817*a*	"	*A*	155
201	"	*M*	1161	386	"	*C*	1059	511*b*	"	*M*	218	681	1926	*J*	191	817*b*	"	*P*	140
204	"	*C*	1218	388	"	*M*	1131	512	"	*A*	95	682	1927	*A*	62	818	"	*A*	159
205	"	*R*	145	391	"	*L*	536	513	1926	*M*	1187	684	1926	*C*	1083	819	1926	*N*	316
206	"	*C*	1219	392	"	*P*	425	514*a*	1927	*A*	100	689	"	*R*	143	821	1927	*A*	175
208	"	*M*	1150	393	1927	*L*	54	514*b*	1926	*L*	693	691	"	*J*	192	822	"	*C*	37
211	1927	*C*	136	394	1926	*P*	433	516*a*	1927	*A*	98	695	1927	*N*	83	824	1926	*J*	192
215	1926	*C*	1226	399	1927	*M*	162	516*b*	1926	*M*	1133	696	1926	*B*	495	825	1927	*C*	29
217	"	*N*	501	400	1926	*B*	526	521	"	*J*	188	698	1927	*M*	155	827	1926	*J*	182
219	1927	*P*	84	401	"	*C*	1163	522	"	*J*	174	700	1926	*R*	186	828	1927	*M*	41
220	1926	*C*	1153	405	1927	*S*	98	523	1927	*P*	104	702	1927	*M*	149	835	"	*C*	86
226	"	*B*	539	407	1926	*B*	231	524	1926	*M*	1128	704	"	*O*	141	836	1926	*J*	188
229	1927	*M*	131	413	"	*C*	1034	525	"	*A*	640	705	1926	*R*	154	837	*Too old*		
236	1926	*N*	489	416	"	*J*	179	526	1927	*R*	4	707	1927	*A*	119	838	1926	*M*	1110
238	"	*C*	1119	417	1927	*R*	20	536	"	*M*	83	708	1926	*R*	164	845	1927	*C*	56
239	"	*B*	537	425	1926	*L*	235	537	"	*N*	76	712	1927	*A*	104	846	"	*P*	103
241	"	*J*	151	426	"	*B*	573	538	"	*M*	213	714*a*	1926	*R*	182	848*a*	1926	*J*	169
248	"	*C*	1203	428	"	*M*	582	540	"	*N*	67	714*b*	"	*C*	1107	848*b*	1927	*A*	194
250	"	*O*	622	431	"	*B*	383	541	"	*C*	339	716	1927	*N*	88	849	"	*C*	49
252	"	*P*	535	432	"	*P*	453	542	1926	*O*	281	718	"	*A*	101	851	"	*M*	239
254	"	*P*	424	435	"	*M*	1123	549	1927	*M*	84	719	"	*A*	193	852	"	*C*	43
255	"	*L*	517	436	"	*B*	567	550	1926	*S*	128	721	1926	*B*	491	854	1926	*J*	173
257	"	*M*	1138	442	1927	*M*	50	552	1927	*M*	192	723*a*	"	*J*	175	855	"	*J*	183
259	"	*M*	1193	446	"	*M*	201	553	"	*A*	96	723*b*	"	*C*	1097	856	1927	*M*	240
263*a*	1927	*A*	102	448	1926	*B*	581	554	"	*P*	94	726	1927	*M*	253	857	"	*L*	66
263*b*	1926	*M*	1173	450	1927	*M*	193	555	1926	*B*	471	728	1926	*C*	924	858	"	*A*	209
267	1927	*M*	98	452	1926	*B*	579	563	1927	*M*	189	729	"	*J*	172	859	"	*L*	80
268*a*	1926	*J*	129	454*a*	"	*M*	1167	565	1926	*R*	146	732	*Too old*			860*a*	"	*C*	27
268*b*	1927	*M*	126	454*b*	"	*B*	576	567	"	*PC*	97	739	1927	*M*	151	860*b*	"	*M*	244
272	1926	*L*	645	455	"	*M*	1209	571	1927	*M*	80	740	1925	*C*	955	862	"	*C*	46
278	1927	*M*	170	457	"	*B*	575	573	"	*A*	56	742	1927	*O*	1	864	"	*L*	99
280	"	*M*	143	458	1927	*M*	212	576	1926	*PC*	112	748	1926	*C*	1105	865	"	*L*	46
281	"	*M*	110	459	"	*R*	28	584	1927	*L*	1	750	1927	*O*	21	866	"	*L*	71
282	1926	*B*	542	460	"	*A*	115	590	1926	*A*	610	751	1926	*C*	1112	867*a*	"	*M*	72
284	1927	*O*	39	461	"	*R*	29	593	1927	*A*	97	753	"	*J*	183	867*b*	"	*L*	73
285	1926	*B*	559	463*a*	1926	*M*	1140	594	1926	*J*	179	754	"	*B*	548	868	"	*L*	40
291	"	*M*	1167	463*b*	1927	*M*	209	597	1927	*M*	177	757	"	*J*	177	869	"	*M*	217
297	"	*B*	577	465	"	*A*	107	599	1926	*L*	385	759*a*	"	*P*	497	870	"	*L*	39
298	"	*J*	127	466	1926	*J*	134	606	"	*A*	711	759*b*	1927	*N*	89	871	1926	*J*	187
299	"	*B*	566	467	1927	*S*	92	607*a*	1927	*M*	139	766	*Too old*			872	"	*M*	1188
300	1927	*O*	15	471*a*	"	*A*	52	607*b*	"	*P*	86	767*a*	*Too old*			875	1927	*L*	35
301	"	*M*	60	471*b*	"	*A*	75	608	"	*A*	105	767*b*	1926	*P*	413	876*a*	1926	*J*	177
303	1926	*J*	130	472	1926	*M*	670	609	"	*M*	179	770	1927	*O*	12	876*b*	"	*M*	1214
308	"	*M*	1154	474	1927	*A*	112	612	"	*L*	6	773	1926	*A*	511	878	1927	*L*	70
310	"	*L*	525	475	"	*A*	108	613	"	*M*	197	778	1927	*O*	87	879	"	*L*	56
313	1927	*M*	10	477	1926	*M*	1165	615	1926	*C*	1149	779	"	*P*	1	880	1926	*J*	192
323	"	*R*	14	478	1927	*A*	163	619	1927	*M*	73	781	"	*C*	76	881*a*	1927	*L*	69
328	"	*M*	75	480	"	*R*	32	621	1926	*R*	148	783*a*	1926	*J*	138	881*b*	"	*L*	47
329	1926	*L*	341	481	"	*A*	116	628	1927	*M*	67	783*b*	1927	*O*	44	882	"	*M*	226
332	"	*M*	478	483	"	*A*	99	629	1926	*B*	479	786	"	*P*	35	883	"	*L*	68
334	"	*C*	1064	484	"	*R*	19	631	1927	*N*	72	787	1926	*M*	1079	884	"	*L*	100
336	"	*L*	519	485	1926	*J*	185	633	1926	*J*	189	789	1927	*O*	36	885	"	*L*	38
338	"	*PC*	119	487	1927	*A*	111	634	"	*B*	497	790	"	*M*	82	886	"	*M*	238
339	"	*L*	338	488	"	*M*	243	650*a*	1927	*N*	116	791*a*	1926	*J*	178	887	"	*L*	48
341	"	*B*	481	489	"	*A*	90	650*b*	"	*L*	9	791*b*	1927	*P*	38	888	"	*S*	114
351	"	*P*	257	491	"	*R*	80	651	1926	*J*	173	794	1926	*B*	410	890	"	*J*	197
353	1927	*O*	7	492	1926	*J*	180	652	1927	*N*	97	799*a*	"	*M*	1166	892	"	*L*	43
357	1926	*N*	244	493	1927	*A*	45	654	"	*M*	241	799*b*	1927	*R*	57	893	1926	*P*	465
358	"	*B*	189	497	1926	*J*	189	657	"	*A*	55	800	"	*M*	76	900	1927	*L*	27
364	"	*P*	438	498	1927	*C*	214	658	"	*N*	95	802	"	*M*	59	901	1926	*PC*	125
366	"	*L*	529	499*a*	"	*A*	144	660	"	*M*	194	803*a*	"	*A*	202	902*a*	1927	*L*	50
367	"	*B*	320	499*b*	1926	*PC*	93	663*a*	1926	*J*	91	803*b*	"	*C*	52	902*b*	"	*R*	1
371	1927	*M*	321	500	"	*J*	193	663*b*	1927	*N*	100	806	"	*A*	183	906	"	*L*	42

98 Indian Cases=All India Reporter —(*Concld.*)

I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.			I.C.	A.I.R.		
907	1927	*A*	126	949	1927	*B*	22	1001	1927	*A*	66	1037	1926	*J*	193	1059	1926	*J*	149
909	"	*S*	100	960	1926	*L*	607	1003	"	*P*	23	1039	"	*J*	175	1060	"	*J*	175
911	1926	*J*	108	961	1927	*A*	137	1005	"	*A*	114	1042	1927	*A*	182	1061	"	*J*	173
912	"	*J*	176	968	"	*P*	117	1007	"	*A*	168	1044	"	*O*	37	1061	"	*J*	180
915	1927	*B*	49	976	"	*A*	27	1008	"	*C*	232	1046	"	*A*	203	1062	1927	*N*	86
919	"	*C*	160	977	"	*C*	243	1010	"	*A*	173	1047	"	*O*	25	1064	"	*A*	195
925	1926	*PC*	129	978	"	*A*	39	1012	"	*A*	127	1049	1926	*J*	174	1065	"	*M*	232
927	1927	*B*	53	981	"	*A*	145	1013	1926	*PC*	100	1050	1927	*A*	181	1066	"	*M*	113
929	"	*L*	128	983	"	*A*	70	1019	1927	*A*	200	1051	"	*O*	65	1067	"	*M*	49
930	1926	*PC*	126	988	"	*C*	239	1019	"	*O*	34	1052	"	*A*	160	1068	1926	*J*	175
933	1927	*B*	40	989	"	*A*	204	1021	"	*C*	229	1053	1926	*J*	187	1069	1927	*A*	156
940	1926	*J*	185	991	1926	*P*	495	1023	"	*A*	150	1055	"	*J*	177	1069	"	*O*	43
941	1927	*B*	52	993	1927	*A*	120	1029	"	*O*	49	1056	1927	*R*	48	1070	1926	*M*	1202
942	"	*L*	59	995	"	*P*	108	1031	1926	*PC*	105	1057	"	*N*	1	1071	1927	*N*	120
943	"	*B*	32	998	"	*A*	128	1035	"	*J*	188	1058	"	*A*	176	1072	1926	*J*	174
946	1926	*L*	596																

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1926 LAHORE Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1926 LAHORE.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1926 Lahore=Other Journals.

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1 SB	6	*Lah*	528	19	26	*Cr L J*	1631	35	89	*I C*	596	51	26	*Cr L J*	1370		89	*I C*	458
	26	*P L R*	772		90	*I C*	927	37	26	*P L R*	832		89	*I C*	831		89	*I C*	831
	26	*Cr L J*	1409		26	*P L R*	808		7	*L L J*	544	52	26	*Cr L J*	1308		26	*Cr L J*	1308
	89	*I C*	833	20	89	*I C*	721		90	*I C*	41	54	89	*I C*	252		89	*I C*	252
4	7	*L L J*	576	21	26	*P L R*	605	39	89	*I C*	792		26	*Cr L J*	1497		26	*Cr L J*	1497
	26	*P L R*	820		90	*I C*	1047	40	7	*L L J*	588	60	90	*I C*	153		90	*I C*	153
	92	*I C*	217	23	89	*I C*	960		90	*I C*	1054		26	*Cr L J*	1459		26	*Cr L J*	1459
	27	*Cr L J*	233	24	7	*L L J*	553		26	*P L R*	819	61	89	*I C*	1027		89	*I C*	1027
6	89	*I C*	884		92	*I C*	235	41	6	*Lah*	493		89	*I C*	479		89	*I C*	479
7	26	*P L R*	735		26	*P L R*	837		26	*P L R*	848	62 (1)	26	*P L R*	756		26	*P L R*	756
	90	*I C*	1052	25	89	*I C*	953		89	*I C*	1022	62 (2)	90	*I C*	1032		90	*I C*	1032
9	7	*L L J*	625	26	90	*I C*	1030	43	89	*I C*	229		26	*Cr L J*	1406		26	*Cr L J*	1406
	26	*Cr L J*	1453		26	*P L R*	630	45	26	*Cr L J*	1377	63	89	*I C*	718		89	*I C*	718
	89	*I C*	973	27	89	*I C*	857		89	*I C*	513		27	*P L R*	50		27	*P L R*	50
10	7	*L L J*	559	28	6	*Lah*	463	47 (1)	26	*P L R*	746	65	8	*L L J*	13		8	*L L J*	13
	26	*P L R*	835		91	*I C*	70		90	*I C*	1042		93	*I C*	344		93	*I C*	344
	92	*I C*	258		26	*P L R*	719	47 (2)	26	*Cr L J*	1350		7	*Lah*	179		7	*Lah*	179
11	89	*I C*	879		27	*Cr L J*	38		89	*I C*	390		7	*Lah*	80		7	*Lah*	80
	26	*P L R*	240	30	89	*I C*	414	48	7	*L L J*	537	72	27	*Cr L J*	638		27	*Cr L J*	638
12	26	*Cr L J*	1369	31 (1)	26	*P L R*	744		26	*Cr L J*	1144		94	*I C*	414		94	*I C*	414
	89	*I C*	457		90	*I C*	1056		26	*P L R*	398		27	*P L R*	514		27	*P L R*	514
18	89	*I C*	995	31 (2)	89	*I C*	378		88	*I C*	456		7	*Lah*	21		7	*Lah*	21
14	6	*Lah*	536	32	6	*Lah*	461		27	*P L R*	829	74	27	*P L R*	280		27	*P L R*	280
	7	*L L J*	548		91	*I C*	30	49	26	*Cr L J*	1441		27	*Cr L J*	929		27	*Cr L J*	929
	26	*P L R*	722		26	*P L R*	721		89	*I C*	961		96	*I C*	385		96	*I C*	385
	92	*I C*	268	33	89	*I C*	434	50	26	*P L R*	291		26	*Cr L J*	1363		26	*Cr L J*	1363
16	89	*I C*	429	34	26	*P L R*	740		26	*Cr L J*	1393	78	89	*I C*	451		89	*I C*	451
19	6	*Lah*	392	35	90	*I C*	1050		89	*I C*	705		26	*P L R*	748		26	*P L R*	748
					26		546	51	26	*P L R*	583	79							

A. I. R. 1926 Lahore=Other Journals—(*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
79	26	*Cr L J*	1420	131	95	*I C*	52	166	27	*Cr L J*	561	205	27	*P L R*	341
	89	*I C*	844		27	*Cr L J*	724		94	*I C*	129		27	*Cr L J*	761
80	89	*I C*	997	132	26	*Cr L J*	1361	167	7	*Lah*	12		8	*L L J*	358
81	26	*Cr L J*	1357		89	*I C*	449		27	*P L R*	219		95	*I C*	281
	89	*I C*	397	134	6	*Lah*	544		93	*I C*	1013	206	7	*Lah*	30
82	89	*I C*	363		93	*I C*	30	168	92	*I C*	249		27	*P L R*	218
83	6	*Lah*	489	135	89	*I C*	427	170	7	*Lah*	35		27	*Cr L J*	563
	26	*P L R*	845	136	89	*I C*	422		27	*P L R*	210		94	*I C*	131
	92	*I C*	423	137	89	*I C*	162		94	*I C*	25	207	7	*Lah*	117
	27	*Cr L J*	247	138	26	*Cr L J*	1429	171	7	*Lah*	4		27	*P L R*	200
84	7	*L L J*	595		89	*I C*	901		27	*P L R*	214		93	*I C*	993
	26	*P L R*	738	139	6	*Lah*	558		93	*I C*	1009	208	26	*P L R*	15
	91	*I C*	6		27	*Cr L J*	400	174	8	*L L J*	35		91	*I C*	479
85	89	*I C*	176		93	*I C*	48		93	*I C*	351	209	27	*Cr L J*	109
86	89	*I C*	736		27	*P L R*	87		27	*P L R*	109		91	*I C*	541
87	89	*I C*	740	140	26	*Cr L J*	1407	175	92	*I C*	297	210	7	*Lah*	124
88	7	*Lah*	84		89	*I C*	719	176	26	*P L R*	429		27	*P L R*	154
	94	*I C*	901	141	89	*I C*	384		27	*Cr L J*	192		95	*I C*	337
	27	*Cr L J*	709	142	89	*I C*	724		91	*I C*	1008	211	92	*I C*	264
	27	*P L R*	583	143	7	*L L J*	582	177	92	*I C*	317	212	27	*Cr L J*	338
90	89	*I C*	871		26	*P L R*	829	178	91	*I C*	528		92	*I C*	850
91	7	*L L J*	603		92	*I C*	222	179	27	*Cr L J*	121	213	27	*Cr L J*	932
	92	*I C*	705		27	*Cr L J*	238		91	*I C*	697		96	*I C*	388
94	89	*I C*	409	144	26	*P L R*	550	181	91	*I C*	166	214	8	*L L J*	10
96	6	*Lah*	512		26	*Cr L J*	1373	182	92	*I C*	313		93	*I C*	340
	92	*I C*	322		89	*I C*	461	183	7	*Lah*	17		27	*P L R*	95
100	27	*P L R*	115	145	89	*I C*	333		27	*P L R*	9	215	26	*P L R*	743
	94	*I C*	695	146	26	*P L R*	397		92	*I C*	947		91	*I C*	8
	7	*Lah*	275		90	*I C*	1037	184	91	*I C*	351	216	91	*I C*	558
108	7	*L L J*	590	147	26	*Cr L J*	1424	185	91	*I C*	571	217	91	*I C*	963
	27	*P L R*	43		89	*I C*	848	186	8	*L L J*	32	218	26	*P L R*	747
	92	*I C*	651	148	89	*I C*	212		93	*I C*	355		91	*I C*	82
	7	*Lah*	55	149	26	*Cr L J*	1455		7	*Lah*	102	219	8	*L L J*	93
109	89	*I C*	360		89	*I C*	975		27	*P L R*	106		27	*Cr L J*	459
110	6	*Lah*	548	150	89	*I C*	982	187	91	*I C*	566		93	*I C*	251
	93	*I C*	54	151	26	*P L R*	701	188	92	*I C*	294		27	*P L R*	132
112	89	*I C*	475		7	*L L J*	571	189	26	*P L R*	825	220	8	*L L J*	73
113	89	*I C*	958		27	*Cr L J*	104		91	*I C*	32		93	*I C*	359
114	26	*Cr L J*	1440		91	*I C*	536	190	26	*P L R*	789		27	*P L R*	140
	89	*I C*	912	152	7	*L L J*	596		27	*Cr L J*	190	221	7	*L L J*	628
115	26	*P L R*	412		27	*P L R*	32		91	*I C*	1006		27	*P L R*	47
	26	*Cr L J*	1374		92	*I C*	595	191	26	*P L R*	253		27	*Cr L J*	283
	89	*I C*	462	153	89	*I C*	661		91	*I C*	10		92	*I C*	459
116	6	*Lah*	499	154	26	*Cr L J*	1418	192	7	*Lah*	10	223	27	*P L R*	18
	26	*P L R*	853		89	*I C*	842		27	*P L R*	206		92	*I C*	966
	92	*I C*	332	155	6	*Lah*	554		93	*I C*	1011	225	92	*I C*	656
117	89	*I C*	865		27	*Cr L J*	408	193	27	*Cr L J*	793	227(1)	91	*I C*	506
118	89	*I C*	351		93	*I C*	72		95	*I C*	393	227(2)	27	*Cr L J*	333
119	7	*L L J*	586		27	*P L R*	85	196	7	*Lah*	15		92	*I C*	749
	96	*I C*	212	156	6	*Lah*	541		27	*P L R*	207	228	92	*I C*	731
	27	*Cr L J*	900		27	*P L R*	80		93	*I C*	1052	229	27	*P L R*	78
120	7	*L L J*	618		27	*Cr L J*	411		27	*Cr L J*	556		92	*I C*	990
	26	*P L R*	754		93	*I C*	75	196	26	*P L R*	616	230	92	*I C*	759
	92	*I C*	531	157	89	*I C*	989		27	*Cr L J*	23	231	92	*I C*	296
121	89	*I C*	437	158	89	*I C*	662		91	*I C*	55	232	7	*Lah*	50
122	26	*Cr L J*	1425	159	89	*I C*	684	197	26	*P L R*	781		27	*P L R*	294
	89	*I C*	897	160	89	*I C*	366		91	*I C*	1054		94	*I C*	406
125	7	*Lah*	42	161	8	*L L J*	106	198	91	*I C*	476		27	*Cr L J*	630
	7	*L L J*	611		94	*I C*	614	199	93	*I C*	700	233	94	*I C*	156
	92	*I C*	712		7	*Lah*	201		27	*P L R*	225	234	7	*Lah*	73
	27	*P L R*	287		27	*P L R*	836		27	*Cr L J*	476		94	*I C*	422
128	7	*L L J*	600	162	7	*Lah*	40	200	91	*I C*	487		27	*P L R*	526
	27	*P L R*	24		27	*P L R*	209	201	27	*P L R*	325	235	27	*P L R*	49
	92	*I C*	597		94	*I C*	27		94	*I C*	150		98	*I C*	425
129	89	*I C*	869	163	91	*I C*	482		7	*Lah*	138	236(1)	92	*I C*	898
130	94	*I C*	709	165	7	*Lah*	1	202	27	*P L R*	194	236(2)	27	*P L R*	67
	27	*Cr L J*	661		27	*P L R*	258		93	*I C*	921		27	*Cr L J*	382
131	8	*L L J*	87		93	*I C*	1007	203	92	*I C*	252		92	*I C*	894
	7	*Lah*	99	166	7	*Lah*	32	204	91	*I C*	213	237	8	*L L J*	70
	27	*P L R*	181		27	*P L R*	221	205	7	*Lah*	134		93	*I C*	375

A. I. R. 1926 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
237	27	*P L R*	142	289	7	*Lah*	129	330	27	*P L R*	144	367	27	*Cr L J*	803
238	27	*P L R*	65		27	*P L R*	310		93	*I C*	361		95	*I C*	467
	92	*I C*	980		95	*I C*	342	332	8	*L L J*	134	368	27	*Cr L J*	573
239(1)	91	*I C*	443	290	96	*I C*	503		27	*P L R*	250		94	*I C*	141
239(2)	26	*P L R*	788		27	*Cr L J*	951		94	*I C*	563	369	27	*Cr L J*	544
	27	*Cr L J*	186	292	8	*L L J*	114	333	93	*I C*	634		93	*I C*	1040
	91	*I C*	1002		27	*P L R*	301	336	8	*L L J*	146	370	94	*I C*	234
240(1)	92	*I C*	813		94	*I C*	635		27	*P L R*	267	371	94	*I C*	121
240(2)	27	*Cr L J*	252	297	27	*P L R*	190		27	*Cr L J*	621	372	8	*L L J*	156
	92	*I C*	428		27	*Cr L J*	468		94	*I C*	365		27	*P L R*	256
241	94	*I C*	181		93	*I C*	692	337	93	*I C*	1012		94	*I C*	7
242(1)	8	*L L J*	78		7	*Lah*	218	338	7	*Lah*	332	373	7	*Lah*	227
	27	*P L R*	187	298	7	*Lah*	121		27	*P L R*	519		27	*P L R*	416
	94	*I C*	650		27	*P L R*	310		8	*L L J*	425		96	*I C*	380
242(2)	92	*I C*	994		95	*I C*	80		98	*I C*	339	375	8	*L L J*	180
243	92	*I C*	289		27	*Cr L J*	752	340	8	*L L J*	111		27	*P L R*	353
244	8	*L L J*	39	299	27	*P L R*	160		27	*P L R*	273		27	*Cr L J*	593
	27	*P L R*	70		93	*I C*	309		94	*I C*	633		94	*I C*	257
	92	*I C*	1012	300	94	*I C*	253	341	7	*Lah*	319	376	96	*I C*	890
	7	*Lah*	173		7	*Lah*	306		27	*P L R*	507	**F B**	7	*Lah*	570
246	26	*P L R*	432		27	*P L R*	460		98	*I C*	329		27	*P L R*	605
	96	*I C*	755	301	8	*L L J*	140	343	27	*P L R*	91	378	27	*Cr L J*	555
247	92	*I C*	725		27	*P L R*	265		92	*I C*	991		93	*I C*	1051
248	8	*L L J*	80		27	*Cr L J*	639	344	8	*L L J*	170	379	7	*Lah*	161
	93	*I C*	689		94	*I C*	415		94	*I C*	117		8	*L L J*	267
	27	*P L R*	188		7	*Lah*	303		27	*P L R*	710		27	*P L R*	321
	7	*Lah*	168	302	93	*I C*	688	345	94	*I C*	394		95	*I C*	124
	27	*Cr L J*	465	303	8	*L L J*	132	346	8	*L L J*	60	381	93	*I C*	996
249	92	*I C*	669		27	*P L R*	249		27	*P L R*	172	382	27	*Cr L J*	510
250	27	*P L R*	74		94	*I C*	557		92	*I C*	986		93	*I C*	974
	92	*I C*	889	304 (1)	7	*Lah*	122	347	27	*Cr L J*	565	383 (1)	94	*I C*	1048
	27	*Cr L J*	377		27	*P L R*	131		94	*I C*	133	383 (2)	7	*Lah*	171
251	92	*I C*	769		27	*Cr L J*	463	348	7	*Lah*	235		27	*P L R*	318
252	27	*P L R*	26		93	*I C*	255		93	*I C*	997		95	*I C*	130
	96	*I C*	376	304 (2)	8	*L L J*	76		27	*P L R*	408	384	27	*Cr L J*	554
253	8	*L L J*	206		27	*P L R*	185		8	*L L J*	350		93	*I C*	1050
F B	7	*Lah*	238	305	7	*Lah*	108	349	97	*I C*	537	385	27	*Cr L J*	1383
	27	*P L R*	356		27	*P L R*	314	350	27	*Cr L J*	562		98	*I C*	599
	95	*I C*	808		95	*I C*	312		94	*I C*	130	392	8	*L L J*	194
262	7	*Lah*	65		27	*Cr L J*	776	351	93	*I C*	829		27	*Cr L J*	817
	27	*Cr L J*	625	307	26	*P L R*	812	352	7	*Lah*	270		95	*I C*	593
	94	*I C*	401		91	*I C*	4		27	*P L R*	384		27	*P L R*	743
	27	*P L R*	523	309	7	*Lah*	148		94	*I C*	329	393	27	*P L R*	330
264	93	*I C*	612		27	*P L R*	327	353	27	*Cr L J*	507		95	*I C*	558
	7	*Lah*	376		27	*Cr L J*	463		93	*I C*	971	394	27	*Cr L J*	527
271	7	*Lah*	70		93	*I C*	255	354	94	*I C*	168		93	*I C*	991
	94	*I C*	403	310	7	*Lah*	91	355	93	*I C*	855	395	94	*I C*	492
	27	*Cr L J*	627		27	*Cr L J*	215	356	7	*Lah*	206		7	*Lah*	522
	27	*P L R*	534		92	*I C*	167		96	*I C*	445		27	*P L R*	846
272	27	*Cr L J*	112	313	96	*I C*	641		27	*P L R*	738	400	7	*Lah*	226
	91	*I C*	544		27	*Cr L J*	977	357	8	*L L J*	242		27	*P L R*	411
273	91	*I C*	465	317	27	*Cr L J*	478		7	*Lah*	348		96	*I C*	382
275	27	*P L R*	151		93	*I C*	702		96	*I C*	257	401	94	*I C*	245
	92	*I C*	982	318	94	*I C*	304		27	*Cr L J*	913		7	*Lah*	416
276	92	*I C*	779		7	*Lah*	442		27	*P L R*	555		27	*P L R*	656
277	7	*Lah*	61	320	8	*L L J*	99	360	93	*I C*	903	402	93	*I C*	938
	94	*I C*	377		27	*P L R*	238	361	8	*L L J*	188	403	94	*I C*	646
	27	*P L R*	517		94	*I C*	627		27	*P L R*	244	404	94	*I C*	2
278	8	*L L J*	97	321	92	*I C*	484		27	*Cr L J*	566	405	96	*I C*	223
	27	*P L R*	171	326	7	*Lah*	104		94	*I C*	134		7	*Lah*	357
	96	*I C*	211		27	*P L R*	298	363	27	*Cr L J*	614		8	*L L J*	255
	27	*Cr L J*	899		95	*I C*	308		94	*I C*	358		27	*P L R*	529
279	92	*I C*	278		27	*Cr L J*	772	364	94	*I C*	58		27	*Cr L J*	911
283	92	*I C*	674	327	93	*I C*	621	365	27	*Cr L J*	607	406	7	*Lah*	359
284	27	*P L R*	11	328	7	*Lah*	113		94	*I C*	271		8	*L L J*	251
	96	*I C*	540		8	*L L J*	3	366	27	*Cr L J*	575		96	*I C*	219
285	27	*P L R*	68		27	*P L R*	75		94	*I C*	143		27	*Cr L J*	907
	96	*I C*	494		92	*I C*	1015	367	7	*Lah*	264		27	*P L R*	551
286	92	*I C*	479	329	93	*I C*	367		8	*L L J*	174	407	27	*Cr L J*	572
287	92	*I C*	273	330	8	*L L J*	125		27	*P L R*	379		94	*I C*	140

A. I. R. 1926 Lahore=Other Journals (*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
408	7	*Lah*	215	437	8	*L L J*	309	470	27	*P L R*	570	504	27	*P L R*	453
	27	*P L R*	412		96	*I C*	447	471	8	*L L J*	291		36	*I C*	439
	8	*L L J*	319		27	*P L R*	749		96	*I C*	440	505	94	*I C*	483
	96	*I C*	473	438	27	*P L R*	292		27	*P L R*	581	506	8	*L L J*	313
409	94	*I C*	114		97	*I C*	823	472 (1)	27	*P L R*	317		94	*I C*	995
410	27	*Cr L J*	782	439	27	*P L R*	276		97	*I C*	800		27	*P L R*	565
	8	*L L J*	257		27	*Cr L J*	600	472 (2)	94	*I C*	78	508	93	*I C*	953
	95	*I C*	318		94	*I C*	264	473	27	*P L R*	375	509	92	*I C*	319
	27	*P L R*	843	440	94	*I C*	148		96	*I C*	913	511	27	*P L R*	432
411	7	*Lah*	159	441	94	*I C*	686	474	94	*I C*	300		94	*I C*	457
	27	*P L R*	319	442	94	*I C*	249	477	95	*I C*	905	512	8	*L L J*	264
	95	*I C*	275		7	*Lah*	337	478	27	*Cr L J*	760		96	*I C*	454
	27	*Cr L J*	755		8	*L L J*	416		95	*I C*	280		27	*P L R*	590
412	8	*L L J*	82		27	*P L R*	532	479	27	*Cr L J*	815	513	8	*L L J*	324
	27	*P L R*	176	443	27	*P L R*	223		95	*I C*	479		97	*I C*	192
	27	*Cr L J*	696		97	*I C*	817		27	*P L R*	630		27	*P L R*	735
	94	*I C*	888	444	27	*P L R*	82	480	7	*Lah*	313	514 (1)	8	*L L J*	238
413	94	*I C*	761		97	*I C*	819		27	*P L R*	462		96	*I C*	415
414	8	*L L J*	240	445 (1)	27	*Cr L J*	719		27	*Cr L J*	556		28	*P L R*	61
	95	*I C*	252		94	*I C*	911		93	*I C*	1052	514 (2)	27	*P L R*	355
	27	*P L R*	842	445 (2)	94	*I C*	396	481	7	*Lak*	408		98	*I C*	165
415	27	*P L R*	260	446	94	*I C*	128		94	*I C*	1037	515	95	*I C*	433
	94	*I C*	75	447	96	*I C*	152		8	*L L J*	476	516	26	*P L R*	267
416	26	*P L R*	123		27	*Cr L J*	888		27	*P L R*	594		27	*Cr L J*	7
	94	*I C*	554		7	*Lah*	507	482	27	*P L R*	89		91	*I C*	39
417	8	*L L J*	166		27	*P L R*	791		98	*I C*	161	517	7	*Lah*	341
	27	*P L R*	344	450	94	*I C*	21	483	94	*I C*	991		27	*P L R*	502
	93	*I C*	928	451	94	*I C*	251		7	*Lah*	471		8	*L L J*	613
418	94	*I C*	514		27	*P L R*	870		27	*P L R*	788		98	*I C*	255
419	27	*Cr L J*	547	452	27	*P L R*	198	484	94	*I C*	158		27	*Cr L J*	1311
	93	*I C*	1043		94	*I C*	125	485	27	*Cr L J*	572	518 (1)	27	*Cr L J*	912
421	7	*Lah*	223	453	27	*P L R*	168		94	*I C*	140		96	*I C*	224
	27	*P L R*	405		93	*I C*	871	486	8	*L L J*	150		7	*Lah*	568
	96	*I C*	368	454	27	*Cr L J*	543		27	*P L R*	351		27	*P L R*	840
422	94	*I C*	243		93	*I C*	1039		99	*I C*	751	518 (2)	94	*I C*	172
	8	*L L J*	451	455	94	*I C*	1055	487	27	*Cr L J*	574	519	7	*Lah*	327
	27	*P L R*	638	456	94	*I C*	1046		94	*I C*	142		8	*L L J*	460
423	7	*Lah*	155	457	8	*L L J*	235	488	7	*Lah*	232		27	*P L R*	541
	27	*P L R*	337		96	*I C*	467		8	*L L J*	338		98	*I C*	336
	93	*I C*	642		28	*P L R*	59		27	*P L R*	400	520	94	*I C*	103
424	7	*Lah*	344	458	94	*I C*	959		93	*I C*	954	521	27	*Cr L J*	824
	27	*Cr L J*	576		7	*Lah*	447	489	8	*L L J*	286		95	*I C*	600
	94	*I C*	144		8	*L L J*	521		95	*I C*	204	522 (1)	95	*I C*	269
	27	*P L R*	493		27	*P L R*	660		27	*P L R*	588	522 (2)	95	*I C*	88
425	8	*L L J*	231	459	7	*Lah*	310	490	27	*P L R*	494	523	92	*I C*	723
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	27	*P L R*	833		96	*I C*	654		8	*L L J*	464	525	26	*P L R*	803
426	27	*Cr L J*	569		27	*Cr L J*	990	493	27	*Cr L J*	563		98	*I C*	110
	94	*I C*	137	460	27	*P L R*	164		94	*I C*	131	527	8	*L L J*	246
427	7	*Lah*	152		97	*I C*	796	494	7	*Lah*	297		95	*I C*	258
	27	*P L R*	339	461	93	*I C*	827		27	*P L R*	463	528	27	*Cr L J*	807
	27	*Cr L J*	570	463	93	*I C*	897		96	*I C*	630		95	*I C*	471
	94	*I C*	138	464 (1)	27	*P L R*	257	496	8	*L L J*	296	529 (1)	95	*I C*	302
428	7	*Lah*	141		97	*I C*	794		27	*P L R*	484	529 (2)	7	*Lah*	368
	27	*P L R*	332	464 (2)	27	*P L R*	254		96	*I C*	215		27	*P L R*	531
	95	*I C*	284		97	*I C*	795		27	*Cr L J*	903		8	*L L J*	447
	27	*Cr L J*	764	465	95	*I C*	243	498	7	*Lah*	315		98	*I C*	366
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	94	*I C*	152	467	96	*I C*	826		27	*Cr L J*	552	530 (2)	92	*I C*	762
	27	*P L R*	755		8	*L L J*	449		93	*I C*	1048	532	7	*Lah*	365
431	94	*I C*	1000		27	*P L R*	626	499	8	*L L J*	333		27	*Cr L J*	610
	8	*L L J*	341	468	8	*L L J*	283		97	*I C*	338		94	*I C*	354
	27	*P L R*	759		27	*P L R*	444		27	*P L R*	576		27	*P L R*	539
433	8	*L L J*	164		96	*I C*	443	501	93	*I C*	1024	533	7	*Lah*	346
	94	*I C*	119		7	*Lah*	476	502	95	*I C*	247		27	*P L R*	512
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434	27	*Cr L J*	720		95	*I C*	315		8	*L L J*	584		98	*I C*	373
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435	93	*I C*	848		96	*I C*	395	503	27	*P L R*	398		93	*I C*	851
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437	7	*Lah*	210		27	*Cr L J*	939	504	8	*L L J*	289	535	95	*I C*	298

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	98	I C	891	575 (2)	7	Lah	370	618	8	L L J	363	661	97	I C	285	97	I C	285
	27	Cr L J	1319		96	I C	323		27	P L R	679	662	27	Cr L J	1025	27	Cr L J	1025
537	95	I C	169		8	L L J	504		97	I C	775		96	I C	977	96	I C	977
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	95	I C	256	580	96	I C	175	623	96	I C	437	665	8	L L J	414	8	L L J	414
	27	P L R	745	581	27	Cr L J	834	624 (1)	8	L L J	432		96	I C	748	96	I C	748
541	95	I C	240		95	I C	754		96	I C	477		27	P L R	729	27	P L R	729
542 (1)	8	L L J	66	582	7	Lah	396		7	Lah	559	666	95	I C	706	95	I C	706
	27	P L R	73		27	P L R	447		27	P L R	643	667	96	I C	856	96	I C	856
	94	I C	127		27	Cr L J	1168	624 (2)	8	L L J	376		27	Cr L J	1000	27	Cr L J	1000
542 (2)	95	I C	565		97	I C	752		27	P L R	676	668	27	P L R	617	27	P L R	617
543	27	Cr L J	812	584	96	I C	108		97	I C	783		97	I C	170	97	I C	170
	95	I C	476	586 (1)	8	L L J	391	626	8	L L J	397	670	96	I C	910	96	I C	910
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544 (2)	95	I C	139		27	P L R	649		97	I C	773	672	27	P L R	693	27	P L R	693
545 (1)	95	I C	121	586 (2)	96	I C	227	627	27	Cr L J	1037		97	I C	293	97	I C	293
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	96	I C	1009	588	96	I C	186	628	27	Cr L J	1022		96	I C	865	96	I C	865
547 (1)	8	L L J	310	589	96	I C	286		96	I C	878		27	P L R	859	27	P L R	859
	97	I C	288	590	27	P L R	469	629	96	I C	825	675	27	Cr L J	571	27	Cr L J	571
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548	95	I C	363	598	27	Cr L J	897		27	P L R	602		96	I C	874	96	I C	874
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	27	P L R	402		7	Lah	488	633	96	I C	844	678	96	I C	837	96	I C	837
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550	27	Cr L J	801	599	95	I C	739	635	96	I C	835	681	8	L L J	569	8	L L J	569
	95	I C	465	600	27	P L R	385	636	8	L L J	402		96	I C	1008	96	I C	1008
551 (1)	95	I C	123		27	Cr L J	1015		27	Cr L J	1153		27	P L R	827	27	P L R	827
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	95	I C	55		97	I C	769		96	I C	875	684	27	Cr L J	1021	27	Cr L J	1021
554	99	I C	71	605	96	I C	416	639 (2)	96	I C	877		96	I C	877	96	I C	877
558	96	I C	185	606	7	Lah	406	640	27	Cr L J	1013	685	96	I C	804	96	I C	804
559	8	L L J	381		27	P L R	601		96	I C	869	688	7	Lah	390	7	Lah	390
	27	P L R	620		97	I C	765	641	8	L L J	43		8	L L J	489	8	L L J	489
	97	I C	396	607	7	Lah	399		27	P L R	100		27	P L R	271	27	P L R	271
561	96	I C	337		27	P L R	688		93	I C	369		94	I C	398	94	I C	398
562	96	I C	207		98	I C	960	642	96	I C	830	689 (1)	27	Cr L J	1002	27	Cr L J	1002
563	96	I C	277	609	27	Cr L J	942	644	94	I C	486		96	I C	858	96	I C	858
564	94	I C	530		96	I C	398	645	8	L L J	434	689 (2)	8	L L J	473	8	L L J	473
565	96	I C	328		7	Lah	468		98	I C	272		97	I C	223	97	I C	223
566	96	I C	247		27	P L R	708	650 (1)	96	I C	915		27	P L R	731	27	P L R	731
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	95	I C	760		96	I C	390	651 (1)	27	Cr L J	1016		27	P L R	611	27	P L R	611
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Criminal Case No. 1 of 1925 decided on 18th July 1925.

* (a) *Criminal P. C.*, s. 260—*High Court can try summarily contempt of Court cases.*

The High Court as a Court of Record has jurisdiction to deal summarily with contempts of Courts, 10 Cal. 109 (P. C.) 29 All. 95 (P.C.), foll. [P. 2, C. 1.]

* (b) *Penal Code*, s. 228—*Publication of an article regarding the decision of a case can be contempt.*

The publication of an article in a newspaper referring to a case which has been decided may amount to and be treated as contempt. *R.* v. *Gray*, (1900) 2 Q. B. 36) and 1922 Bom. 426), foll. [P. 2, 1].

** (c) *Penal Code*, s. 228—*Reasonable comment on a decision of a case is justifiable, but accusing a High Court Judge not deciding a case according to justice is not.*

If reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court, but it is a very grave and serious contempt to accuse a Judge of High Court of having decided a case not according to the dictates of justice but in order to please and curry favour with others and to say that the door of justice (clearly including the door of High Court) has been closed against a particular community. Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt, or to lower its authority is a contempt of Court. Such contempt belongs to the category characterised as "scandalising a Court or a Judge." *R. V. Gray*, (1900) 2 Q. B. 36 and In re Read *Huggonson* (1742) 2 Atk. 291, applied. [P. 3, C. 1].

The principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the Tribunal be undermined or impaired. *Rex* v. *Davies* (1906) 1, K. B. 32 Foll. [P. 3, C. 1].

** (d) *Penal Code*, s. 228—*Tender of apology by accused is not a sufficient justification in a serious and grave case.*

It is most necessary that Judges should not only be impartial but their impartiality should be recognised by the public at large. Attacks upon the Judges excite in the minds of the people a general dissatisfaction with all judicial determinations and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice calling out for a more rapid and immediate redress than any other obstruction not for the sake of the Judges as private individuals but as the channels by which the King's justice is, conveyed to the people. [P. 3, C. 2].

The mere fact that an apology has been tendered by the accused is not a sufficient reason to secure for him impunity from punishment in a serious and grave contempt case. *Rex* v. *Almon*, (1765) Wilmot's Opinions 243, applied.

Govt. Advocate —for the Crown.

Broadway, J.—On the 13th of July this Court was moved by the Government Advocate to grant a rule against Habib son of Sayyad Sadullah Khan, as editor, printer and publisher of a daily newspaper known as the *Siasat* to show cause why he should not be committed, or otherwise dealt with in accordance with law, for contempt of Court in respect of two articles published in the said newspaper on the 28th and 30th of June 1925 respectively. As the articles complained of contained certain scandalous

matter reflecting on a Judge of this Court as well as on the Court itself, the Rule was issued by a Division Bench of the Court. The rule was returnable on the 17th of this month. On the date fixed the said Habib appeared in person and filed an affidavit in which he states that there was nothing objectionable in the article published in the issue of the 28th of June and that the article in the issue of the 30th of June 1925 had been published during his absence from Lahore but admits his legal responsibility for the same. He further admits that in this latter article there are "expressions, words and sentences" that are "unfortunate" and of which he felt "ashamed." He goes on to say: "It is my duty to withdraw the same and apologise which I hereby do and express heartfelt and sincere regret for the same." He concludes by saying as follows:—

"Undefended as I am, I leave myself entirely at the mercy of this Hon'ble Court."

It will be seen that no objection has been taken to the jurisdiction of this Court. It is, therefore, unnecessary to discuss this point at any length. The authorities on the subject have been carefully examined by me and I am satisfied that this Court as a Court of Record has jurisdiction to deal summarily with contempts of this nature. In this connection reference may be made to the case of *Surendra Nath Baneriee* v. *Chief Justice and Judges of the High Court at Fort William in Bengal* (1) and the remarks of their Lordships of the Privy Council *In the matter of Sashi Bhushan Sarbadhicary* (2).

Further having regard to the decisions in *R.* v. *Gray* (3) and *In re Satyabodha Ramchandra Adabaddi* (4) there can be no doubt that the publication of an article referring to a case which has been decided may amount to, and be treated as contempt.

The next question for determination is whether the articles complained of, amount to contempt, and before proceeding further it is material to state the circumstances under which these articles came to be published. Certain riots had taken place in Delhi and nine Muhammadans had been found guilty of having been concerned in the said rioting and had been convicted and sentenced. Their appeals had been dismissed by the learned Sessions Judge and they had moved this Court on the revision side for re-consideration of their case. This revision came up as a petition before Mr. Justice Zafar Ali on the 26th June 1925. After hearing the learned Counsel for the petitioners Mr. Justice Zafar Ali dismissed the petition *in limine*. As stated above this was on the 26th of June 1925. In the issue of the *Siasat* newspaper dated the 28th of June 1925 appeared an article referring to this case. It is headed: "The noted Delhi Affray Case; Heavy punishments to nine Muhammadans, Appeal of the oppressed Muhammadans dismissed." In the course of this article the decision of the Hon'ble Judge was referred to as having been arrived at "hastily." The argument of the learned Counsel for the petitioners was given, or purported to be given, in considerable detail. Surprise was expected at the circumstance that the extraordinarily able arguments advanced by the learned Counsel had not achieved success. The article shows a certain want of knowledge on the part of the writer, for instead of "a revision" the matter before the Court is described as an "appeal." Although the language employed is a little unhappy, had matters stopped there no notice would have been taken of the article. It has, however, a bearing on what followed, for in the issue of the *Siasat* newspaper dated the 30th of June 1925 appeared a leading article. This was headed as follows: "*Insaf kush be iltifati. Ek khushamadi Judge ka na wajib faisla,*" which has been translated in the translation filed with the application as "Indifference resulting in injustice. Improper decision of a parasitic Judge." The learned Government Advocate has suggested that a more appropriate translation of the word "*khushamadi*" would be "sycophantic." This article was read at length by the learned Government Advocate and it is not necessary to read it again. It contains expressions, words and sentences which have been described by Habib in his affidavit as "unfortunate," and he has further stated that he is ashamed of them. As a matter of

(1) (1884) 10 Cal. 109=10 I. A. 171=4 Sar. 474 (P. C.).

(2) (1907) 29 All. 95=34 I. A. 41=4 A. L. J. 84 =17 M L. J. 74=9 Bom. L. R. 9=11 C. W. N. 273=5 C. L. J. 130=2 M. L. T. 1=5 Cr. L. J. 152 (P. C.)

(3) (1900) 2 Q. B. 36=69 L J. Q. B. 502=82 L. T. 534=64 J. P. 484=48 W. R. 474=16 T. L. R. 305.

(4) 1922 Bom. 426=47 Bom. 76=24 Bom. L. R. 928=23 Cr. L. J. 644.

fact there can be no doubt from a perusal of this article that it is a very grave and serious contempt of this Court. The innuendo is clearly that which is contended for by the learned Government Advocate and put briefly it accuses a Judge of this Court of having decided the case under comment not according to the dictates of justice, but in order to please and curry favour with others. It further says that the door of justice (clearly including the door of this Court) has been closed against Muhammadans in the Punjab.

As was pointed out in *R.* v. *Gray* (3) by the Lord Chief Justice Russell. " Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt, or to lower its authority is a contempt of Court." And this class of contempt belongs to the category which Lord Hardwicke, L. C., in *In re, Read and Huggonson* (5) characterised as " scandalising a Court or a Judge." There can be no doubt that the article now under consideration falls within that category and does scandalise the Court and a specific member of this Court. Doubtless Judges and Courts are alike open to criticism, and " if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court." As stated above, however, Habib has not suggested that this is not contempt of Court, nor has he claimed that this article falls within the right of public criticism. In *Rex* v. *Davies* (6) Justice Wills made the following remarks:—" What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders ? It will be found to be, not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the Tribunal be undermined or impaired."

There can be no doubt that it is most necessary that Judges should not only be impartial but that their impartiality should be recognised by the public at large and as pointed out by Chief Justice Wilmot in *Rex* v. *Almon* (7) " attacks upon the Judges excited in the minds of the people a general dissatisfaction with all judicial determinations and whenever men's allegiance to the laws was so fundamentally shaken, it is the most fatal and dangerous obstruction of justice calling out for a more rapid and immediate redress than any other obstruction not for the sake of the Judges as private individuals but they are the channels by which the King's justice is conveyed to the people." Having regard to these remarks there can be no doubt whatever that this article amounts to a very serious contempt, and one calling for prompt and efficient action. The learned Government Advocate urged that the contempt committed by Habib in this case was of such a serious nature as called for exemplary punishment. He urged that the mere fact that an apology had been tendered was not a sufficient reason to secure for Habib impunity from punishment. In *Surendra Nath Banerjee's case* (1) a very full apology had been tendered nevertheless he was sentenced to imprisonment. In *R.* v. *Gray* (3) again a very full apology was made at the first possible opportunity. Gray was, however, sentenced to pay a fine of £100 and £25 as costs. According to the affidavit filed by Habib, he was away from Lahore at the time when this particular leading article was published. In addressing the Court he stated that he was a stout supporter of Hindu and Muslim unity, but that unfortunately among his employees there was one who did not see eye to eye with him and that it was this person (unnamed) who had taken advantage of his temporary absence from Lahore and had published this leading article. It appears, however, that this particular employee has been in Habib's employ for over a year. Further, the affidavit showed that Habib returned to Lahore on the morning of the 2nd July. He had not, however, brought to our notice any issue of his paper in which he repudiates this leading article or in any shape or form expresses his regret at its contents. In these circumstances the fact that he was absent when the article was published does not, to any material extent, relieve him from the serious responsibility that rested upon him as the editor, printer and publisher of the newspaper in question. I take into account

(5) (1742) 2 Atk. 291.
(6) (1906) 1 K. B. 32=75 L. J. K. B. 104=93 L. T. 772=54 W. R. 107=22 T. L. R. 97.

(7) (1765) Wilmot's opinions, 243.

the fact that this is the first occasion that this Court has been compelled to exercise this particular jurisdiction, and further I also bear in mind that Habib has tendered an apology in his affidavit and has made that apology a much fuller one in addressing the Court. Nevertheless I think the scandalous nature of this article calls for punishment that shall be a deterrent not only to the offender in this case but to all others and I, therefore, direct that Habib be imprisoned for a period of one month (simple) and do also pay a fine of Rs. 1,000 and a further sum of Rs. 100 as costs of these proceedings. He will remain imprisoned until the fine and costs are paid.

Addison, J.—I concur.

Coldstream, J.—I concur.

Accused convicted.

A. I. R. 1926, Lahore 4

ZAFAR ALI AND JAI LAL, JJ.

Hari Singh and others—Convicts-Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 665 of 1925, decided on 12th September 1925, from the order of the S. J., Ferozepore, dated 18th May, 1925.

Penal Code, Ss. 148 *and* 302—*Assembly, of five persons intending to defend a water-head and armed with deadly weapons and ready to strike if any body comes in the way is an unlawful assembly and all are responsible if any one of them strikes a fatal blow.*

Where five persons assembled at the water-head to take water by force and armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose.

Held that they constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in 'pursuance of their common object, and further that as every one of them knew that these weapons were likely to be used with deadly effect, they were all responsible if any one of them inflicted a fatal injury. A. I. R. 1925 Lah. 49 Dist.

Moti Sagar and *Bal Mokand Vaid*—for Appellants.

Des Raj Sawhney—for Respondent.

Zafar Ali, J.—The two brothers Hari Singh and Indar Singh and their uncle Sher Singh have been convicted by the Sessions Judge of Ferozepore of the murder of one Jaimal Singh Jat and along with two others, namely, Sawal and Ganesha, they have further been convicted of rioting under section 148, Indian Penal Code. All five have filed a joint appeal through Mr. Moti Sagar and the case is also before us under section 374, Criminal Procedure Code, for confirmation of the capital sentence passed upon Hari Singh.

The first three appellants are *Kumhars, i.e.*, potters by caste but are agriculturists by avocation. Of the remaining two, Sawal is a *Bagri Jat*, and Ganesha a *Bania*. They are all residents of the village Mithri, District Ferozepore. All these appellants set up *alibis*, but produced no evidence whatsoever and thus left the prosecution evidence quite unrebutted. Their Counsel could do no better than to urge that the prosecution evidence was unreliable, and he advanced the argument that the appellants could not be held guilty of rioting because they fought in defence of their right to use the water of which they were already in possession and further contended that the charge of murder was not established against any one of the appellants who have been held guilty of that offence. But he could refer to no material on the record in support of any of the questions of fact or law that he raised and argued before us, and as will presently be shown he failed to make out any of his points.

The account of the fatal event given by the eye-witnesses may be summarised thus :—On the 13th October 1924 at about *rotiwela* (noon) Dayal Singh (P. W. 7) with his 18 years old son Har Chand Singh (P. W. 8) was directing the irrigation of his field No. 343 about 5 *bighas* in area when the flow of water ceased all of a sudden and he heard a shout from Hari Singh who was at the water-head about half a mile away to the following effect :—" We have diverted your water, come and do what you like about it." Dayal Singh proceeded to the water-head accompanied by his son Har Chand Singh who was empty handed but Dayal Singh carried a *kahi* with which he had been regulating the irrigation. Bhaggu Singh (P. W. 10) with his *Siri* Wayaman and brother-in-law Saudagar followed Dayal Singh and Har Chand Singh from a neighbouring field to see what would happen. As Dayal Singh got to the water-head he found the water diverted into Hari Singh's cottonfield. All the five appellants were standing there armed with *Chhavis*. Dayal Singh asked them why

they had diverted his water. Hari Singh replied "we have stopped your water. We do not care whether it is your turn or not. Take it if you can."

Dayal Singh proceeded to reopen his channel whereupon Ganesha struck him on the head with a *chhavi* and next Sawal struck him with a *chavi*. At this stage Jaimal Singh, brother of Dayal Singh, who had come up from his field near there, interfered on behalf of his brother and shouted to the appellants not to strike his brother. Thereupon Hari Singh struck Jaimal Singh on the head with his *Chhavi* and then Indar Singh inflicted a *chhavi* blow on his head. Jaimal Singh dropped down and as he did so Sher Singh struck him on his left arm with a *chhavi*.

The above version was given in the first information report and was supported by all the eye-witnesses who appeared in the witness box, and the learned Sessions Judge came to the conclusion that it was substantially true. Further, there was the evidence that it was Dayal Singh's turn to the use of the water and that the appellants had not even a shadow of a claim to take the water at that stage. The appellants made no attempt to refute even this point. Their Counsel in the Court below contented himself with urging :—

(1) that the eye-witnesses were unworthy of credit because they were all connected with each other and Sahib Singh *Lambardar* (P. W. 13);

(2) that there was an unnecessary delay in making the first information report;

(3) that an inference unfavourable to the prosecution should be drawn from their failure to produce two of the eye-witnesses, namely, Karam Singh and Wayaman; and

(4) that the prosecution story was inherently improbable.

The learned Sessions Judge in his judgment considered all these contentions and overruled them for reasons which appear to us to be unanswerable and which we do not consider it necessary to repeat here. But he accepted one contention, *viz*, that the attack on Jaimal Singh was not made in pursuance of the common object of the unlawful assembly and that therefore only those members of the assembly who actually made the assault upon Jaimal Singh were responsible for it and not the rest. There is no appeal from his order acquitting Sawal and Ganesha of the charge of murder and therefore we need not express any opinion with regard to the validity or otherwise of this conclusion of the learned Sessions Judge, but we agree with him that the prosecution version is substantially true and that the defence have entirely failed to show that that evidence was unworthy of belief. From the facts thus established by the prosecution it follows that the five appellants had assembled at the water-head to take water by force and had armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accoplishing their purpose. This being so, these five men constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in pursuance of their common object. Further, as every one of them knew that these weapons were likely to be used with deadly effact, they were all responsible if any one of them inflicted a fatal injury.

The mainstay of the defence was a judgment of a Division Bench of this High Court reported in the Criminal Law Journal, 1924, at page 625 (*Bhag Singh* v. *Emperor* (1)) which was relied upon and referred to before the Sessions Judge and again before us; but that was quite a converse of the present case. The distinguishing features are that there in the first place the water was diverted in the *bona fide* belief that the turn of the man who had been taking the water had expired. Secondly, it was next the turn of the man who diverted the water, and thirdly it was the latter who was attacked first and had received injuries before he shot his assailant and killed him. In the present case Dayal Singh was entitled to irrigate the whole of his fields of five *bighas* but he had hardly irrigated two *bighas* when the water was diverted. Thus it was wrongfully diverted before time and by a person who had no right to take the water at that stage, as the turns of several others intervened between his turn and that of Dayal Singh.

It is clear from what has been stated above that the appellants at first made a preparation for an attack and subsequently resorted to force to carry out their wrongful purpose. The common object of the assembly undoubtedly was to defend by use of violence their act of diverting the water which was a wrongful act. The amount of violence that they all intended

(1) A. I. R. 1925 Lah. 49.

to use or knew would likely be used is to be inferred from the nature of the weapons with which they came armed. As they all knew that the weapons would be used and that if used mortal injuries would very likely be inflicted, every one of them who joined the assembly with that guilty knowledge was liable to be held responsible for the use of those weapons by any of them. The argument that the appellants were not the aggressers because having already taken possession of the water they were entitled to resist by force any attempt to dispossess them thereof is obviously fallacious, because having no right to take the water at that time their act of diverting it was wrongful and quite unjustified and the rightful person was entitled to recover what he had lost by a wrongful act. Further there is nothing to show that the appellants had any reason to apprehend any injury at the hands of Dayal Singh, nor is there anything to indicate that Dayal Singh and his brother made any show of criminal force. It was, therefore, a very wanton attack that the appellants made to restrain Dayal Singh from diverting the water to his field, and to chastise his brother for raising a voice on his behalf. We therefore come to the conclusion that Hari Singh, Indar Singh and Sher Singh have rightly been held guilty of the murder of Jaimal Singh.

We may here refer to another contention of the learned Counsel for the appellants which, it appears, had not been raised in the Court below. The prosecution evidence was that Hari Singh and Indar Singh inflicted one *chhavi* blow each on the head of the deceased, but the medical witness after describing two injuries on the head stated that both were practically the result of a single blow. On the strength of this opinion of the medical witness the learned Counsel contended that the deceased received only one *Chhavi* blow on the head, that it could not be said which of the two appellants Hari Singh and Indar Singh dealt that blow, and that therefore neither of them could be held responsible for it. We have already held that all the appellants who were armed with *Chhavis* and attacked the deceased were responsible for his death and this contention therefore falls to the ground, but we may point out with regard to it that the police officer who arrived at the spot and examined the body of the deceased found two wounds on his head and noted their lengths in the inquest report as well as in the statement of injuries which he prepared on the spot. The medical witness also did not positively state that there was only one injury on the head and we are unable to understand what he meant by saying that the two injuries were *practically* the result of a single blow.

As regards the capital sentence, we are of opinion that Hari Singh who was evidently the ring-leader well deserves it, and that the lesser punishment would not meet the ends of justice in his case. We, therefore, dismiss the appeal of all the convicts and confirm the sentence of death.

Appeal dismissed.

A. I. R. 1926 Lahore 6

ABDUL RAOOF, J.

Buta Singh and others—Defendants-Appellants.

v.

Jagu and others—Plaintiffs—Respondents.

Second Appeal No. 2680 of 1923, decided on 8th April 1924, from a decree of the Addl. Dist. Judge Lahore, dated 1st June 1923.

Punjab Tenancy Act, ss. 50 and 73 (3)—Suit for possession of occupancy holding by tenant's heirs against landlord is cognizable by Revenue Court.

A suit for possession of occupancy holding against landlord by the heirs of the occupancy tenant is cognizable by a Revenue Court and a Civil Court has no jurisdiction to entertain it. A. I. R. 1924 Lah. 539 Foll.

Mehr Chand—for Appellants.

Judgment.—The facts giving rise to this second appeal are few and simple. Moti was the occupancy tenant of the land in suit. He mortgaged it to Kishen Singh and others. The defendants as proprietors brought a suit for the cancellation of the mortgage and succeeded in getting a decree in the execution of which they obtained possession of the land in dispute on the 6th of June 1916. On the death of Moti his sons brought the present suit for possession. One of the pleas raised in defence was that the suit was cognizable by a Revenue Court and a Civil Court had no jurisdiction to entertain it. The Trial Court held that the suit was cognizable by a Civil Court and granted a decree for possession. That decree has been confirmed by the Additional District Judge of

Lahore. The defendants have consequently preferred this second appeal.

On the question of jurisdictionthe Full Bench decision in *Akbar Hussain* v. *Karam Dad* (1) appears to be conclusive. Under similar circumstances in *Mahindar Singh* v. *Allah Ditta* (2) a Division Bench of this Court on the 19th of November 1923 decided following the ruling in *Akbar Hussain* v. *Karam Dad* (1) that such a suit was cognizable by a Revenue Court.

I, therefore, accept this appeal and acting under s. 100 (3) of the Punjab Tenancy Act direct that the decree passed by the Civil Court be registered in the Court of an Assistant Collector, first grade. I make no order as to costs.

Appeal accepted.

(1) (1918) 90 P. R. 1918 (F. B.).
(2) A. I. R. 1924 Lah. 539.

A. I. R. 1926 Lahore 7

JAI LAL, J.

Dhanpat Rai —Decree-holder—Appellant

v.

Gopal Kaur —Objector—Respondent.

Misc. First Appeal No. 3106 of 1924, decided on the 6th May 1925, against the order of the Sub-J., First Class, Lahore, dated 31st October 1924.

(a) *Custom (Punjab)—Alienation—Status of males and females is distinct—Alienations by males cannot be contested by females.*

The status of a female heir in the Punjab is quite different to that of male proprietors; one important difference is that females are not ordinarily entitled to contest alienations made by males. [P. 8, C. 1.]

(b) *Civil P. C., s. 60—Property in the hands of mother deriving title by virtue of marriage can be attached for debts of previous male holder—Custom (Punjab).*

The estate in the hands of the mother of a deceased proprietor who derives her title by virtue of her marriage in the family is liable to attachment for payment of debts incurred by a previous male holder of the estate.

(c) *Custom (Punjab)—Female deriving title by virtue of marriage is not a reversioner of deceased.*

A female heir who derives her title by virtue by her marriage in the family of the deceased holder of the estate is not a reversioner of the deceased. 89 P. R. 1915 ; 12 P. R. 1918 Appr.

Badri Dass —for Appellant.

Ghulam Mohy-ud-Din —for Respondent.

Judgment.—A suit was instituted against one Udham Singh for recovery of Rs. 13,633. Udham Singh died during the pendency of the suit and his son Balwant Singh was substituted as defendant. Balwant Singh also died and his son Harmohan Singh was substituted in his place. Harmohan Singh also died and Sardarni Gopal Kour widow of Balwant Singh and the mother of Harmohan Singh was substituted as defendant and a decree passed against the estate of the deceased Udham Singh. When the decree-holder attempted to execute the decree by the attachment of the property in the hands of Sardarni Gopal Kaur, he was met by an objection by the lady that the estate, not being charged with the debt of Udham Singh, came to her in her own rights as a reversioner and could not, therefore, be attached in execution of the decree. Reliance was placed on *Jagdip Singh* v. *Bawa Narain Singh* (1) and on *Bur Chand* v. *Gopal Kaur* (2). The learned Subordinate Judge upheld the objection of Sardarni Gopal Kaur and dismissed the application for execution of the decree. The decree-holder appeals to this Court.

It is contended on behalf of the decree-holder that the judgment in *Bur Chand* v. *Gopaul Kour* (2) not being *inter partes*, is not *res judicata* and that *Jagdip Singh* v. *Bawa Narain Singh* (1), is distinguishable from the present case because in that case the property sought to be attached was in the hands of reversioners and the widow is not a reversioner. A widow, the learned Counsel says, does not claim through any common ancestor but derives her interest by virtue of her marriage with the judgment-debtor and it is, therefore, claimed that the present case is governed by *Bhambul Devi* v. *Narain Singh* (3), in which it was held that "where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree." In that case *Jagdip Singh* v. *Narain Singh* (1) was considered

(1) (1913) 4 P. R. 1913=173 P. L. R. 1912=160 P. W. R. 1912.
(2) (1919) Case No. 836 of 1919.
(3) (1915) 89 P. R. 1915=103 P. W. R. 1915=8 P. L. R. 1916.

and distinguished and the question was propounded whether the widow was to be considered the next holder as the term was used in the 1913 ruling and the following answer was given :—

"The tenure of the widow is very difficult from that of the reversioner both in its nature and in its origin. The widow's life-tenure originated in her right to maintenance but though originally her right was one only of maintenance which in course time became a right to the enjoyment of of the whole estate, whether it exceeded her needs or not, it is not now disputable that her right is to the whole estate.

That right she derives from her marriage; she is her husband's representative and so far has this principle been carried that in many tribes she represents her husband even in collateral succession.

Had her husband remained in existence he could not have resisted attachment of his property. How then can his widow who derives all her right from her husband, claim a privilege which her husband did not enjoy."

On these grounds it was held that the property was attachable.

The learned Counsel for the respondent has relied upon *Mikor* v. *Chhaju Ram* (4) in addition to the ruling already referred to. In that case the rule laid down in *Jagdip Singh* v. *Bawa Narain Singh* (1) was re-affirmed. LeRossignol, J., who was one of the Judges, who sat on the Full Bench in *Mikor* v. *Chhaju Ram* (4) doubted the desirability or utility of laying down the abstract proposition contained in *Jagdip Singh* v. *Bawa Narain Singh* (1) and was of opinion that the earlier ruling was misleading in that it laid down one universal principle and appeared to hold that all the incidents of the tenure of a male owner of ancestral landed property had been exhaustively ascertained. But finally he agreed with the opinion of Chevis, J., who agreed with the earlier judgment. *Bhambul Devi* v. *Narain Singh* (3) which is also a judgment by LeRossignol, J., was not referred to in *Mikor* v. *Chhaju Ram* (4); probably that was not necessary. The status of a female heir in the Punjab is quite different to that of the male proprietors; one important difference is that females are not ordinarily entitled to contest alienations made by males, see *Zenab* v. *Shah Nawaz Khan* (5).

The learned Counsel for the appellant relied also on *Kishen Singh* v. *Rahmat Bibi* (6) in which it was held that as 'a daughter is not an agnate and derives her title not from the common ancestor but from her father...she represents her father and his estate in her hands is liable for his debts.'' *Jagdib Singh* v. *Bawa Narain Singh* (1) was distinguished in that case also. On the strength of these judicial pronouncements it is claimed on behalf of the appellant that the estate being in the hands of the mother of a deceased proprietor, who cannot be called an agnate and, who derives her title by virtue of her marriage in the family is liable to attachment in payment of debts incurred by a previous male holder of the estate. The learned Counsel for the respondent sought to distinguish the authorities relied upon on behalf of the appellant on the ground that the original debtor in this case was Udham Singh and that between Udham Singh and Sardarni Gopal Kaur two male heirs, *i.e.*, Balwant Singh and Harmohan Singh intervened and that, therefore, *Musammat* Gopal Kaur stepped into the shoes of her husband and her son respectively and further that by virtue of *Jagdip Singh* v. *Bawa Narain Singh* (1), the estate not being attachable in the hands of Balwant Singh and Harmohan Singh in payment of the debts of Udham Singh, it was equally not liable to attachment in the hands of the person, that is Sardarni Gopal Kaur who represents them. At first sight this contention seems to be plausible one but, in my opinion, there is no force in it. The real question to be decided is whether the person, who is in possession of the estate and who objects to its attachment is a reversioner, that is, whether she derives her title from the common ancestor of herself and the judgment-debtor. This cannot be predicated about any female heir at least not of one who derived her title by virtue of her marriage in the family of the deceased holder of the estate, and that was the *ratio decidendi* in *Bahmbul Devi* v. *Narain Singh* (3) and *Kishen Singh* v. *Rahmat Bibi* (6). The point is not free from difficulty but I think no difference is made by the fact that the son and the grandson of Udham Singh inherited the

(4) (1919) 17 P.R. 1919=6 P. W. R. 1919 (F.B.).

(5) (1912) 47 P. R. 1912=103 P. L. R. 1912=145 P. W. R. 1912.

(6) (1918) 12 P. R. 1918.

property before it came into possession of Sardarni Gopal Kaur.

I, therefore, accept this appeal, set aside the order of the learned Subordinate Judge and hold that the land left by Udham Singh and in the hands of Sardarni Gopal Kaur is liable to attachment and sale in execution of the decree against the estate of Udham Singh and I remand the case to the learned Subordinate Judge with directions to proceed with the execution of the decree in accordance with law.

Appeal accepted.

A. I. R. 1925 Lahore 9.

HARRISON, J.

Kishen Chand--Complainant—Petitioner.

v.

Nanak Chand—Respondent.

Criminal Revision Petition No. 424 of 1925, decided on 8th May 1925 against the order of the S. J., Lahore, dated 20th February 1925.

(a) *Criminal P. C., s. 517—Court can pass order under s. 517 at or after the passing of judgment.*

No order can be passed under s. 517, Cr. P. C. until the case is concluded. After that, and within a reasonable time, the Magistrate, who heard the case, is empowered to act. He may do so at the time of pronouncing his order or later. It cannot be laid down that an order under s. 517, Cr. P. C. can only be passed in favour of a person from whose possession the property was recovered. [P. 9 C. 2].

(b) *Criminal P. C., s. 517—Appellate Court holding that trial Court has no jurisdiction under s. 517 cannot exercise powers under s. 520.*

Where the appellate Court holds that the Magistrate had no jurisdiction under s. 517, it cannot say that it itself had jurisdiction under s. 520, as such jurisdiction could only arise from an order legally passed under s. 517. [P. 9 C. 2].

Durga Das—for Petitioner.

Anant Ram—for Respondent.

Judgment. The facts of this case are that on the 9th of October 1924 Lala Shankar Das discharged one Miraj Din, who was sent up for trial under s. 411, Indian Penal Code, the allegation being that he had received certain gold bangles stolen from one Kishen Chand. These bangles were recovered from Nanak Chand, with whom they were pawned. On the following day, the 10th, October, this man Nanak Chand applied for an order under s. 517, Cr. P. C., and asked to have the bangles returned to him. On this the Magistrate passed an order on the 24th of October 1924 that the bangles should be returned to Lala Kishen Chand "to whom they belong and from whom they were stolen." The order continued as follows: "They cannot be returned to the applicant who was the mortgagee of the stolen property." From this order an appeal was presented to the Sessions Judge, who held that the order passed by the Magistrate under s. 517 was *ultra vires*. He followed *Abdul* v. *Ghulam Muhammad* (1), in which it was held, that an order under s. 517, which cannot be made before the final order in the case is passed, can equally not be made after, and must apparently be contemporaneous. While holding that the Magistrate had no jurisdiction under s. 517, the Sessions Judge held that he himself had jurisdiction under s. 520, and overlooked the fact that such jurisdiction could only arise from an order legally passed under s. 517. He directed that the bangles be restored to Nanak Chand, from whose possession they had been recovered. From that order this application for revision has been presented.

With all respect to the learned Judge, who delivered the judgment reported as *Abdul* v. *Ghulam Muhammad* (1), I cannot agree with the view taken by him. In Sohoni's Commentary at page 1081 there is a paragraph headed "order ought not be made before the conclusion of an enquiry or trial", a self-evident proposition as the words of the section say "when an enquiry or trial is concluded." Half way down the paragraph, the words occur "he (the Magistrate) must make the order at the time of passing judgment," and the authority quoted in support of this further *dictum* is *Rash Mohun Goshamy* v. *Kali Nath Raha* (2). Now, this ruling dealt with s. 132 (*a*) of Act VIII of 1869, which ran as follows:

"When a trial in any Criminal Court is concluded the Court *at the time of passing judment* may pass such an order."

The important words of the section are "at the time of passing judgment." These words were omitted from the present Code presumably for very good reasons and when a distinct provision of this nature is excluded from the corresponding section of the amended Act, such exclusion can only mean that the restriction is removed and that such orders are not confined to

(1) 1924 Lah. 261=4 Lah. 460=25 Cr. L. J. 84.
(2) 19 W. R., Cr. 3.

orders passed at the time of pronouncing judgment or passing the final order, and embodied in such final order or judgment. Counsel for the respondent then contends that an order giving him possession would have been legal but that an order giving possession to the man, who was found to be the owner, was illegal. He also contends that because the order of discharge does not state definitely, as does the later order, that the bangles are the property of Kishen Chand, the Magistrate had no jurisdiction to give a finding on this point. If an order of this sort could only be passed in favour of a person from whose possession the property was recovered such orders would in the majority of cases be confined to orders restoring stolen property to thieves or receivers. In my opinion, the meaning of the section is clear. No order can be passed until the case is concluded. After that, and obviously within a reasonable time, the Magistrate, who heard the case, is empowered to act. He may do so, at the time of pronouncing his order or later. I hold that the original order was correct and *intra vires* and I restore it.

Revision allowed.

A. I. R. 1926, Lahore 10.

MARTINEAU AND ZAFAR ALI, JJ.

Natha Singh and others—Defendants—Appellants.

v.

Sundar Singh and others—Plaintiffs.
Barkat Ram—Defendant.—Respondents.

First Appeal No. 1115 of 1921, decided on 15th April 1925, from the decree of the Senior Sub-J., Sheikhupura at Gujranwala, dated 14th March 1921.

(a) *Pre-emption—Consideration—One item fictitious—No evidence as to market value—Sum actually paid is the proper value.*

Where one of the items of consideration in the sale deed is found to be fictitious and when there is no satisfactory evidence of the market value of the land, the sum actually paid may be taken to be the proper value.

(b) *Evidence Act*, s. 115—*Pre-emption—Pre-emptor refusing to buy—Vendee demanding higher price than subsequent sale-price—Pre-emptor is not estopped.*

Where the vendor has offered property to the pre-emptor at a price higher than that ultimately accepted by him from vendee the pre-emptor is not estopped from asserting his right by reason of his refusal to buy the property.

Nand Lal and *Amolak Ram Kapur*—for Appellants.

Badri Nath and *Mehr Chand*—for Respondents.

Martineau, J.—Barkat Ram, defendant 1, sold the land in suit to defendants 2 and 3 for Rs. 12,000. The plaintiffs sue for pre-emption, alleging themselves to be collaterals of the vendor, and have been given a decree subject to the payment of Rs. 12,024 the additional Rs. 24 having been allowed for improvements to well-gear. Both parties have appealed.

The evidence of Atma Ram P. W. 1 and Pala Mal D. W. 3, who are both first cousins of the vendor, proves that the plaintiffs are the latter's second cousins. Their statements are supported by an extract from the Settlement pedigree table which is on the record, and are unrebutted. We agree with the lower Court's finding that the plaintiffs are collaterals of the vendor and have a right of pre-emption superior to that of the vendees.

The next question is whether the full price entered in the sale deed was paid, and the main dispute relates to an item of Rs. 1,400 alleged to have been paid by the vendees to Mangal Singh, who is said to have been a creditor of the vendor Barkat Ram. Mangal Singh is the vendor's sister's son, and the *bahi* which he produces to prove the debt which he says Barkat Ram owed him is one in which an entry could be made at any time, as he keeps no cash book or daybook. The receipt that he gave to the vendees for the Rs. 1,400 is unattested. He lives about 8 kos from the vendee's village, but it is alleged that when he went there to ask Barkat Ram for payment the vendees undertook in writing to pay the money for Barkat Ram, and that they paid it about a month later. The written undertaking which the vendees are said to have given is not on the record, although it was produced before the Lower Court. It is peculiar that the receipt for the Rs. 1,400 bears date the 2nd *Poh*, which was one day before the execution of the sale-deed. The vendees themselves have not gone into the witness-box, and we regard the evidence of Mangal Singh as to the debt and the payment of Rs. 1,400 with suspicion, and are not satisfied that any such payment was made. We have no doubt that the remaining sum of Rs. 10,600 was paid. There is no satisfactory evidence of the market value of the land, and

Rs. 10,600, the sum actually paid, may be taken to be the proper value.

The evidence was given by the vendees to prove that the land had been offered to the plaintiffs and that they had refused to buy it and had thus waived their right, but as the evidence is to the effect that Barkat Ram demanded Rs. 12,000 for the land, and we have found that the market value was much less, the plea of waiver has no force.

There is no dispute about the item of Rs. 24, allowed by the lower Court for improvements.

We accept the plaintiff's appeal (No. 1437 of 1921) and alter the decree to one for possession of the land in suit on payment of Rs. 10,624. It is not necessary to fix a date for payment as the amount has already been deposited. The defendants-vendees will pay the plaintiff's costs in both Courts.

The defendants' appeal (No. 1115 of 1921) is dismissed with costs.

Plaintiffs' appeal accepted.

A. I. R. 1926, Lahore 11

HARRISON AND CAMPBELL, JJ.

Kanshi Ram—Plaintiff—Appellant.

v.

Prem Singh and others—Defendants—Respondents.

First Appeal No. 873 of 1921 decided on 13th March 1925, against the decree of the Sub-J., First Cl. Amritsar, dated 8th January 1921.

(a) *Civil P. C.*, O. 34 *R.* 4—*Mortgage decree—Interest after date of sale—Court has discretion to grant or not.*

Court has full powers under O. 34, to allow a mortgagee decree holder any interest beyond the date fixed for sale of the mortgaged property but it is not obligatory to grant interest after the date of sale. The matter is entirely one within the discretion of the Court. [P. 12. C. 1.]

(b) *Practice—Appeal—New plea—Memo of appeal urging condition regarding enhancement of interest being penal—Condition conceded to be not penal at the hearing—Compensation under S. 74 Contract Act cannot be granted*—C. P. C. 041 R. 2.

Where the appellant definitely claimed in the memo. of appeal the whole amount of interest entered in the plaint on the ground that the condition for enhancement was not a penalty but conceded at the hearing that the finding of the lower Court regarding condition being penal was correct.

Held the Court cannot listen to an entirely different plea which was not entered in the memorandum of appeal that the condition was penal but that reasonable compensation should be granted.

D. C. Ralli add *Balkishen*—for Appellant.

M. L. Puri and *Jagan Nath Agarwal*—for Respondents.

Judgment.—The plaintiff sued to recover principal and interest due on a mortgage by sale of the mortgaged property and has appealed against the decree of the lower Court, objecting that the amount allowed to him by way of interest is insufficient.

The appellant has not brought the original mortgage-deed on to the printed record, but, according to the lower Court's judgment, the rate of interest fixed was 12 annas per cent. per mensem with a stipulation that in case of default the rate of interest would be raised to Rs. 1-8 per cent. and that this enhanced rate would be calculated from the date of the execution of the mortgage and not only from the date of default. The Trial Court held that this was a stipulation by way of penalty and refused to allow the plaintiff a higher rate than 12 annas per cent. up to the date of decree. It declared on that date Rs. 2,900 to be due as principal and Rs. 1,200 as interest, and granted the plaintiff a preliminary decree for recovery of Rs. 4,100 by describing the decree as one under Or. XXXIV, r. 4 of the C. P. C., and directing that the decree sheet be prepared in Form 4 of Appendix D of the Code.

The decree, however, was not in accordance with Or. XXXIV, r. 4 for the lower Court did not act in compliance with Or. XXXIV, r. 2 which required it either to order that an account be taken of the amount due to the plaintiff for principal and interest and costs on a future date within six months or to declare the amount so due at the date of the decree. What the lower Court did was to declare the amount due at the date of suit.

The first ground of appeal is that the stipulation regarding the enhancement of interest was not one by way of penalty and that the plaintiff should have been awarded the whole interest at the rate which he claimed. It has been conceded before us that the finding as to the stipulation being penal is correct, but we have been asked to grant something in addition to the rate of 12 annas as reasonable compensation under s. 74 of the Contract Act. If the plaintiff, however, had wanted this relief he should have asked for it in his memorandum of appeal, and it is not covered by his ground

No. 1 which definitely claimed the whole amount of interest entered in the plaint on the ground that the condition for enhancement was not a penalty. We cannot now listen to an entirely different plea which was not entered in the memorandum of appeal that the condition was penal but that reasonable compensation should be granted.

The second ground of appeal is that the Court below should have decreed interest from the date of suit till the date of payment, and it has been argued on the strength of the reference in Or. XXXIV, r. 4 to subsequent interest that the rule obliges a Court in passing a preliminary decree for sale to allow interest at such rate as it thinks fit up to the date of realisation of the mortgage charge by sale. We can find no authority for this proposition. It was formerly held by the Allahabad High Court in *Amolak Ram* v. *Lachmi Narain* (1) that the provisions of the Transfer of Property Act which subsequently were embodied in Or. XXXIV of the present C. P. C. did not permit a Court to allow a mortgagee decree-holder any interest beyond the date fixed for sale of the mortgaged property, but this view was overruled by their Lordships of the Privy Council in *Maharaja of Bhartpur* v. *Rani Kanno Dei* (2) where it was pointed out that the Court had full power to allow such additional interest. The same pronouncement was made by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (3) and these decisions perhaps were responsible for the insertion, in r. 4 of Or. XXXIV of the reference to subsequent interest which did not appear in the old s. 88 of the Transfer of Property Act. But no authority has been cited to us where it was declared obligatory to grant interest after the date of sale. The Privy Council judgments referred to indicate, in our opinion, that the matter is entirely one within the discretion of the Court.

In the present case the lower Court admittedly acted in error in not allowing interest beyond the date of the institution of the suit, and this mistake has been the cause of the present appeal which has come up for hearing more than four years from the date of the Trial Court's judgment. The plaintiff-appellant is not responsible for the delay which has occurred in bringing the mortgaged property to sale for he could not in the circumstances have executed his decree as well as appealed against it. It is our task to settle the appropriate relief in the light of the present situation and we have decided to do as follows :—

We accept the appeal and in lieu of the decree of the Trial Court we pass a decree ordering that an account be taken of what will be due to the plaintiff on 18th May 1925 for, (*a*) the principal sum of the mortgage, (*b*) interest at 12 annas per cent. per mensem from the date of mortgage to 18th May 1925, (*c*) costs in the Trial Court on Rs. 4,100, and (*d*), half costs in this Court on the difference between (*a*) plus (*b*) and Rs. 4,100, and we direct that if the defendant pays into Court on or before 18th June 1925, the amount so found to be due the plaintiff shall deliver up to him all documents relating to the mortgaged property free from mortgage; that if such payment be not made the plaintiff shall be entitled to apply to the Court below under Or. XXXIV, r. 5 for a final decree for sale of the mortgaged property and that if the net proceeds of the sale are insufficient to pay such amount together with subsequent costs the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance. Half costs only are allowed to the plaintiff because he has failed on the point of enhanced interest and we decline to allow any further interest beyond 18th May, 1925.

Cross objections were filed by the defendants—respondents, but they have not been argued and they are hereby dismissed.

Decree modified.

(1) (1897) 19 All. 174=1897 A. W. N. 9.
(2) (1901) 23 All. 181=28 I. A. 85=3 Bom. L. R. 51=5 C. W. N. 137=7 Sar. 792 (P. C.)
(3) (1907) 34 Cal. 150=34 I. A. 9=5 C. L. J. 106=9 Bom. L. R. 304=11 C. W. N. 249=2 M. L. T. 75=17 M. L. J. 48=4 A. L. J. 109 (P. C.)

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* A. I. R. 1926 Lahore 12.

LEROSSIGNOL, J.

Mt. Allah Wasai and another —Accused-Petitioners.

v.

Emperor—Respondent.

Criminal Revision No. 1558 of 1924, decided on 16th January 1925, reported by S. J., Multan, dated 7th November 1924.

* (*a*) *Penal Code, s. 193—Application for transfer of Criminal Case—False statements made in, can be basis of prosecution under s. 193—Criminal P. C. ss. 342 and 526.*

An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal P. C. upon answers to questions put to the accused by the Court trying the case. 1922 Lah. 113 foll. 28 All. 331 and 33 All. 163 dissented.

Dhanpat Rai—for Petitioner.

Dalip Singh—for Respondent.

Order.—During the hearing of a complaint under s. 498, Indian Penal Code, against Allah Ditta for enticing away *Musammat* Allah Wasai, the alleged wife of the complainant, Allah Ditta and *Musammat* Allah Wasai jointly applied to the District Magistrate for transfer of the case alleging that the aunt of the complainant was kept by the Magistrate. The allegation was emphatically denied by the Magistrate of the First Court and the District Magistrate has ordered the prosecution of both Allah Ditta and *Musammat* Allah Wasai under ss. 182 and 193 of the Indian Penal Code.

The learned Sessions Judge has forwarded the proceedings for revision on the ground that in *Emperor* v. *Bindeshri Singh* (1) it was held that an accused person cannot be prosecuted under s. 193, Indian Penal Code, in respect of false statements contained in an affidavit accompanying an application for transfer, and a similar decision was arrived at in *Maitan* v. *Emperor* (2). So far as Allah Wasai is concerned she was a mere tool in the hands of Allah Ditta and did not sign the application for transfer, although in a statement she did support it.

I set aside the order of the District Magistrate so far as she is concerned.

As regards Allah Ditta, I see no reason why the prosecution should not proceed. An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Cr. P. C. upon answers to questions put to the accused by the Court trying the case. This view was taken in *Ghulam Muhammad* v. *Emperor* (3) where the Allahabad view was considered and dissented from. I concur in the conclusions expressed in that decision of this Court and hold that the alleged false statement made by Allah Ditta was not part of his defence to the complaint which the Magistrate was trying, and that his trial, as directed by the District Magistrate, should proceed.

Order set aside.

(1) (1906) 28 All. 331=1906 A. W. N. 42=3 A. L. J. 98=3 Cr. L. J. 225.

(2) (1910) 33 All. 163=7 A. L. J. 1143=7 I. C. 914=11 Cr. L. J. 537.

(3) (1922) Lah. 113=3 Lah. 46=23 Cr. L. J. 999.

A. I. R. 1926 Lahore 13.

MOTI SAGAR, J.

Ismail—Plaintiff-Appellant

v.

Ibrahim and another—Defendants-Respondents.

Second Appeal No. 201 of 1923, decided on 15th January 1924, from a decree of the Dist. J., Gurdaspur, dated 16th November 1922.

Lim. Act Art. 142—*Plaintiff proving title—Onus is on defendant to prove plaintiff's dispossession within* 12 *years—If not proved presumption is in plaintiff's favour that possession goes with title.*

Where there is no satisfactory evidence in rebuttal the presumption that possession goes with title must be given effect to and it is only in cases where it is clearly proved that the plaintiff has either been dispossessed or that he has discontinued possession that Art. 142 would apply. In cases where the plaintiff has succeeded in proving a clear title the burden lies on the defendants to prove adverse possession for the statutory period, and if he fails to do so, the plaintiff must succeed simply on the strength of his *prima facie* title as owner. 41 All. 669 and 1923 Nag. 2 Rel. on.

[P. 14 C. 1.]

Mehr Chand Mahajan—for Appellant.

B. D. Qureshi—for Respondents.

Judgment.—The sole question for determination in this case is whether the plaintiff's suit for possession is within limitation. The dispute related to a small field, 2 *marlas* in area, and the plaintiff is recorded as its owner in the revenue papers. The suit was resisted by the defendants on two grounds, (1) that they were themselves the owners, and (2) that they had been in adverse possession for more than 12 years. The Trial Court decreed the suit holding that the defendants' ownership had not been established and that the suit was within limitation. On appeal the learned District Judge held that the suit was governed by Art. 142 of the Indian Limitation Act and that it was for the plaintiff to prove that he had been in possession within 12 years of the institution of the suit. The suit having been dismissed the plaintiff has now come up in second appeal to this Court.

In my opinion Art. 142 of the Indian Limitation Act has no application to this case, and the suit is clearly within limitation. It has nowhere been stated by the plaintiff in his plaint that he had been dispossessed or that he had discontinued possession. The entries in the revenue papers show that the plaintiff was cultivating the land himself in 1905-06. In 1911-12 the defendants are shown as cultivating the land as tenants of the plaintiff. In the column of rent it is stated that they do not pay any rent *bawajih banna shikni*.

The learned District Judge was of opinion that as the defendants were the owners of an adjoining field, it must be presumed that they must have encroached upon the land in suit and their possession was consequently adverse. In my opinion the learned District Judge was not justified in raising this presumption in favour of the defendants. The plaintiff in the present case has clearly established his title to the property and could, therefore, rely upon the presumption that possession went with the title. It has been repeatedly held that where there is no satisfactory evidence in rebuttal the presumption must be given effect to, and that is only in cases where it is clearly proved that the plaintiff has either been dispossessed or that he has discontinued possession that Art. 142 of the Limitation Act would apply. In cases where the plaintiff has succeeded in proving a clear title the burden lies on the defendants to prove adverse possession for the statutory period, and if he fails to do so, the plaintiff must succeed simply on the strength of his *prima facie* title as owner. In *Jai Chand* v. *Girwar Singh* (1), which is a case exactly in point, the plaintiff, who was a *zemindar*, sued to eject the defendant from certain land within the ambit of the plaintiff's *zemindari* alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee and claimed that he had acquired a title to the land in suit by adverse possession. He had, however, failed to prove that he had been in possession of the land for more than 12 years. It was held that the plaintiff was entitled to succeed on the ground of title alone, and that it was not incumbent upon him to establish possession within 12 years of suit. Similarly in *Sakharam* v. *Deoba* (2) it was held that in such cases if the plaintiff proves title, it rests on the defendant to show that he and those under whom he claims have been in possession for over 12 years before suit. The defendants in the present case have entirely failed to show when their possession became adverse, and the plaintiff's suit must, therefore, succeed.

I accept the appeal, and setting aside the order of the Court below, decree the plaintiff's suit with costs throughout.

Appeal accepted.

(1) (1919) 41 All. 669=52 I. C. 366=17 A. L. J. 814.

(2) 1923 Nag. 2.

A. I. R. 1926, Lahore 14.

BROADWAY AND COLDSTREAM, JJ.

Hussain Bakhsh—Plaintiff—Appellant

v.

Sarbuland—Defendant—Respondent.

First Appeal No. 55 of 1924, decided on 23rd July 1925, from the decree of the Senior Sub-J., Shahpur at Sargodha, dated 30th November 1923.

Punjab Colonization of Government Lands (Punjab Act, 5 of 1912), s. 19—Agreement to admit brother to a share in the tenancy is void.

An Agreement by a Government tenant admitting his brother to a share in his tenancy, without the previous consent in writing of the Commissioner under s 19 is void under s. 19. 13 P. R. 1913 ; 58 P. R. 1913 and A. I. R. 1922 Lah 287 Dist.

J. L. Kapur for *Muhammad Alam*, and *Maya Das*—for Appellants.

M. L. Puri and *Bal Kishan*—for Respondents.

Coldstream, J.—This order will dispose of the two appeals Nos. 55 and 422 of 1924. The circumstances out of which they arise are as follows :—

In or about the year 1903 Sarbuland, the respondent, was given by Government a horse breeding grant of two squares of land Nos. 21 and 30 in Chak No. 36 in Sargodha *Tahsil*. On 30th August 1912 Sarbuland executed a document reciting that his brother Hussain Bakhsh and he had jointly purchased the mare required for the grant of land and paid for the grant out of joint funds, that they were jointly liable for their debts, and that the land would be considered their joint property in future. The document stated that Hussain Bakhsh was to continue to cultivate the square No. 21 and Sarbuland the other square. If Sarbuland resiled from this

" agreement " he was to pay Rs. 5,000 to Hussain Bakhsh.

Sarbuland then proceeded to petition for insolvency on 2nd October 1913 and was adjudicated insolvent. In subsequent proceedings Hussain Bakhsh appears to have made several unsuccessful attempts to have one square, or its produce, released on the strength of the document of 1912. There was, it seems, some kind of arrangement between Sarbuland and his creditors leading to a discharge, for on 7th January 1922 a creditor applied to the Insolvency Court to have Sarbuland declared insolvent again. On 12th May 1922 Hussain Bakhsh filed objections to the attachment of one square. His petition was dismissed by the District Judge on 27th March 1923 by the following order:—

" He claims to be the owner of one square out of two squares held by the insolvent. Hussain Bakhsh has sometimes put in a claim for the produce of the land as a tenant and had once asked to be admitted as a creditor to the extent of Rs. 5,000 if this claim to one square was not allowed, but my predecessors have not admitted his rights. I am not prepared to re-open the question. He may have the question if he likes decided by a Civil Court. The application is accordingly rejected."

On 10th May 1923 Hussain Bakhsh filed a suit in the Court of the Senior Subordinate Judge at Sargodha against Sarbuland for a declaration that he had the same right in the square No. 21 as Sarbuland had in square No. 30, alleging that the grant had been paid for out of proceeds of ancestral land of himself and his brother and relying on the document executed by Sarbuland in 1912.

The plaint ended with the prayer that if Hussain Bakhsh was not found entitled to the rights claimed, a decree in respect of the rights found proved might be granted. This suit was dismissed on 30th November 1923 on the grounds, firstly that the question of plaintiff's title had been finally decided against him under the provisions of S. 4 (2) of the Provincial Insolvency Act, 1920, by the order of the Insolvency Court of 27th March 1923, and secondly that the provisions of the document of the 30th August 1912 were contrary to the law contained in s. 19 of the Colonization of Government Lands (Punjab) Act, 5 of 1912, by which any transfer or change made without the consent in writing of the Commissioner, or other officer empowered, of any of the rights or interest vested in a tenant by or under the Government Tenants (Punjab) Act, 1893 or the Act V of 1912 "shall be void." Against this order Hussain Bakhsh on 4th January 1924 filed the appeal No. 55 of 1924. Three days later he filed the appeal No. 422 of 1924 against the order of the District Judge dated 27th March 1923, along with an affidavit in support of his prayer for extension of time under s. 14 of the Indian Limitation Act.

We may take first the appeal against the District Judge's judgment of 30th November 1923.

Mr. J. L. Kapur for the appellant admits that the defendant is still a tenant, bound by the provisions of Act V of 1912, and that the agreement of 1912 was executed after the Act V of 1912 came into force, but contends that there is nothing in s. 19 of that Act to preclude the grant of a decree giving effect to the agreement of 1912, which can be binding only upon the parties to the suit and will not affect the rights of Government. He cites *Ali Mardan* v. *Balsar Khan* (1), *Hussain Khan* v. *Jahan Khan* (2) and *Nathu* v. *Allah Ditta* (3). The facts in these three cases were, however, clearly distinguishable from those of the present case. In *Ali Mardan* v. *Balsar Khan* (1) the question for decision was whether a Deputy Commissioner could move for the revision of a decree which contravened a provision of the Government Tenants (Punjab) Act III of 1893 (which has been superseded by the Colonization of Government Lands Act, 1912). It was held that there was no legal procedure providing for such revision.

The ruling. *Hussain Khan* v. *Jahan Khan* (2) dealt with a case in which it was sought to enforce an agreement, similar to that relied upon here, after proprietary rights had been acquired in land granted under the provisions of Act III of 1893. Similarly in the case decided in *Nathu* v. *Allah Ditta* (3) the defendant, against whom an agreement to share a grant was enforced, had acquired proprietary rights and was no longer a mere tenant. It is further to be noticed that s. 19 of Act V of 1912 contains an express provision that

(1) (1913) 13 P. R. 1913=7 P. W. R. 1913=17 I. C. 680=27 P. L. R. 1913.
(2) (1913) 58 P. R. 1913=18 P. L. R. 1913=18 I. C. 5=36 P. W. R. 1913.
(3) A. I. R. 1922 Lah. 287=3 Lah. 92.

the mosque, etc., and to appoint a capable *Imam* of the mosque.

The plaintiff's case is that the defendant ever since the date of her taking charge of the property has carried out not even one of the objects above recited and that she has been bringing the income of the trust property to her own private use. A large number of witnesses have been produced who deposed that the defendant has mismanaged the property and that she has committed other acts of misfeasance which are not calculated to inspire confidence in her career as a trustee and which render her absolutely unfit to remain in charge of the office any longer. Nur Hussain (P. W. No. 1) states that the defendant and her father, Nazir Hussain, have been causing much damage to the trust property and that they have even removed the tomb of Pir Gohar Shah, a previous incumbent of the shrine, and have been tying a she-buffalo on that place. He further states that the bricks of the *tharra* have been taken out and sold and that the big gate has also been taken out and sold. The income of the shrine according to him ought to be spent on improving the shrine and keeping a *langar*, but the defendant has been doing quite the reverse. He also deposed to the effect that the defendant has misappropriated the whole income. The witness is supported in the allegations made by him by Saidullah Khan (P. W. No. 3), Karam Ali (P. W. No. 10), Ghulam Mohammad (P.W. No. 11), Allah Ditta (P. W. No. 26), and a number of other witnesses whose names it is not necessary to mention in this judgment. Indeed the defendant's own witnesses have admitted that they had never seen any *urs* being performed in this shrine during the incumbency of the defendant. Allah Bakhsh (D.W. No. 1) states that there never was an annual fair at the *Takia*, Allah Ditta (D. W. No. 2) states that no annual fair has ever been held at the *Takia*. Muhammad Ibrahim (D W. No. 3) and Lakhmi Das (D. W. No. 6) have also made similar statements. Sowaya Mal (D. W. No. 5) states that no annual fair has been held at the *takia* for the last six or seven years. Sultan Ahmad (D. W. No. 7) says that he has not seen any *urs* taking place for the last 18 years. Rahim Bakhsh (D.W. No. 8), Khuda Bakhsh (D.W. No. 9), Ghulam Hussain (D. W. No. 10) and Nur Muhammad (D. W. No. 11) have also deposed to the effect that they have never seen any annual fair being held at the *takia*. No evidence has been produced by the defendant to prove that she has been feeding any *fakirs* or making any arrangements for their residence and comfort in this shrine. As to any *kawali* or *khatam* being performed at the shrine there is not the slightest evidence on the record, nor is there any evidence to show that the mosque has been properly looked after or that any capable *Imam* has been appointed to lead the prayers. The most serious charge against the defendant, however is that she has been setting up an adverse title of her own and has been persistently denying the religious character of the property. In a sale-deed dated the 20th February 1913 executed by her in favour of Sheikh Ata Ilahi she describes herself as the exclusive owner of the property, having inherited the same under a Will executed by her late father Nazir Hussain on the 18th August 1899. By this deed she alienated 15 *marlas* of land for a sum of Rs. 2,000 and it was stated in the deed that out of the sale consideration of Rs. 2,000 a sum of Rs. 1,000 was required to redeem a certain house known as the *kothi* and the rest for the construction of new houses for her own residence. On the 4th September she executed another sale-deed of 5 *marlas* of land in favour of Sheikh Abdul Rahman for a sum of Rs. 980 necessity for the sale being to pay off a decree outstanding against her. In this sale-deed also she has described herself as the absolute owner of the land sold and has clearly denied the religious character of the property. In a previous suit instituted in 1914 by Nur Hussain Shah and others for a declaration that the property was *wakf* and that they were entitled to its possession and management, the defendant *Musammat* Hussain Bibi stated that the property was not *wakf* and that she was the exclusive owner thereof. The finding of the Court, however, was against the defendant and it was held that the property was *wakf* and she was not its exclusive owner. It is probably on account of this finding that in the present suit the defendant has admitted the religious character of the property and has not set up her own title in respect thereto. Her witnesses, however, do not support her in the position that she has taken up in this suit, and it is obvious from their evidence that the defendant has always treated the property as her own and

has never admitted that it was *wakf*. Allah Bakhsh (D. W. No. 1) states that the defendant is the absolute owner of the property and so was her father before her. Allah Ditta (D. W. No. 2) states that the defendant sold a plot of land attached to the *takia* and that the sale proceeds went to pay her father's debts. Muhammad Ibrahim (D. W. No. 3) stated that people have always treated the defendant and her father as the absolute owners of the property and that he has never seen any outsider paying a visit to the *takia*. Sultan Ahmad (D. W. No. 7) gives a similar statement and says that the *takia* is the ancestral property of *Musammat* Hussain Bibi. It is thus obvious that the defendant has persistently contended that the property connected with the *gaddi* has not a religious foundation and that the property claimed as public trust was the private property of herself and her late father, Nazir Hussain. In the case of *Mohammed Ismail Ariff* v. *Ahmed Moolla Dawood* (1), it was laid down by the Privy Council that the interests of the trust are supreme and the Court must have regard to such interests in dealing with the question whether the persons appointed as trustees are persons who can be probably entrusted with the management of the institution. In the present case it is clearly proved from the evidence produced on both sides that the interest of the trust have not been kept in view and that the defendant's conduct has not been such as to inspire confidence. There is no doubt that it has been held in some cases that the mere denial of the existence of a public trust, if *bona fide*, does not by itself disqualify the man from being appointed or retained as trustee of the institution. We are, however, convinced that this is not such a case and that under the circumstances the retention of the defendant as trustees should not be upheld and that she should be removed from the trusteeship of the *gaddi* in question.

We accordingly accept the appeal and setting aside the order of the learned District Judge decree the plaintiff's suit with costs throughout.

Appeal accepted.

(1) (1916) 43 Cal. 1085=43 I. A. 127=14 A. L. J. 741=18 Bom. L. R. 611=20 C. W. N. 1118=31 M. L. J. 290=(1916) 1 M. W. N. 460=20 M. L. T. 110=24 C. L. J. 198=4 L. W. 269=9 Bur. L. T. 141=35 I. C. 30=8 L. B. R. 517 (P. C.).

A. I. R. 1926 Lahore 19

SCOTT-SMITH, J.

Haq Dad and others—Appellants.

v.

The Crown—Respondent.

Criminal Appeal No. 170 of 1925, decided on the 26th March 1925, against the order of S. J., Mianwali, dated the 12th January 1925.

(a) *Penal Code, s. 99—Public servant acting without jurisdiction—Section does not apply.*

A police officer found the accused at night time carrying a *kulhari*. He suspected that the accused was going to kill a certain person with whom he had enmity and demanded the *kulhari* but the accused refused to give. Thereupon the officer tried to snatch it from the accused. The accused assaulted the officer.

Held that the action of the Sub-Inspector was wholly without jurisdiction, and therefore section 99 was not applicable. [P. 20, C. 1.]

Held also that the circumstances did not give rise to any right of private defence on the part of the accused. [P. 20. C. 1.]

Ram Lal—for Appellants.

Des Raj, Sawhney—for Respondent.

Scott-Smith, J.—This is an appeal from the order of the Sessions Judge, Mainwali, convicting Haq Dad under s. 325, Indian Penal Code and Sohan and Ali Khan under s. 323, Indian Penal Code, and sentencing the first named to three years' rigorous imprisonment and the latter to one year's rigorous imprisonment each. The hurts were said to have been caused in the course of a fight with Fazal Shah, Sub-Inspector, in the following circumstances:—

Fazal Shah was in charge of the Punitive Police Post in the appellants' village and was sitting on the *thara* outside his house talking to Allah Dad Khan and Budha Khan, *Pathans*, when Haq Dad, appellant, passed along the lane in front of the Sub-Inspector's house, he was carrying a long-handled *kulhari* in his hand. The Sub-Inspector thought that Haq Dad was perhaps on his way to attack one Mamrez with whom he had enmity and called to him that he should not go about at night time armed with such a *kulhari* and asked him to hand over the *kulhari* to him. Haq Dad replied that the Sub-Inspector had no authority to take the *kulhari* from him and refused to give it up. Upon this the Sub-Inspector went up to Hag Dad and laid his hands on the *kulhari* in order to snatch it from him. Haq Dad resented this and shouted out to his *Pathan* associates who came up to his assistance

and are said to have assaulted the Sub-Inspector. Out of six persons challaned by the police the three appellants only were convicted, the Sessions Judge holding that each of them struck the Sub-Inspector one blow. The *chalan* was under s. 333 of the Indian Penal Code, but the learned Sessions Judge held that at the time of the occurrence the Sub-Inspector was not acting in the discharge of his duty as a public servant because he had no right to snatch away the *kulhari* from the hands of Haq Dad, it not being an arm the possession of which without a license was forbidden by law. At the same time the Sessions Judge held that under s. 99 of the Indian Penal Code the appellants had no right of private defence against the act of the Sub-Inspector when trying to snatch away the *kulhari*, as such act did not cause the apprehension of death or grievous hurt, the act being done by a public servant acting in good faith under colour of his office though that act might not be strictly justifiable by law. Mr. Rattan Lal in his Law of Crimes, 9th edition, in his notes under s. 99 at page 185 states as follows:—

"This section has no application to a case where the initial proceeding, and the power under which any public servant purports to act are altogether without jurisdiction and entirely *ultra vires*. But the protection afforded under it to public servants is not lost to them by reason of any mistake on their part in the exercise of their proper functions. The section thus applies to cases where there is an excess of jurisdiction as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, but not to cases where the act could not possibly have been done rightly."

These remarks of the author are supported by authority, one of which is *Queen-Empress* v. *Jogendra Nath Mukerjee* (1). Now, there can be no doubt that the act of the Sub-Inspector in trying to snatch away an axe from Haq Dad was wholly without jurisdiction, and therefore, in my opinion, s. 99 is not applicable. At the same time I do not see how the appellants had any right to make an assault upon the Sub-Inspector. They knew perfectly well that he was not trying to commit a theft of the *kulhari*, and therefore they had no right to attack him in order to protect Haq Dad's property from being taken away by him. Nor had they any reason to fear that the Sub-Inspector would cause hurt to Haq Dad.

As regards the merits, I see no reason to differ from the learned Sessions Judge in his finding that the three appellants did each of them give one blow to the Sub-Inspector. The point that really requires consideration in the case is whether the sentences awarded are suitable. There can be no doubt that the appellants acted with undue violence, and that they had no justification for assaulting the Sub-Inspector. At the same time it must not be forgotten that the latter was in the wrong in doing an act or trying to do an act which was unlawful. The hurt caused to the Sub-Inspector by Haq Dad was technically grievous hurt. Under the circumstances I think that the sentences awarded are unduly severe. I accept the appeal and reduce the sentences as follows :—In the case of Haq Dad to nine months' rigorous imprisonment, and in the cases of Sohan and Ali Khan to four months' rigorous imprisonment each.

Appeals partly accepted.

(1) (1897) 24 Cal. 320=1 C. W. N. 154.

A. I. R. 1926 Lahore 20

SCOTT-SMITH AND MARTINEAU, JJ.

Eclipse Motor Car Co.—Appellant-Defendant.

v.

Mr. H. O. Warburton and another—Plaintiffs-Respondents.

First Appeal No. 1342 of 1924, decided on 6th February 1925, from a decree of the Senior Sub-J., Rawalpindi, dated 29th February 1924.

Civil P. C., Or. XLI, r. 27 (1) (b)—Appellate Court can admit additional evidence even on the application of a party.

The jurisdiction of an appellate Court under r. 27 (1) (*b*) to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it. Under the words or for any other substantial cause an appellate Court has a discretion to admit further evidence upon the application of a party A I. R. 1923 P C. 128 Foll. [P. 21, C. 2.]

Tekchand, Gobind Ram Khanna and Mehr Chand Mahajan—for Appellant.

Aziz Ahmad and Kanhaya Lal Gauba and Dalip Singh—for Respondents.

Order.—The respondents have been given a decree by the Senior Subordinate

Judge, Rawalpindi, for Rs. 43,400 against the defendant appellant, as damages on account of the injuries sustained by them in an accident which occurred to a motor car belonging to the Eclipse Motor Company in which they were travelling from Rawalpindi to Murree.

The defendant Company has filed an appeal from the above decree and Mr. Tek Chand, on behalf of the appellant, has applied that under Or. XLI, r. 27, C. P. C., the appellant be allowed to have the plaintiff No. 1 medically examined and to lead evidence in regard to his present physical condition.

The record shows that after certain evidence for the plaintiff had been recorded on the 15th March 1923 the case was adjourned for the recording of the statement of plaintiff No. 1 and for the entire remaining evidence to the 6th of April 1923. On the 22nd March an application was put in on behalf of the plaintiffs asking that the date should be accelerated as they were about to proceed to England. In accordance with this plaintiff No. 1 was examined on the 25th March and thereafter proceeded to England. The evidence for the plaintiff was closed on the 6th April and thereafter the defendant Company led its own. On the 14th November 1923 the defendant applied that plaintiff No. 1 should attend in person so that he might be medically examined in order to enable the defendant to lead evidence in rebuttal of that produced on the other side. This application was rejected on the ground that it was a belated one and plaintiff No. 1 was absent in England. Plaintiff No. 1 did not return to this country until after judgment was pronounced. He returned, however, last year and is at present in India and is admittedly in temporary military employ in Rawalpindi.

Counsel for the respondents objects to the grant of the application on the ground that the first medical witness for the plaintiff was produced on the 9th February 1923 and the defendant had then an opportunity for getting plaintiff No. 1 medically examined and could have, therefore, produced evidence as to his physical state. It is, however, pointed out by Mr. Tek Chand that his client did not know that plaintiff was about to proceed to England until after the application of 22nd March 1923 was made when there was no time for them to get plaintiff No. 1 medically examined.

We think there is force in this contention. Their Lordships of the Privy Council have ruled in *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1), "that the jurisdiction of an Appellate Court under Or. XLI, r. 27 (1) (*b*), of the C. P. C., 1908, to admit additional evidence is not confined to cases in which the Court itself discovers a *lacuna* or defect and requires evidence to fill up or remedy it. Under the words 'or for any other substantial cause' an Appellate Court has a discretion to admit further evidence upon the application of a party."

In our opinion substantial cause has been made out in the present case for admitting additional evidence. We, therefore, under Or. XLI, r. 27 remand the case to the Court of the Senior Subordinate Judge, Rawalpindi, in order that he may record the medical evidence which the appellant may lead as to plaintiff No. 1's present physical condition. The evidence should be directed to show what the effect of the injuries will be upon his earning capacity and on his enjoyment of life. The plaintiffs may adduce evidence in rebuttal. The lower Court is requested to treat this order as very urgent. We direct that the parties shall attend in the lower Court on the 3rd March next and then and there give the names of the medical witnesses whom they wish to examine. Arrangements should be made to have plaintiff No. 1 examined by these witnesses before the witnesses appear in Court to give their evidence. Return should be made to this Court within one month without fail.

Case remanded.

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(1) A. I. R. 1923 P. C. 123=2 Pat. 676=50 I. A. 183=21 A. L. J. 554=4 P. L. T. 447=1 Pat. L. R 345=25 B. L. R. 1259=28 C. W. N. 277=45 M. L. J. 578=33 M. L. T. 233=18 M. L. W. 728=5 L. R. (P. C.) 8=39 C. L. J. 318 (P. C.).

A. I. R. 1926 Lahore 21

ADDISON, J.

Devi Chand —Plaintiff-Appellant

v.

Jai Chand and another —Defendants-Respondents.

Second Appeal No. 582 of 1925, decided on 11th July 1925, against the decree of the Addl. Dist. J., Hoshiarpur, dated 24th November 1924.

(a) *Civil P. C., s. 100—Construction of documentary evidence is a question of fact.*

The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal. A. I. R. 1925 All. 39 Foll.

(b) *Civil P. C., s.* 100—*Construction of document includes two things namely meaning of words and its legal effect—The former is a question of fact and the latter one of law—Deed - Construction.*

The expression ' construction ' as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words is in all cases a question of fact and the effect of the words is a question of law. A. I. R. 1923 Lah. 626 Foll.

(c) *Civil P. C.*, s. 100—*Whether* ala malik *has rights in* shamilat *is not a question of law.*

The question that an *ala malik* must be presumed to have rights in the *shamilat* is not a question of law. 35 P. R. 1919; 36 P. R. 1919; 68 P. R. 1916 Appl.

Gullu Ram and *Shamair Chand* - for Appellant.

Mehr Chand Mahajan – for Respondents.

Judgment.—One Mian Devi Chand sued Colonel Sir Jai Chand, Raja of Lambagraon ; and the Secretary of State for India for a declaration that he should be declared *jagirdar* and *ala malik* co-sharer in the *shamilat* of 11 *tikas* in village Kotlu, Tahsil Palumpur, District Kangra, to the extent of his *jagir* in these *tikas* and that he was entitled to share the income from the *shamilat* in the above proportion. The Raja *inter alia* pleaded that the plaintiff was a *jagirdar* and *ala malik* only in those lands which were in the occupation of his *adna maliks*, and that he had nothing to do with the *shamilat*. It was further pleaded that in the case of *tika ban banjar* the plaintiff was neither owner nor *ala malik* in that *tika*.

Issue No. 2 was whether the plaintiff was an owner and co-sharer with the Raja in the rights in dispute. The lower Court held that he had no rights in *tika ban banjar* and that as regards the other *tikas* he was *ala malik* only and had no right to the *shamilat* or its income. He found that the original *sanad* was not produced and that undoubtedly the Settlement entries of 1868 and of the last settlement were against the plaintiff's claim, though at the second Settlement of 1891-92 there were some entries against which an appeal was filed by the Raja and as stated in the second part of para. 91, page 53, of the final report of the revised Settlement of 1897 that appeal was accepted and it was ordered that the former entries of 1868 should be restored though this was not done. He came to the conclusion that those entries of 1891-92 were an interpolation.

The learned Additional Judge has come to the same finding on the above point and on all other points as did the Trial Court. As regards the entries of 1891-92 he could not understand how these entries had ever been made in face of the remarks in the revised Settlement report of 1897 already referred to. He further held that whether or not there had been some interpolation in 1891-92 the document in question could not be relied upon as there was no foundation for the making of those entries. He further held that the document relied upon was inconsistent and indefinite.

On the above finding and also on other grounds the Courts below concurred in dismissing the plaintiff's suit. The plaintiff has filed this second appeal relying principally on the entries already discussed in the Settlement of 1891-92. It was contended, however, that no second appeal lay on this ground. In *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) it was held "that there was no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be". The Allahabad High Court held in *Gupta Nand Bharthi* v. *Hari Shankar* (2) " that the question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal". The Lahore High Court held in *Dal Singh* v. *Pluiman* (3) " that the expression ' construction ' as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words is in all cases a question of fact and the effect of the words is a question of law." The document in question has been held by the learned Additional District Judge to be inconsistent and indefinite though he also held that the words ' two parties' referred to the Raja and the *zemindars* and not to the plaintiff. This is a finding of fact which cannot be challenged on second appeal. Besides, there is other documentary evidence which is clearly against the appellant's claim and which

(1) (1891) 18 Cal. 23=17 I. A. 122=5 Sar. 560 (P. C.).
(2) A. I. R. 1925 All. 39.
(3) A. I. R. 1923 Lah. 626.

both the Courts below were entitled to consider. There is no evidence that the rights claimed were ever exercised. I would, therefore, hold that no second appeal lies.

It is also clear that the contention that an *ala malik* must be presumed to have rights in the *shamilat* is not a question of law. It was laid down in *Sultan Ali* v. *Amir* (4) that where the lower Appellate Court had after full consideration of all the evidence including the terms of the sale-deed found that the ancestor of the defendant did not acquire a right to a proportionate share in the *shamilat* such finding was one of fact. Similarly it was held in *Muhammad Ali* v. *Amir Khan* (5) that where the deed of sale was silent on the point the question whether a *pro rata* share in the *shamilat* was intended to be conveyed to the vendee was not one of the construction of the deed and consequently could not be gone into in second appeal. In the recent case the original *sanad* has not been produced. It follows from these rulings that a share of the *shamilat* does not necessarily go to a particular proprietor. See also *Diwan Chand* v. *Sundar* (6). In the present case there is a clear finding of fact that the plaintiff is not entitled to the *shamilat* rights he claims and that finding is based on evidence properly considered and discussed.

I accordingly reject this appeal with costs.

Appeal rejected.

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(4) (1919) 35 P. R. 1919=78 P. L. R. 1919.
(5) (1919) 36 P. R. 1919=79 P. L. R 1919.
(6) (1916) 68 P. R. 1916=182 P. W. R. 1916.

A I. R. 1926 Lahore 23

CAMPBELL, J.

Pars Ram —Defendant—Appellant

v.

Tehu and others—Plaintiff—Defendants-Respondents.

Second Appeal No. 141 of 1924, decided on 17th April 1924, from a decree of the Dist. J., Kulu, Dist. Kangra, dated 4th October 1923.

Custom (Punjab)—Alienation by father of ancestral land—Payment of just debt is necessity—Where alienor is male, alienee need not show that alienor's income was sufficient to pay off such debt.

The payment of a just debt by a male proprietor is a necessity for which he can validly as against the reversioners, alienate ancestral land. It is only in the case of an alienation by a woman that the alienee is required to show that the alienor's income was insufficient to provide the money required for the purpose for which the sale was made. When the alienor is a man the only question for consideration is whether the purpose for which the alienation was effected was a necessary purpose. 40 Cal. 283 P. C. Foll. [P. 24, C. 1.]

Mehr Chand Mahajan for *Dalip Singh* —for Appellant.

Judgment.—The suit out of which this second appeal has arisen was by a son for a declaration that a sale of land by his father should not affect his reversionary rights.

The sale was for Rs. 300 out of which the vendor received Rs. 9 in cash, while the remaining Rs. 291 were applied to satisfy a decree which the vendee had against the vendor.

The vendor had five sons and the other four did not join the plaintiff in contesting the alienation. The suit was not obviously collusive with the father since in the Trial Court the father sided with the vendee and declared that the plaintiff had treated him badly in refusing to help him to pay off the decree which was against the plaintiff as well as against his father. Khoru, the father, also stated in lower Court that he had partitioned most of his land among his other sons, that he had kept some for himself and that he had sold what would have been the plaintiffs' share because he did not help to pay off the debt due from both of them under the decree.

The trial Court dismissed the suit holding that the sale had been for a necessary purpose, namely, to pay off the decree. On appeal the learned District Judge reversed his finding and gave the plaintiff the decree sought. He apparently held that the decree was a just antecedent debt as defined in *Devi Ditta* v. *Saudagar Singh* (1) but he came to the conclusion that this was the only debt which Khoru owed and that it was not necessary for him to sell ancestral land in order to defray it, since he had four other sturdy sons who, with or without help of the plaintiff, could have earned enough from their land or by their labour extricate their father from his liability.

In dealing with the case thus the learned District Judge has, I think, not acted in accordance with the principles laid down by authority for treating questions of this nature. In *Kirpal Singh* v. *Balwant*

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(1) (1900) 65 P. R. 1900=322 P. L. R. 1900.

Singh (2) the Privy Council held, as a general rule of custom, that the payment of a just debt by a male proprietor is a necessity for which he can validly as against the reversioners, alienate ancestral land, and it has been pointed out on more than one occasion by this Court that only in the case of alienation by a woman is the alienee required to show that the alienor's income was insufficient to provide the money required for the purpose for which the sale was made. When the alienor is a man the only question for consideration is whether the purpose for which the alienation was effected was a necessary purpose. In the present case the sale was effected for a necessary purpose, and the alienee defendant was not obliged to show that the alienor could not have paid off the just antecedent debt otherwise that by alienating his land.

For these reasons I accept the appeal and restore the order of the Trial Court dismissing the suit with costs throughout.

Appeal accepted.

(2) (1913) 40 Cal. 288=18 M. L. T. 5=11 A. L. J. 1=9 P. W. R. 1913=17 C. L. J. 137=15 Bom. L. R. 79 =17 C. W. N. 302=28 P. L. R. 1913=24 M. L. J. 318=1913 M. W. N. 58=17 I. C. 666=26 P. R. 1913 (P. C.).

A. I. R. 1926 Lahore 24

ADDISON, J.

The Firm Jai Singh Diyal Singh and others —Appellants.

v.

Narmal Das, Debtor —Insolvent and others—Respondents.

Misc. First Appeal No. 1037 of 1925, decided on 29th October 1925, from the order of the Dist. J., Jhang, dated 23rd February 1925.

(a) *Provincial Insolvency Act* (1920), s. 75—*Adjudication at creditor's instance—Creditors are aggrieved parties.*

Where a person is adjudicated an insolvent at the instance of the creditors, they are obviously the aggrieved parties and have a right of appeal. [P. 24, C. 2.]

(b) *Provincial Insolvency Act* (1920), s. 41—*Time stated in adjudication order—Addendum specifying Time added —Addendum cannot be considered.*

Where no time is stated in the adjudication order within which the insolvent has to apply for his discharge but an addendum is added at the foot of the order stating that the insolvent should apply within two years for his discharge, the addendum cannot be considered a part of the order and the court should not pass an order annulling the adjudication of the insolvent for his failure to apply for his discharge within two years. [P. 25, C. 1.]

(c) *Practice—Order even if wrong is final when passed —Judicial order.*

A wrong order when passed becomes final unless set aside in accordance with law [P. 25, C. 1.]

Nand Lal —for Appellants.

Ram Chand Manchanda —for Insolvent.

Addison, J.—Certain creditors applied to have Narmal Das adjudicated an insolvent and this was done by the District Judge of Jhang on 8th January 1923. At the foot of the order on the English record there is an addition signed by the District Judge but not dated to the effect that Narmal Das should apply within two years for his discharge. I have consulted the vernacular record, however, and it is only translation of the order proper and not of the undated addition. Proceedings went on before the District Judge and certain objections were urged before him. In the middle of these objections without notice to any one on the subject the District Judge who had succeeded the first District Judge noticed that the two years had expired in January 1925 and he, therefore, passed an order annulling the adjudication as Narmal Das had not applied for his discharge within two years. This order is dated the 23rd February 1925, and it was further ordered that the receiver should distribute the money in his hands amongst those creditors who had proved their debts and return the rest of the insolvent's property to him. Against this order two creditors have appealed.

A preliminary objection was taken that no appeal lay at the instance of the creditors as the property of the insolvent had vested in the receiver and that he, therefore, was the only person aggrieved by the order annulling the adjudication especially as the ordinary rights of the creditors revived by the order of annulment. Narmal Das, however, was adjudicated an insolvent at the instance of the creditors and they are obviously the aggrieved parties. For this reason alone the creditors have a right of appeal. In this view of the case it is not necessary to decide whether a creditor must be an aggrieved party before he has the right of appeal as to which different views seem to have been taken by this High Court and the Allahabad High Court *vide Isher Das* v. *Ladha Ram* (1) and *Shikri Prasad* v.

(1) (1921) 62 I. C 924.

Hafiz Aziz (2). I overrule the preliminary objection.

In the appeal it was argued that it is clear from two records that the addendum at the foot of the signed and dated order was not written at the time the order was made. It seems to me that this view must prevail. It is true that it is laid down in s. 114 of the Evidence Act that the Court may presume that judicial and official acts have been regularly performed, but it is clear from a comparison of the two records that the addendum was not written when the order of adjudication was made. It is not clear when it was added. This may have been the next day or a week later or at any other subsequent time. But in any case it cannot be held to be a part of the order as no proper steps were ever taken by the Judge to review it after notice to the parties. It follows that this addendum cannot be considered and that no time was stated in the order within which the insolvent had to apply for his discharge although such time should have been stated.

As no such time was stated the order under appeal cannot be sustained. Of course, it would still be possible for the debtor to apply for his discharge under s. 41 of the Act which provides that he may apply at any time after the order of adjudication and shall apply within the period specified by the Court. Further, as he was never directed by the order to apply within two years s. 43 of the Act does not apply and the adjudication cannot be annulled for the reason given.

It was contended on behalf of the respondent-insolvent that as a time was not fixed within which he was to apply for his discharge as ordered by s. 27 of the Act the order was defective, and it must be held that he was not adjudicated an insolvent in accordance with law. This consequence, however, does not follow. A wrong order when passed becomes final unless set aside in accordance with law.

No other point was argued before me. For the reasons given I accept the appeal and set aside the order of the District Judge under appeal. He is directed to proceed with the insolvency proceedings according to law. There will be no costs of this appeal as the insolvent does not seem to be to blame for what has happened.

Appeal accepted.

(2) (1921) 19 A. L. J. 862.

A. I. R. 1926 Lahore 25

SCOTT-SMITH AND FFORDE, JJ.

Daulat Ram and another—Defendants-Appellants

v.

Ghulam Fatima—Plaintiff and another Defendant-Respondents.

Second Appeal No. 2110 of 1921 decided on 16th April 1924, from a decree of the Dist. J., Hoshiarpur, dated 29th June 1922.

(a) *T. P. Act, s. 53—Transferee's mala fide intention alone vitiates transfer.*

Where a transfer is attacked as having been made to defeat and delay creditors, it is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer. If the transferee buys in good faith and for valid consideration his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without the knowledge of the transferor's object in selling. [P. 26 C. 1.]

(b) *Civil P. C., Or. XXI, r. 63—Objector proving bona fides of the transfer—Onus is on decree-holder to prove the contrary.*

A person who claims property which has been attached in pursuance of an execution decree must in a suit brought under r. 63 of Or. XXI, of the C. P. C. give *prima facie* evidence of the genuineness of the document of sale and once he has shown a *prima facie* title the onus is shifted to the judgment creditor to prove that the transfer was fraudulent and unreal. [P. 26 C. 1.]

Fakir Chand and *Mehr Chand Mahajan*—for Appellants.

Shah Nawaz—for Respondents.

Judgment.—On the 21st October 1919 the defendants appellants obtained a decree against the respondent Muhammad Bakhsh and proceeded to execute the decree by attaching certain house property. The respondent *Mt.* Ghulam Fatima wife of Muhammad Bakhsh filed objections claiming that the property attached had been sold to her by her husband. These objections were disallowed on the 4th March 1920 and the plaintiff-respondent then brought a suit to establish her right to this property and to have it released from attachment. Both the lower Courts have held that the sale to *Mt.* Ghulam Fatima by her husband was a *bona fide* transaction, untainted by fraud and decreed the claim and the matter now comes before us on second appeal by the defendants.

It was decided in the case of *Ibrahim* v. *Jiwan Das* (1) that where a transfer is

(1) (1924) Lah. 707.

attacked as having been made to defeat and delay creditors, it is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer. If the transferee buys in good faith and for valid consideration his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without the knowledge of the transferor's object in selling. It was further held that a person who claims property which has been attached in pursuance of an execution decree must in a suit brought under r. 63 of Or. XXI of the C. P. C. give *prima facie* evidence of the genuineness of the document of sale and once he has shown a *prima facie* title the onus is shifted to the judgment-creditor to prove that the transfer was fraudulent and unreal. In the present case *Musammat* Ghulam Fatima gave *prima facie* evidence of a transfer by her husband to her of the property attached. The onus then lay on the defendant-appellants to show that *Musammat* Ghulam Fatima bought with knowledge of her husband's object in making tranfer to her. In other words the onus was on the appllants to prove that the transfer was fraudulent and unreal. Both the lower Courts have held that the transfer in the present case was a real transaction for valid consideration and that the defendants have entirely failed to show that it was in any way tainted by fraud. These are findings of fact which cannot be contested in second appeal. The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 26

ABDUL RAOOF AND ADDISON, JJ.

Gopi Chand —Plaintiff—Appellant

v.

Kirpa Ram —Defendant —Respondent.

First Appeal No. 52 of 1925, decided on 22nd July 1925, against the decree of the Sub-J., First Class, Ferozepur, dated 15th December 1924.

Civil P. C., Or. XVI, r. 1—Witnesses not present owing to non-service of summons—Court ought to issue fresh summonses.

Where certain witnesses are not present on the date of hearing owing to non-service of summonses upon them without fault of a party the Court ought to issue fresh summonses and is not justified in depriving the party who wishes to produce them. of his right to have the evidence of those witnesses taken. [P. 27 C. 1.]

Shamair Chand and *Dev Raj Sahwney* —for Appellant.

Durga Das and *Sagar Chand* —for Respondent.

Judgment.—The plaintiff brought the suit for a declaration that half of the property attached in execution of the decree of defendant No. 3 against the defendants Nos. 1 and 2 belonged to him and, therefore, was not saleable in execution of the decree against defendants Nos. 1 and 2. This claim was based upon the main ground that after the separation of the sons of Durbari Mal, a re-union had taken place between Raman Mal and Udham Mal and that the properties, though standing in the name of one or the other, were owned jointly by them. To support his claim he relied both upon documentary and oral evidence. On the 13th of November the evidence of four witnesses was recorded. Jaimal witness, who was summoned for that date, had not turned up as service of summons had not been effected upon him. The Court made the following order : —

Orders relating to him will be passed to-morrow. Adjourned to to-morrow for further proceedings."

On the 14th of November 1924 warrants were directed to be issued to Gokal and Nand Lal witnesses who had absented themselves in spite of personal service of summonses upon them. The warrants were sent to Hissar and were received on the 24th of November. They were handed to the bailiff on the 6th of December 1924. The next date for hearing was fixed for the 12th of December 1924. Thus there were six days during which the warrants could have been executed, but the bailiff refused to act on the ground that the distance of the place where the witnesses resided from Hissar was 35 miles and that the service could not be effected. Jaimal, Jiwan Singh, Kirpa Ram, and Hira Lal witnesses had not been served.

The Court, therefore, made the following order :

'Jaimal Singh, Jiwan Singh, Kirpa Ram and Hira Lal have not been served. The plaintiff himself admits that he did not take any step to get them served. Such being the case he has forfeited his right to get fresh processes issued to these persons.

He can himself bring them to Court on the next hearing. Case adjourned to 12th December 1924 for remaining evidence of the plaintiff and rebuttal evidence of the defendant. No other opportunity shall be given to the parties for evidence."

This order was made on the 14th of November 1924. Of the two witnesses against whom warrants had been issued Gokal appeared and was examined as a witness. Of the witnesses whom the plaintiff was directed to bring into Court on the date fixed for hearing the plaintiff succeeded in bringing Jaimal, Jiwan Singh and Kripa Ram whose evidence was recorded but Hira Lal did not come, for the summons had not been served upon Hira Lal. The Court ought to have issued fresh summons for service and it was not justified in depriving the plaintiff of his right to have the evidence of this witness taken.

The suit of the plaintiff has been dismissed, and in appeal it has been contended before us that the decision has gone against the plaintiff-appellant because the case has been decided upon an incomplete record. Having regard to the circumstances referred to above we are constrained to hold that the Court below did not act properly in refusing to enforce the attendance of these witnesses. Under ordinary circumstances we would have set aside the decree of the Court below and remanded the case for trial *de novo* after recording the evidence of the two witnesses mentioned above; but as the parties are anxious that the case be decided speedily, acting under Or. XLI, r. 28, C. P. C., we direct the Court below to procure the attendance of Nand Lal and Hira Lal, record their evidence and send it to this Court after it has been recorded with as little delay as possible.

Case remanded.

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* A. I. R. 1926 Lahore 27

HARRISON AND CAMPBELL, JJ.

Hari Kishen—Plaintiff—Appellant

v.

Mulkh Raj and another—Defendants-Respondents.

First Appeal No. 1940 of 1924, decided on 13th March 1925, from a decree of the Senior Sub-J., Gujranwala, dated 20th May 1924.

** Civil P. C., Or. XVII, r. 3—Party acting with due diligence and paying process fee in time—Witness not served—Any adjournment granted for want of service does not amount to time granted to party.*

When a party has paid the process-fee for summoning witnesses the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service in spite of a party in question having shown due diligence and put in his process-fee in time to allow of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of Or. XVII, r. 3

Fakir Chand—for Appellant.

C. H. Oertal and *Kharak Singh*—for Respondents.

Judgment.—Two Civil Suits Nos. 17 and 18 of 1923, were dismissed by the Trial Court, on the 20th May, 1924 the cases being between the same parties and connected. The Court acted under Or. XVII, r. 3. It held that the plaintiff had failed to produce his evidence on a date granted to him and to him alone for the purpose and, in the absence of any evidence in support of his claims it dismissed the suits.

The facts are simple. After the framing of issues dates were fixed in both cases for evidence. No evidence was recorded as the parties prayed for an adjournment in the hope of effecting a compromise. The date so fixed was the 23rd April and the order of the previous hearing, the 8th February 1924, was that the witnesses present be paid diet money for their next attendance and one particular witness was informed that he would be re-summoned, if necessary, and the 23rd April was fixed on the application of the parties for a compromise. On the 23rd April an order was passed reciting that no witness of either party was said to be present and as the parties said they had been unable to compromise because of plague a further adjournment to the 20th May was given for the purpose. The order continued "the plaintiff had to produce his evidence to-day in case the compromise be not effected. He will now be responsible for the production of his evidence on the next date. The witnesses number about 10. The same order in the other suit No. 118."

On the 9th May the plaintiff put in process-fees only without diet money for the hearing on the 20th May. No service was effected for the 20th May though the process-server was able to pay one visit to the houses of some of the witnesses and found them not at home. On the 20th May the suit was dismissed.

On appeal it is urged that this is not a case in which Or. XVII, r. 3 applies. Counsel has quoted much authority for the self-evident proposition that under Or. XLVI, r. 1 summonses must issue, however, late the date may be on which the party applies for them.

For the further proposition which he puts forward that once summonses have issued without success no subsequent adjournment whether given to one party or to both, can be treated as an adjournment of the type contemplated in Or. XVII, r. 3. He relies on only one authority *Harjas Rai* v. *Narain Singh* (1). This states that " when a party has paid the process-fee for summoning witnesses the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of Or. XVII, r. 3."

The adjournment in that case was given for the benefit of both parties and not for one as in this and the facts are, therefore, wholly different. In the second place we are of opinion that the words " caused by the non-attendance of witnesses for want of service", can only mean when the witnesses have not been served in spite of a party in question having shown due diligence and put in his process-fee in time to allow of service. But it is urged by Counsel in this case the process-server was able to reach the houses of some of the witnesses, and it was, therefore, possible to effect service. This is true but the orders of this Court are clear and are to the effect that if service is not effected at the time of the first visit the process-server must not return the summonses until he has succeeded in effecting service, or at any rate until he has made several attempts. No sufficient time was allowed for a thorough attempt to be made to effect service for the hearing of the 20th May. The hearing of the 23rd April was apparently for the evidence of both parties and the adjournment to the 20th May was given for the definite purpose explicitly stated in the order of enabling the plaintiff to produce his witnesses if a compromise were not effected. On the hearing of the 20th May the plaintiff himself stated that he had only gone to Amritsar to effect the compromise five days before. It was not, therefore, in consequence of having been buoyed up by false hopes of a compromise till the last minute, that he delayed applying for process. The fact relied on by Counsel that there was plague in the town of Hafizabad should have made him all the more careful to allow sufficient and proper time. On the 23rd of April the Court allowed nearly a month for service in case the compromise failed. The process-fee was not put in until 11 days before the date of hearing no attempt to compromise having been made in the interval. The plaintiff clearly did not act with due diligence and did not avail himself of the opportunity given to him for the production of his evidence. He, therefore, failed to comply with the conditions on which he could have had another adjournment, that is to say, had he taken the necessary action and had the failure to effect service been entirely due to the negligence of the Court or the process serving staff or to circumstances over which he had no control. We, therefore, are of opinion that the Trial Court acted quite correctly and we dismiss both appeals with costs.

Appeal dismissed.

(1) 29 Ind. Cas. 938=51 P. R. 1915=98 P. L. R. 1916.

A. I. R. 1925 Lahore 28

HARRISON, J.

Ismail—Petitioner

v.

The Crown.—Respondent.

Criminal Revision No. 496 of 1925, decided on 15th May 1925, against the order of the S. J., Ferozepore, dated 23rd January 1925.

(a) *Penal Code, s.* 442—*Wara though unroofed yet forming practically part of the house is "building" within s* 442.

Where the *Wara*, of which the small gate was locked, adjoined the room in which the accused lived and was for practical purposes one of the rooms of the house, and an integral part of the building,

Held that though the *wara* was unroofed it was a "building" within the meaning of s. 442, Penal Code. 208 P. L. R. 1915 and 56 P. L. R. 1919 Dist. 35 P. R. (Cr.) 1879 Foll. [P. 29, C. 1.]

(b) *Penal Code, s.* 103 (4)—*Striking a burglar after his entrance into the house and causing his death—Right of private defence is not exceeded.*

Where the accused found a burglar in his house at midnight and struck him during the scuffle which ensued between the accused and the burglar,

Held that the accused did not exceed his right of private defence as he had every reason to suppose that either the burglar had committed theft

or was going to do so and that if he met him he would presumably strike him. [P. 29, C. 2.].

Tara Singh.— for Petitioner.

Anant Ram.—for Respondent.

Harrison, J.—The facts of this case are that one Ismail and Dula, his brother, were waked up in the middle of night by the sound of movement in the *wara* adjoining the room where they were sleeping. They got up and found a man Sardara inside the *wara*, and, in the scuffle which ensued, Ismail killed him by striking him on the head with his stick. He has been convicted under s. 304 and sentenced to four years' rigorous imprisonment and his conviction and sentence have been upheld by the learned Sessions Judge, who found that he had exceeded the right of private defence of his person and property as three blows were found to have been inflicted on the head.

It was urged before the trial Court and the Sessions Judge that s. 103, Indian Penal Code, applied as the man who was killed was committing or had committed the offence of house-breaking. Both the lower Courts have held that the offence of house-breaking was not committed. The Sessions Judge has followed *Kohmi* v. *Emperor* (1) and *Sundar* v. *Emperor* (2), but his attention does not appear to have been drawn to *Shera* v. *Empress* (3) which ruling, it appears to me, exactly covers the facts of this case, while those relied on do not. The map and the evidence show that this so-called *wara* forms an indivisible part of the building, which constitutes the house of the accused. It fills up a corner, it is surrounded on all four sides by a wall, entrance and exit are effected through a small gate or *phalla* which is kept locked at night, and the thief Sardara must have effected his entrance by scaling the wall. Neither in *Kohmi* v. *Emperor* (1) nor in *Sundar* v. *Emperor* (2) did the enclosure in question form part of a building. In *Sundar* v. *Emperor* (2) the wall did not go the whole way round, and in the earlier ruling the *wara* was of the common type of an enclosure for cattle out in the fields. Here the enclosure is for practical purposes one of the rooms of the house ; from it other rooms open and, although it has no roof, it is an integral part of the building. The facts are identical with those of *Shera* v. *Empress* (3). Following the decision of the majority of the Judges, who decided that case, I hold that here also the enclosure in question is a part of a building.

While, however, it is clear that the man Sardara committed the offence of house-breaking, the question still remains whether s. 103 or rather 103 (2) applies in its entirety : I think not. The right of private defence of property extends to the voluntary causing of death, if the offence, the committing of which occasions the exercise of the right, be one of certain offences including house-breaking by night. In this case that offence had been completed, once the burglar got over the wall, and it was past history. It could not be said to occasion the exercise of the right of private defence. It is, therefore, necessary to see whether the apprehension of what was going to happen justified the accused in acting as he did. All that he knew was that a burglar was in his house in the middle of the night in a dark room. He had every reason to suppose that the burglar had committed theft or was going to do so and that if he (the owner of the house) met him he would presumably strike him. He could not know in the dark whether the burglar was armed or not and taking everything into account I do not think that he exceeded his right of private defence by striking the burglar three times and rendering him incapable of doing any further injury to his person or property. I find, therefore, that the right of private defence was not exceeded and that the case fulfils the requirements of s. 103 (4), though it does not fulfil the requirements of s. 103 (2).

I accept the revision and acquit the petitioner.

Revision accepted.

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(1) (1915) 208 P. L. R. 1915=24 P.R. 1914 Cr= 26 I. C. 305=16 Cr. L. J. 1.

(2) (1919) 56 P. L. R 1919=11 P. W. R. 1919 Cr.=49 I. C. 864=20 Cr. L. J. 240.

(3) (1879) 735 P. R. 1879 Cr.

* A. I. R. 1925 Lahore. 30

SHADI LAL, C. J., AND MALAN, J.

Mohammad Akram —Defendant—Appellant

v.

Mula Singh —Plaintiff

and

Sunder Singh—Defendant—Respondents.

Second Appeal No. 2634 of 1921, decided on 17th May 1924, from the decree of the Dt. J. Lahore, dated the 9th May 1921.

* *Specific performance—Sale deed executed but taken out of vendee's control before registration—Fresh deed can be ordered to be executed.*

A fresh deed can be ordered to be executed in a suit for specific performance of a contract to sell if the deed already executed is for any reason, removed from the vendee's control before its registration by loss or fraudulent suppression on the part of the vendor. 20 Mad 19, 20 Mad 250, Rel. on. 16 Mad 341, Dist.

Niaz Muhammad—for the Appellant.

Amar Nath Chopra—for the Respondents.

Judgment.—Haji Mohammad Akram defendant No. 1 bought certain land from one Makhan Singh on 4th October 1917. Mula Singh plaintiff, sued for pre-emption. The case was compromised, defendant No. 1 agreeing to sell two-thirds of the land to plaintiff and one-third to his brother, defendant No. 2 for Rs. 1,400. Defendant No. 1 agreed to cut the crop within three months and have a sale-deed registered. A sale-deed was executed but not registered. Plaintiff then sued for specific performance of the contract. The Trial Court dismissed the suit. The District Judge, on appeal, gave plaintiff a decree for two-thirds of the land by specific performance of the contract, on payment of two-thirds of the price—Rs. 300 had already been deposited by Mula Singh, and Rs. 633-5-4 were still due from him.

Defendant No. 1 has come up on second appeal. His Counsel relies on *Venkatasami* v. *Kristayya* (1) as authority for holding that, as a deed has already been executed, defendant No. 1 cannot be compelled to execute another deed. In that ruling, however, the non-registration of the executed document was due to plaintiff's inaction. Later rulings, *e. g.*, *Chinna Krishna Reddi* v. *Dorasami Reddi* (2), *Nallappa Reddi* v. *Ramalingachi Reddi* (3) and *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh* (4) are authority for holding that a fresh deed can be ordered to be executed if the original deed is for any reason, removed from plaintiff's control, *e.g.* by loss or fraudulent suppression on the part of defendant. In the present case plaintiff did his best to have the contract completed. The mere execution of the deed was not a full compliance with the admitted terms of the agreement between the parties, as an unregistered deed of sale could not operate to transfer the land to the vendee. The original deed is actually on the record of a criminal case under s. 420, Indian Penal Code, instituted by plaintiff against defendant No 1. In a summary enquiry under s. 202, Cr. P. C., the Criminal Court had the deed produced by the Counsel of defendant No. 1. The complaint was then dismissed under s. 203, Cr. P. C. plaintiff being referred to the Civil Courts. In the circumstances it was clearly impossible for plaintiff to obtain possession of the deed in order to have it registered compulsarily within the period of limitation.

Counsel for appellant argued that the lower Appellate Court gave no findings on Issue No. 5 framed by the Trial Court, as to whether plaintiff has lost his rights by reason of a breach of the agreement. We are, however, satisfied that time was not of the essence of the contract, as ruled in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (5) and that the lower Appellate Court has rightly held that the breach of contract was committed by defendant No. 1 and not by plaintiff. There is, therefore, no ground for a remand for a more definite finding on Issue No. 5.

The appeal is accordingly dismissed with costs in favour of plaintiff.

Appeal dismissed.

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(1) (1898) 16 Mad. 341=3 M. L. J. 169.
(2) (1897) 20 Mad. 19.
(3) (1897) 20 Mad. 250.
(4) (1910) 12 C. L. J. 464=8 I. C. 794.
(5) (1916) 40 Bom. 289=43 I. A. 26=30 M. L. J. 186=3 L. W. 239=19 M. L. T. 184=14 A. L. J. 225 (1916) 1 M. W. N. 229=18 Bom. L.R. 163=28 C. L. J. 858=32 I. C. 246=20 C. W. N. 744 (P.C.).

A. I. R. 1926 Lahore 31.

MARTINEAU, J

Mt. *Ram Rakni*—Plaintiff—Appellant

v.

Daulat Ram and another—Defendants—Respondents.

Second Appeal No. 3040 of 1924, decided on 20th April 1925, against a decree of the Dist. J., Shahpur, dated 11th October 1924.

(a) *Anand Marriage Act* (7 *of* 1909)—*Scope.*

The Act is an enabling and not a disabling Act and it does not follow that because that Act does not apply the marriage is not a vaild one.

(b) *Hindu Law—Marriage—All ceremonies are not necessary to validate a widow remarriage of a* Khatri *girl.*

It is not necessary for the validity of a marriage by a *Khatri* widow that all the usual ceremonies which have to be performed in the case of a *Khatri* girl on her first marriage should be performed and in such cases if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such a union is a valid marriage 49 P. R 1903 Foll.

D. C. Ralli—for Appellant.

Badri Das—for Respondents.

Judgment.—The plaintiff sued for a declaration that she was not the wife of the defendant Daulat Ram who alleged that she had married him after the death of her first husband. She was given a decree by the Trial Court but the District Judge on appeal dismissed the suit, finding that the plaintiff had been married to the defendant, the marriage having been solemnized according to the *Anand* ceremony, that she lived with him as his wife and that the marriage was valid.

It is contended for the plaintiff in second appeal that as the defendant Daulat Ram is a *Khatri* and not a *Sikh* the marriage is invalid, the Anand Marriage Act VII of 1909 not being applicable to a marriage between persons not professing the *Sikh* religion. But as observed by the learned District Judge the Act VII of 1909 is an enabling and not a disabling Act and it does not follow that because that Act does not apply the marriage is not a valid one. In *Lal Chand* v. *Thakur Devi* (1), it was held that it is not necessary for the validity of a marriage by a *Khatri* widow that all the usual ceremonies which have to be performed in the case of a *Khatri* girl on her first marriage should be performed and that in such cases if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such a union is a valid marriage. I agree with the learned Judge that this ruling is in point and that the marriage solemnized between the parties in the *Anand* form was a valid marriage.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1903) 49 P. R. 1903=118 P. L. R. 1903.

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* A. I. R. 1925 Lahore 31.

CAMPBELL AND MOTI SAGAR, JJ.

Samail and another—Plaintiffs-Appellants

v.

Haji and others—Defendants-Respondents.

First Appeal No. 2681 of 1920, decided on 10th June 1924, from the decree of the Sub-J., First Class, Shahpur at Sargodha, dated 11th August 1920.

* *Civil P. C., Or.* I *r.* 8—*Some defendants allowed to represent whole body of defendants—Some non-appearing defendants dying during suit—Legal representatives not added—Suit abates—Civil P. C., Or* XXII, *r.* 4.

An order passed under Or. I, r. 8 allowing some defendants to represent the whole body of defendants will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour, and the representatives of any of the e persons who have died. The appeal will abate *in toto*, if the appellants do not bring the legal representatives of the latter on the record within the time prescribed by law. 1924 Lah. 124 Rel. on.

Ram Chand Manchanda—for Appellants.

Nanak Chand and *Devi Dayal*—for Respondents.

Judgment.—Mr. Nanak Chand on behalf of the respondents takes a preliminary objection that some of the respondents are dead and that appeal has abated by reason of the appellants' failure to apply for their legal representatives to be brought on the record in time. Mr. Ram Chand on behalf of the appellants argues that his clients made an application under Or. I, r. 8, C. P. C. that five of the respondents might be permitted to defend the appeal on behalf of the others and that this application was granted by this Court. It is pointed out that none of these five respondents has died and that in these circumstances it was not necessary for the appellants to make an application that the representa-

tives of the other deceased respondents should be brought on the record. We are unable to accept this contention. The respondents who have died were clearly parties to the suit and to appeal in this Court, and, as recently held in the case of *Wali Muhammad* v. *Mahlu* (1), an order passed under Or. I, r. 8, C. P. C., will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour, and the representatives of any of these persons who have died, and that the appeal will abate *in toto*, if no steps have been taken by the appellants to bring the legal representatives of the latter on the record within the time prescribed by law.

The preliminary objection prevails and we hold that the appeal has abated *in toto*. The appellants will pay the costs of the respondents.

Appeal dismissed.

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(1) 1925 Lah. 124=5 Lah. 429=6 L. L. J. 360.

* A. I. R. 1925 Lahore 32.

ADDISON, J.

Budhu Ram—Plaintiff—Petitioner

v.

Kalu Ram —Defendant—Respondent.

Civil Revision No. 90 of 1925, decided on 12th May 1925, against the decree of the Dist. J., Dera Ghazi Khan, dated 29th July 1924.

(a) *Civil P. C., Or. III r.* 4—Vakalatnama *need not be accepted in writing by a Vakil.*

Or. III, r. 4 does not expressly state that the acceptance of a *Vakalatnamah* should be in writing. The fact that the Vakil appeared and conducted the case in the lower Court and also filed the appeal is sufficient to show that he accepted it. 1923 Lah. 402 Appr.

*(b) *Civil P. C., Or. III, r. 4—Power to prosecute all litigation implies power to lodge and conduct appeal and fresh power is not necessary for appeal.*

A power of attorney authorising a Pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the High Court and fresh power is not necessary for appeal. 80 P. W. R. 1915 Foll.

Amar Nath Chona —for Petitioner.

Sagar Chand —for Respondent.

Addison, —J.—The plaintiff sued the defendant for recovery of Rs. 119-10-0 on a promissory note. His suit was dismissed and he appealed in the Court of the District Judge. His appeal has been dismissed on the ground that the *vakalatnamah* or appointment of the Pleader, who filed the appeal, was not accepted in writing by him. Against this decision this revision petition has been filed.

It obviously must be accepted. It is not stated in Or. III, r. 4 (2), Civil Proceedure Code, that the *vakalatnamah* should be accepted by a Pleader in writing. It was conceded by the learned counsel who appeared in the case of *Mathra Das-Bishambar Nath* v. *Rama Lal-Kanshi Nath* (1) that the acceptance of a power of attorney need not be in writing. It was held in *Mahesh Chandra Addy* v. *Panchu Mudali* (2) that Or. III, r. 4, Civil Procedure Code, does not expressly state that the acceptance of a *vakalatnamah* should be in writing, and it was pointed out that in a previous case of that Court this had also been held In the Calcutta High Court there is now a rule of that Court that the acceptance must be in writing, but there is no rule of this High Court that this should be so. The ruling relied upon by the District Judge, namely *Muhammad Ali Khan* v. *Jas Ram* (3) is not in point. There the name of the Pleader was omitted from the body of the *vakalatnamah*. I, therefore, hold that the acceptance of a *vakalatnamah* need not be in writing by the Pleader upon the *vakalatnamah*, and the fact that he appeared and conducted the case in the lower Court and also filed the appeal shows that he accepted it.

It was argued, however, by the respondent's counsel that the revision should be dismissed as a fresh power of attorney was not filed with the appeal. There is no force in this as by the original power of attorney the Pleader was given authority to file an appeal and to conduct it. It has been held by this Court in *Dyal* v. *Hirde Ram* (4) that a power of attorney authorising a Pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the Chief Court.

In the result this revision petition is accepted with costs and the order of the District Judge is set aside, and the appeal is returned to him for decision on the merits.

Revision accepted.

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(1) 1923 Lah. 402.

(2) (1915) 43 Cal. 884=32 I. C. 395=23 C. L. J. 297=20 C W N. 287.

(3) (1914) 36 All. 46=23 I. C. 461=11 A. L. J. 1015.

(4) (1915) 80 P. W. R. 1915=29 I. C. 895=153 P. L. R. 1915.

* A. I. R. 1926 Lahore 33

ABDUL RAOOF, J.

Feroze Din—Defendant—Appellant

v.

Ghulam Fatima—Plaintiff—Respondent.

Second Appeal No. 2347 of 1923 decided on 3rd April 1924, from a decree of the Senior Sub-J., Amritsar, dated 13th July 1923.

* *Contract Act*, s. 23—*Agreement by husband to the wife not to maltreat her or in default to pay a fixed maintenance is not bad, though made pending a criminal case provided it is made independently of the criminal case.*

A compromise was executed by the husband undertaking to keep his wife comfortable and not to ill-treat her and in case of default he agreed to pay per mensem by way of maintenance a fixed sum. Such an agreement is not bad in law though executed while a complaint relating to an uncompoundable offence was pending against the accused by the brother of his wife and was dismissed after the execution of the deed, provided that the agreement was arrived at independently of the criminal case. 31 P. R. 1911 Foll: 39 P. R. 1914 Dist. [P. 31, C. 1].

Nawal Kishore—for Appellant.

K. J. Rustomji—for Respondent.

Judgment.—The facts giving rise to the suit out of which the present appeal has arisen are few and simple. The plaintiff is admittedly the wedded wife of defendant Feroze Din. Owing to certain differences between the husband and wife the latter left the former's house and went to reside with her own people. She carried away her infant daughter with her. The people of the brotherhood intervened and brought about a compromise beween the parties in consequence of which a deed of compromise was written by the defendant, on the 10th June, 1921, undertaking to keep the plaintiff comfortable and not to ill-treat her and in case of default he agreed to pay Rs. 14 per mensem by way of maintenance. The present suit was lodged for recovery of Rs. 98, the arrears of maintenance for seven months. The suit was resisted on the ground that the defendant had not maltreated his wife and that she had left him without justification and that in any case the agreement was bad in law according to the provisions of s. 23 of the Contract Act inasmuch as it had been executed in consideration of a compromise to withdraw a complaint relating to an uncompoundable offence alleged to have been committed by the defendant. It appears that Feroze Din, defendant, took away the daughter from the possession of his wife. Thereupon the wife's brother filed a complaint under s. 363, Indian Penal Code. That complaint was pending at the time the agreement dated the 10th June, 1921, was executed. The complaint was subsequently ordered to be filed on the 18th June 1921. Two issues were framed by the Trial Court upon the pleadings, namely,

(1) Has the defendant been treating the plaintiff with harshness?

(2) Was the agreement executed under undue influence and in consideration of withdrawal of criminal prosecution under s. 363, Indian Penal Code?

The first issue was decided in favour of the plaintiff and against the defendant. Under the second issue the Trial Court held that the agreement was bad in law. For this decision the Trial Court relied on the ruling in *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The plaintiff's suit was accordingly dismissed.

On appeal the lower Court disagreed with the Trial Court and held that the case was rather governed by the ruling in *Karam Chand* v. *Basant Kuar* (2) than by the rule laid down in *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The crucial question to be decided in the case was whether the agreement had been executed in consideration of a compromise to withdraw the prosecution. That question was a question of fact which had to be determined upon the evidence in the case. The lower Appellate Court after considering the evidence bearing on the question has come to the conclusion that the compromise was brought about by the brotherhood independently of any idea of the withdrawal of the complaint. In fact the lower Appellate Court has categorically found that the Magistrate filed the complaint only after being informed that the dispute between the parties had been amicably settled through the intervention of the brotherhood.

Having regard to the facts found by the lower Appellate Court the ruling in *Karam Chand* v. *Basant Kuar* (2) is applicable and not that reported as *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The learned Judges, who decided the latter case, are

(1) (1914) 39 P. R. 1914=57 P. W. R. 1914=22 I. C. 393=54 P. L. R. 1914.

(2) (1911) 31 P. R. 1911=236 P. W. R. 1911=11 I. C. 321=192 P. L. R. 1911.

reported to have observed on page 141 of P. R. 1914 of the report as follows :—

"In *Karam Chand* v. *Basant Kuar* (2), it would appear from the judgment that Sardar Kalwant Singh, who executed the mortgage-deed there sued upon, had executed and handed over the deed to the mortgagee before the criminal prosecution launched by the latter against him was terminated by the complant being dismissed in default. The completion of the contract of mortgage by the delivery of the deed to the mortgagee was not made contingent upon the complaint being dismissed or the mortgagor being discharged by the Magistrate ; the mortgage was completed and the deed was handed over to the complainant independently of the result of the criminal prosecution, though the necessary consequence of the complainant being satisfied once the deed of mortgage was executed in his favour was that he did not appear in the Magistrate's Court and, therefore, the complaint was dismissed in default."

The facts in the present case according to the finding of the lower Appellate Court are very much similar. It is not mentioned in the agreement that the brother of complainant would withdraw the complaint against the defendant if the latter agreed to the terms mentioned in the agreement. According to the finding of the lower Appellate Court the agreement was arrived at independently of the criminal case. In this view the judgment of the lower Appellate Court must be held to be right. The learned Vakil for the defendant has, however, contended that the lower Appellate Court should have recorded a finding upon issue No. 1 also. The decision of the First Court on this issue was against the defendant and it does not appear that this question was ever raised on behalf of the defendant in the lower Appellate Court. It was open to him to have supported the judgment of the Trial Court upon that issue under Or. XLI, r. 22. No affidavit has been filed or any other proof given to show that this plea was ever urged before the lower Appellate Court.

The appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 34

ABDUL RAOOF AND FFORDE, JJ.

Mt. Begam Bibi — Judgment-debtor — Appellant

v.

Bulaqi Shah and sons—Decree-holders — Respondents.

Misc. Second Appeal No. 2564 of 1924, decided on 19th February 1925, from an order of the Dist. J., Gujranwala, dated 1st July 1924.

(a) *Civil P. C., ss. 50 and 99—Application for substituting legal representative's name can be made to the Court passing the decree—If it is not made to that Court, it is mere irregularity which is cured by s. 99.*

An application for the substitution of the name of the legal representative of a deceased can be made to the Court to which the decree has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by s. 99. 22 Cal. 558 ; 35 Cal. 1047 Foll. 17 All 431 ; 19 All. 337 and 28 Mad. 466 Not foll. [P. 35, C. 1.]

(b) *Limitation Act, Art. 182 (5)—Name of legal representative incorrectly given—Still execution application is a step-in-aid.*

Though the name of the legal representative is incorrectly given in the application for execution it must be treated as a step-in-aid of execution according to law. 35 Cal. 1047 Foll. [P. 35, C. 2.]

Shuja-ud-din —for Appellant.

Judgment.—On the 30th of July 1916 Bulaki Mal obtained a money-decree from Lahore Court against Fazal Hussain. The first application for execution of this decree was made on the 16th of June 1917. The execution case was then transferred under a certificate to a Court at Gujranwala on the 18th of October 1916. On the 9th of August 1917 the record was consigned to the record room. In the meantime Fazal Hussain, the judgment-debtor, had died on the 11th of June 1918. On the 19th of April 1920 second application for execution was made against the son of the deceased judgment-debtor who was described as Rahmat Ullah under the guardianship of his mother *Musammat* Hussain Bibi. This application was made to the Executing Court at Gujranwala. A prayer was made in this application to have the name of Rahmat Ullah substituted as the son and the legal representative of the judgment-debtor. A house was attached, and it is stated that 1/3rd of it was sold by auction and was purchased by a third party. This sale, however, was set aside on the 11th of January 1922, on the application of a third party who claimed the ownership of the

house. This was done with the consent of the decree-holder. The present application for execution was made on the 25th of October 1922, against the son of the judgment-debtor who is now described as Inayat Ullah, son of Fazal Hussain, under the guardianship of his mother *Musammat* Begam Bibi. The execution of the decree was objected to on the following grounds, namely, (1) that the application for the substitution of the name of the son as the legal representative of the judgment-debtor ought to have been made to the Lahore Court which had passed the decree; and (2) that as Rahmat Ullah whose name was mentioned in the application of the 19th of April 1920, was not the son of the deceased judgment-debtor that application in the eye of the law was irregular and had no legal effect and that consequently the present application is barred by time.

On the first question there is a conflict of authority. The Madras and Allahabad High Courts are of opinion that an application for the substitution of the name of the legal representative of a deceased judgment-debtor ought to be made to the Court which had passed the decree (s. 50 of the C. P. C.); while, on the other hand, the Calcutta High Court has ruled that the application can be made to the Court to which the decree has been transferred for execution and that in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by s. 99 of the C. P. C. (s. 578 of the old Code, 1882). The objectors cited the cases of *Seth Shapurji Nana Bhai* v. *Sankar Dat Dube* (1), *Madho Prasad* v. *Kesho Prasad* (2) and *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (3) in support of their objections. The decree-holder relied on the decision of the Calcutta High Court in the case of *Sham Lal Pal* v. *Modhu Sudan Sircar* (4).

On the second question the decree-holder relied upon the case of *Bipin Behari Mittar* v. *Bibi Zohra* (5).

Sardar Sewa Singh, Subordinate Judge, Second Class, Gujranwala, gave effect to the objections and dismissed the application for execution as barred by time.

On appeal Mr. Ganga Ram, the learned District Judge, preferred to follow the ruling of the Calcutta High Court and held that the application for substitution had rightly been made to the Execution Court at Gujranwala and that in any case the irregularity was covered by s. 99 of the C P. C. On the second question also the learned District Judge adopted the view expressed in *Bipin Behari Mittar* v. *Bibi Zohra* (5), and held that, though the name of the son of Fazal Hussain, judgment-debtor was incorrectly given the application dated the 19th of April 1920 must be treated as a step-in-aid of execution according to law. The appeal was allowed, the application for execution was held to be within time and the case was remanded with the direction that the execution of the decree should proceed according to law.

Against this order the present appeal has been preferred and both the contentions raised in the Courts below have been put forward before us by Mr. Shuja-ud-din the learned Counsel for the judgment-debtor. We have no hesitation in holding that the view taken by the Calcutta High Court being more consonant with justice is correct, and, following that ruling, we hold that the application for substitution made in 1920, cannot be treated as being wholly ineffectual. We are also in accord with the view expressed by the Judges of the Calcutta High Court in *Bipin Behari Mittar* v. *Bibi Zohra* (5) and we hold that the application of the 19th of April 1920 was a step-in-aid of execution according to law, and the present application not barred by time.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1895) 17 All. 431=1895 A. W. N. 74.
(2) (1897) 19 All. 337=1897 A. W. N. 75.
(3) (1905) 28 Mad. 466=15 M. L. J. 116 (F.B.).
(4) (1895) 22 Cal. 558.
(5) (1908) 35 Cal. 1047.

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* A. I. R. 1926 Lahore 35

JAI LAL, J.

Harbhagwan and others —Plaintiffs—Appellants

v.

Taja —Defendant—Respondent.

Second Appeal No. 2534 of 1924, decided on 29th April 1925, from a decree of the Dist. J., Shahpur at Sargodha, dated 8th June 1924.

***Civil P. C., Or. XXI, r. 35—Symbolical possession given though actual possession should have been given by Court—Judgment-debtor is bound by the order and cannot claim adverse possession as against decree-holder thereafter—Principle of estoppel and res judicata applies—Civil P. C., s. 11—Evidence Act, s. 115.**

The delivery of symbolical possession to a decree-holder, even in cases in which actual possession should have been given, puts an end to the adverse possession of the judgment-debtor who is in actual possession of the property and effectually vests the property in suit in the decree-holder so as to give him a fresh cause of action for recovery of actual possession from the judgment-debtor. The operation of this rule is restricted to judgment-debtors. Symbolical possession wrongly given to a decree-holder does not give him a fresh starting point against persons who are not bound by the decree. A person who is a party to certain legal proceedings is not entitled to question the legality of the procedure adopted in such proceedings, except in the manner authorised by law and that is by appeal to a higher Tribunal, but if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and, therefore, to be bound by it. The general principle of estoppel similar to *res judicata* will apply to a case like this. [P. 37, C. 2.]

Jai Gopal Sethi—for Appellants.

C. L. Gulati—for Respondent.

Judgment.—On the 20th July 1891, one Lehna mortgaged the land in suit to the plaintiffs who instituted a suit for its possession under the mortgage on the 1st August 1908, against one Bahlak and Jowaya, son of Lehna. The suit was decreed *ex parte* against Bahlak on the 7th of October, 1908. Another suit was instituted by the plaintiffs against Bahlak and his son Taja for possession on the 30th of July 1913. This suit was decreed on the 17th of October 1914. The plaintiffs executed this last decree and possession was delivered to them on the 15th of November 1915. It appears that actual possession was not given but only symbolical possession was given to the decree-holders in the absence of the judgment-debtors and a report of such possession having been given was duly made to the Executing Court. It has been found that the judgment-debtors continued to cultivate and enjoy the land in suit as before.

On the 22nd March 1920, the plaintiffs instituted the suit out of which this appeal has arisen against Taja, son of Bahlak. It was contested by the defendant principally on the ground of limitation. It was alleged that the plaintiff never obtained actual physical possession of the land in suit under his decree and that, therefore, the defendant continued in adverse possession for more than 12 years prior to the institution of the suit. Therefore, it was pleaded, the plaintiff had lost his interest in the land. Other grounds also were raised in defence by the defendant but they do not concern the present appeal, as the only point, on which the plaintiff's suit has been dismissed by the learned District Judge, is that of limitation and adverse possession.

It was admitted by the Counsel for the respondent that, if actual physical possession had been given to the plaintiffs in execution of the decree of the 17th October 1914, no question of the present suit being barred by limitation would arise. But it was urged that, merely symbolical possession having been given to the decree-holder and the defendant having remained in actual cultivating possession of the land, the adverse possession by the defendant had not been interrupted by any process of the Court and, therefore, the plaintiffs' suit was barred by limitation. In support of his contention the learned Counsel relied upon *Mahadev Sakharam* v. *Janu Namji* (1), *Shridhar Madhavrao* v. *Ganpati Punja* (2), and *Lakshman* v. *Moru* (3). These authorities no doubt support the contention of the learned Counsel for the defendant-respondent but I note that in the case of *Radha Krishna Chanderji* v. *Ram Bahadur* (4), their Lordships of the Privy Council seem to approve the contrary view taken by the Calcutta High Court in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (5), in which it was held that symbolical possession availed to dispossess the defendants sufficiently because they were parties to the proceedings in which it was ordered and given. This view of the Calcutta High Court was affirmed in *Runjit Singh* v. *Banwari Lal Sahu* (6), and also in *Radha Krishna Chanderji* v. *Ram Bahadur* (4). A similar view was taken by the Patna High Court in *Udai Nath Sahi* v. *Sunderbans Koer* (7), and also by this Court in *Jauhri Lal* v. *Pewan* (8). The Allahabad High Court is of the same opi-

(1) (1912) 36 Bom. 373=14 I. C. 447=14 Bom. L. R. 115.

(2) (1919) 43 Bom. 559=51 I. C. 72=21 Bom. L. R 357.

(3) (1892) 16 Bom. 722.

(4) (1918) 16 A.L J. 33=4 P. L. W. 9=20 Bom. L. R. 502=23 M.L.T. 26=34 M.L.J. 97=7 L.W. 149=27 C.L.J. 191=1918 M.W.N. 163=43 I. C. 268=22 C.W.N. 330 (P.C.).

(5) (1880) 5 Cal. 584=5 C.L.R. 548 (F.B.).

(6) (1884) 10 Cal. 993.

(7) (1923) Pat. 76=24 Cr. L. J. 279=3 P. L. T. 628.

(8) (1920) 2 L. L. J. 563=68 I. C. 182.

nion —*vide Jagan Nath* v. *Milap Chand* (9), and the same is the view of the Madras High Court. It would thus be observed that with the exception of the Bombay High Court practically all the other High Courts are agreed in holding that symbolical possession given in execution of a decree to a decree-holder, even if the judgment-debtor is in actual possession of the property, is sufficient to put a stop to the adverse possession of the judgment-debtor and gives the decree-holder a fresh starting point for a suit to obtain actual possession of the property. Or. XXI, r. 35, lays down that where a decree is for the delivery of any immoveable property in actual possession of the judgment-debtor, the possession shall be given by removing any person bound by the decree who refuses to vacate the property. In other words, actul possession of the property has to be given to the decree-holder by ejectment of the judgment-debtor. Or. XXI, r. 36, provides that where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the possession shall be given by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, the substance of the decree in regard to the property. This is called the delivery of symbolical possession to the decree-holder as opposed to actual possession. The possession delivered in his case was admittedly symbolical but it was given by an officer of the Court under a warrant issued by the Court.

The *ratio decidendi* in the judgments referred to above which support the contention of the appellant, is that symbolical possession given in circumstances in which actual possession ought to have been delivered is not a nullity. The delivery of such possession even erroneously amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned. The possession in this case was obtained through the Court and by process of law and the judgment-debtor must be deemed to be a party to and present at the proceedings in which it was taken. In the eye of the law, therefore, the delivery of symbolical possession to a decree-holder, even in cases in which actual possession should have been given, puts an end to the adverse possession of the judgment-debtor and effectually vests the property in suit in the decree-holder so as to give him a fresh cause of action for recovery of actual possession from the judgment-debtor. The operation of this rule is restricted to the judgment-debtors. Symbolical possession wrongly given to a decree-holder does not give him a fresh starting point against persons who are not bound by the decree. It is obvious that a person, who is a party to certain legal proceedings, is not entitled to question the legality of the procedure adopted in such proceedings, except in the manner authorised by law and that is by appeal to a higher Tribunal, but if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and, therefore, to be bound by it. The general principle of estoppel similar to *res judicata* will apply to a case like this.

In my opinion, therefore, the decree of the learned District Judge dismissing the plaintiffs' suit cannot be sustained. The plaintiffs' suit was not barred by limitation and the defendant had not been in adverse possession for more than 12 years before the institution of the suit. I accept the appeal, reverse the decree of the learned District Judge and restore that of the Trial Court. The plaintiffs will have their costs throughcut against the defendant.

Appeal accepted.

(9) (1906) 28 All. 722=3 A. L. J. 504=1906 A. W. N. 213.

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* A. I. R. 1926 Lahore 37

ABDUL RAOOF AND FFORDE, JJ.

Gurditta Mal and others—Plaintiffs—Appellants

v.

Muhammad Khan and others—Defendants—Respondents.

First Appeal No. 307 of 1921, decided on 22nd April 1925, from the decree of the Senior Sub-J., Shahpur at Sargodha, dated 3rd November 1920.

(a) *Practice—Division Bench—Order of, cannot be objected to before another Division Bench.*

An appellant obtaining an adjournment from a Division Bench of the High Court to enable him to apply for an order to set aside the abatement of his appeal cannot question the correctness of that order when his application is laid before another Division Bench. [P. 38, C. 2.]

* (b) *Civil P. C., Or. XXII, r. 4—Legal representatives of deceased respondent already on record—Application under r. 4 (1) must still be made.*

The mere fact that the alleged legal representatives of a deceased respondent were already parties to the appeal does not relieve the appellants from the necessity of making an application under Or. XXII, r. 4 (1). 1925 Patna 123 Foll ; 11 P. L. R. 1921; 24 O. C 374 ; 50 P. R. 1902 and 1925 Rang. 95 Not foll. [P. 38, C. 2.]

Nanak Chand and *C. L. Mathur*—for Appellants.

Ram Chand Manchanda and *Nanwa Mal*—for Respondents.

Judgment.—This was a suit for a declaration that defendants Nos. 5-17 had no share in the *shamilat* land and that they were merely *qabza maliks* having purchased lands in certain *khatas* mentioned in the plaint without any share in the *shamilat* land measuring 10,523 *kanals*, *khewat* No. 177. The suit was dismissed. Thereupon the present appeal was preferred by the plaintiffs. The defendants were made respondents.

The appeal came up for hearing before a Division Bench constituted by Mr. Justice Harrison and Mr. Justice Campbell on the 7th February 1925 when a preliminary objection was raised to the effect that inasmuch as respondent No. 28 Muhammad Akram and respondent No. 16 *Mt.* Jalal Bibi had died and their legal representatives had not been brought on the record within the period of limitation, the appeal had abated. The learned Judges made the following order :—It is shown by the affidavit of Muhammad Khan, which is not contested, that this appeal has abated against *Mt.* Jalal Bibi and Muhammad Akram, the former being shown to have died in 1922, Mr. Nanak Chand asks for an adjournment to enable him to apply for an order setting aside the abatement. Fresh date to be given *i. e*, the 3rd March conditional on payment of Rs. 50 costs by the appellant to respondents."

Mr. Nanak Chand, Counsel for the appellants, filed a petition on the 2nd of March 1925, by which instead of applying under Or. XXII, r. 4, C. P. C., for the setting aside of the abatement, he contested the correctness of the order of the Division Bench dated the 17th February 1925 on the ground that no abatement had taken place at all inasmuch as the legal representatives of the deceased respondents were already on the record and that it was not necessary to make a formal application for the substitution of their names on the record in their character of the legal representatives of the deceased. When the appeal came on for hearing before us on the 17th March 1925 this application was placed before us and the following points were urged by Mr. Nanak Chand :—

(1) that the order of the 17th February 1925 was wrong.

(2) that, inasmuch as the right of appeal had survived against the surviving defendants-respondents alone it was not necessary to make an application under Or. XXII, r. 4, C. P. C.

(3) that in any case the appeal must be held to have abated against the deceased respondents alone and that against the remaining respondents it could go on.

As regards the first point, we are clearly of opinion that it is not open to the appellants to question the correctness of the order passed by another Division Bench.

As regards the second point urged, in our opinion, the right of appeal had not survived against the surviving respondents alone but it had survived against the surviving respondents and the legal representatives of the deceased respondents. The mere fact that the alleged legal representatives were already parties to the appeal did not relieve the appellants from the necessity of making an application under Or. XXII, r. 4 (1), C. P. C. Cl. (2) of r. 4 provides that "any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant." This clearly indicates that the legal representative of a deceased defendant will have a right to make a defence appropriate to his character as legal representative only when he is substituted as such. Supposing no application is made to substitute as the legal representative of a deceased respondent the name of the legal representative who happens to be already on the record how is he to know that it has become necessary for him to file an appropriate defence ? It is quite possible that he may already be a party to the suit and yet may not know of the death of a defendant whose legal representative he may be. How will he then file an appropriate defence ? Our view is supported by a decision of the Patna High Court in *Lilo Sonar* v. *Jhagru Sahu* (1). A contrary view was expressed by one of us in *Kartar Singh* v. *Lal Singh* (2), but the question was not fully consider-

(1) (1925) Pat. 123=3 Pat. 853=6 P. L. T. 313=3 Pat. L. R. 97.

(2) (1921) 11 P. L. R. 1931=59 I. C. 238=9 P. W. R. 1921.

ed and no reasons were assigned for the view expressed. Similarly, a contrary view taken by the Oudh Judicial Commissioner's Court in *Hafiz-un-nissa* v. *Jawahir Singh* (3) is not supported by any reasoning. The same remarks apply to the case of *Haidar Khan* v. *Jahn Khan* (4) and *Maung Po* v. *Ma Shwe Ma* (5) was decided upon special facts, and moreover no reasons were assigned for the contrary view taken in that case also.

The next question, which we have to decide is whether the whole appeal has abated or not. It is clear that defendants Nos. 5—17 were joint owners and that the cause of action against them was a joint one. According to the test laid down in various cases decided in this Court what we have to see is whether the suit could proceed in the absence of the deceased defendants-respondents. It is obvious that it could not, *vide Sardari Lal* v. *Ram Lal* (6) and *Jamna* v. *Sarjit* (7). We must, therefore, hold that the whole appeal has abated. The respondents are entitled to their costs.

Appeal abated.

(3) (1921) 24 O. C. 374= 66 I. C. 24.
(4) (1902) 65 P. L. R. 1902=50 P. R. 1902.
(5) 1925 Rang. 95=2 Rang. 445.
(6) (1920) 1 Lah. 225=1 L. L. J. 225.
(7) (1919) 67 P. R. 1919.

* A. I. R. 1926 Lahore 39

SCOTT-SMITH, J.

Padmun and others—Plaintiffs—Appellants.

v.

Achhar and others—Defendants—Respondents.

Second Appeal No. 2284 of 1923, decided on 19th February 1924, from a decree of the Dist. J., Hoshiarpur, dated 1st June 1923.

* *T. P. Act, S. 6—Sale of reversionary interest of Hindu reversioner is transferable in the Punjab—Sp. Rel. Act, S. 18.*

As the Transfer of Property Act does not apply to the Punjab, the sale of *spes successionis* of a Hindu reversioner is transferable and under S. 18 of the Specific Relief Act a sale of reversionary right of succession, though at the time of sale it does not effect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. 13 P. R. 1899 Foll. 1923 P. C. 189 Not Foll.

Mehr Chand Mahajan—for Appellants.
Fakir Chand—for Respondents.

Judgment.—In the suit out of which the present second appeal arises plaintiffs sued for a declaration that they were entitled to one-half of the estate left by *Mt.* Rajji and to half of the offerings made to a certain goddess. The claim was based upon an agreement dated the 5th of June 1896 alleged to have been executed by the defendants or their predecessors-in-interest in which the executants agreed *inter alia* to make over to the plaintiffs' predecessors any property which might in future come to them by way of inheritance. The First Court held that the agreement was admissible in evidence and decreed the suit. The learned District Judge on appeal held that the agreement was not admissible in evidence for want of registration because it was clear that property worth Rs. 100 or more was alienated thereby. He was however, of opinion that the agreement was tantamount to a transfer of future rights of inheritance not only of the executants but of their heirs and that such a transfer was void according to law having regard to S. 6 of the Transfer of Property Act and *Tota* v. *Abdulla Khan* (1). He, therefore, held that the agreement was void in so far as it purported to transfer the future rights of inheritance and dismissed the plaintiffs' suit.

Counsel for the appellants contends that though the Full Bench in *Tota* v. *Abdulla Khan* (1) held that a reversioner cannot transfer his right of succession it was subsequently held in *Malik Ala Bakhsh* v. *Ghulam* (2) that under S. 18 of the Specific Relief Act a sale of reversionary right of succession, though at the time of sale it does not effect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession. He points out that *Mt.* Rajji's estate has now fallen into possession and that, therefore, having regard to this authority the agreement should be enforced. Counsel for the respondents, on the other hand, cite *Sri Jagannada Raju Garu* v. *Sri Rajah Prasada Rao* (3) wherein it was held that contracts for sale of expectancies are void in India under the provisions of S. 6 of the Transfer of Property Act and S. 23 of the Indian Contract Act, and the suit for the specific performance of such a contract,

(1) (1897) 66 P. R. 1897 (F. B.)
(2) (1899) 13 P. R. 1899.
(3) (1915) 39 Mad. 554=28 M. L. J. 650=17 M. L. T. 419=1915 M. W. N. 626.

instituted after the expectancy fell into possession is not maintainable. The *ratio decidendi* of that decision was that the Statute Law of India forbids transfer of expectancies, and it would be futile to forbid such transfer, if contracts to transfer them are to be enforced as soon as the estate falls into possession. This decision was cited with approval by their Lordships of the Privy Council in the case reported as *Ananda Mohan Roy* v. *Gour Mohan Mullick* (4) wherein it was held that a contract by a Hindu to sell immoveable property to which he is the then nearest reversionary heir-expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him, is void. The Transfer of Property Act, however, is not in force in the Punjab and, therefore, there is no Statute Law in the Punjab which forbids the transfer of expectancies. In England it is settled law that in the case of such expectancies equity will enforce a contract to convey the estate when it fell in ; and it is pointed out in *Sri Jagannada Raju Garu* v. *Sri Rajah Prasada Rao* (3) that a similar rule has been applied in India in cases which were not governed by the Transfer of Property Act. As this Act is not in force in the Punjab the case is not governed thereby and *Malik Ala Bakhsh* v. *Ghulam* (2) is clear authority in support of the appellants' Counsel's argument that the agreement in question gave rise to a right which the Court should enforce when the inheritance falls into possession. I, therefore, do not think, having regard to the fact that the Transfer of the Property Act is not in force in the Punjab, that I should follow the decision of the Privy Council reported as *Ananda Mohan Roy* v. *Gour Mohan Mullick* (4) but that I should follow *Malik Ala Bakhsh* v. *Ghulam* (2) which is a decision of a Division Bench. I, therefore, hold that the agreement relied upon by the plaintiff is not void in so far as it purports to transfer future rights of inheritance and that the plaintiffs' case cannot be dismissed on that ground alone.

The agreement shows that it was executed on behalf of Achhar and Situ who were at the time minors and by Nihala, father of the other defendants. I also note that the defendants in the Trial Court did not admit the execution of the agreement. The following questions will, therefore, remain for decision :—

(1) Whether the agreement sued upon was executed by Nihala and on behalf of Achhar and Situ.

(2) Whether it is binding upon Achhar and Situ who were at the time minors.

(3) Whether it is binding on Nihala's heirs who are now defendants.

I accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for re-decision. It will be open to the lower Appellate Court, to remand the case to the Trial Court for such further enquiry as it may deem necessary. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

(4) 1928 P. C. 189=50 Cal. 929=50 I. A. 239=21 A. L. J. 718=4 P. L. T. 609=45 M. L. J. 617=25 Bom. L. R. 1269=1923 M. W. N. 803=4 L. R. P. C. 164=28 C. W. N. 713=40 C. L. J. 10=33 M. L. T. 365 (P. C.).

A. I. R. 1926 Lahore 40

SHADI LAL, C. J.

Firm of Hira Singh-Pritam Singh—Plaintiffs—Petitioners.

v.

The Secretary of State—Defendant—Respondent.

Civil Revision Petition No. 140 of 1925, decided on 16th July 1925, against the decree of the Small Cause Court Judge, Amritsar, dated 1st December 1924.

(a) *Railways Act, s. 76—Burden of proof.*

Burden of proving loss through wilful neglect of Railway Company is on the plaintiff in a case of risk-note form 'B'.

(b) *Railways Act, s. 72—Refusal to account for loss is not proof of loss by wilful misconduct of Company's servants.*

The refusal of the Railway Company to account for the loss of the goods cannot justify the Court in holding that the loss arose from the wilful misconduct of the Company's servants. *Smith* v. *G. W. Ry.* (1922) 1 A. C. 178 Foll.

Jai Gopal Sethi—for Petitioners.

Dalip Singh—for Respondent.

Judgment :—On the 4th February 1923, 168 tins of *ghi* were delivered at Kaithal to the defendant Railway Company for despatch to the plaintiffs at Amritsar, but when the goods reached the consignees at Amritsar, 10 tins of *ghi* were found missing. The question is whether the defendant Company are liable for the loss caused to the plaintiffs.

The contract between the parties is contained in what is called Risk Note Form B, and the goods were despatched at a reduced rate upon the condition that the Railway Company shall not be liable for loss etc., unless the loss is due "either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants". It is obviously the duty of the plaintiffs to prove that their case falls within the aforesaid exception, and this they have failed to do so. There is no direct evidence to show that the loss was due to the wilful neglect of the Railway Administration or to the theft by or to the wilful neglect of its servants, and the circumstances relied upon by plaintiffs are inconclusive.

As pointed out by the House of Lords in *Smith Limited* v. *Great Western Railway*(1), even the refusal of the Railway Company to account for the loss of the goods cannot justify the Court in holding that the loss arose from the wilful misconduct of the Company's servants.

The learned Judge of the Small Cause Court has, upon a consideration of all the relevant circumstances, come to the conclusion that the plaintiffs have failed to prove any wilful neglect or theft which would bring the case within the exception contained in the Risk Note and his finding cannot be impeached in revision.

The application for revision is accordingly dismissed with costs.

Petition dismissed.

(1) (1922) 1 A. C. 178=91 L. J. L. B. 423=38 T. L. R. 359=27 C. C. 247.

* A. I. R. 1926, Lahore 41.

MARTINEAU AND ZAFAR ALI, JJ.

Khem Chand—Plaintiff—Appellant

v.

Narain Das Sethi and others—Defendants—Respondents.

First Appeal No. 904 of 1922, decided on 19th June, 1925, from a decree of the Senior Sub-Judge, Multan, dated 6th February, 1922.

* (a) *Hindu Law—Debts—Speculative transactions.*

Debts incurred in speculative transactions cannot be said to be immoral debts. [P. 43 C. 1.]

* (b) *Hindu Law—Mortgage by father for paying debts in the ordinary course of business—Subsequent adjudication of his being insolvent—Co-parcenary property including minor's share is liable.*

Where mortgages were effected by a Hindu father of joint family property for debts in the ordinary course of business, who was subsequently adjudged an insolvent, the co-parcenary property is available for such debts including minor's interest even if it did not vest in the Receiver.

[P. 43 C. 1 & 2.]

[Case law reviewed.]

Gobind Ram Khanna and *Faqir Chand*—for Appellant.

D. C. Ralli for B. R. Puri and *J. L. Kapur*—for Respondents.

Judgment.—This first appeal arises out of a suit by a Hindu minor for a declaration to the effect that the mortgage of ancestral property effected by his father Chanun Ram was not binding on him.

The father and son are co-parceners of the property and under the Law of Mitakshara, to which they are subject, neither had any separate defined share in that property. The said Chanun Ram who figures as defendant No. 2 and one Sita Ram entered into partnership in 1890 and carried on business at Multan for a number of years under the name and style of 'Sita Ram-Chanun Ram.' Thau Ram (defendant) was the co-partner of his brother Sita Ram. The latter died in 1905 leaving three minor sons who became his representatives in the concern after his death. It appears that the firm suffered heavy losses in about 1909, and in order to pay its debts Chanun Ram mortgaged certain family properties to 'Beli Ram-Baldeo Das' for a sum of Rs. 20,000 on the 3rd of September, 1909. Thau Ram also on his own behalf and on behalf of his minor nephews mortgaged certain properties to 'Beli Ram-Baldeo Das' for the same debt of Rs. 20,000. In April 1911, the firm closed its business, and the Firm of Ralli Brothers brought a suit against Chanun Ram, Thau Ram and the sons of Sita Ram to recover the money due from them. The suit was decreed, but the Chief Court held on the strength of *Joykisto Cowar* v. *Nityanund Nundy* (1) and s. 247 of the Indian Contract Act that the liability of the sons of Sita Ram, who were minors, was confined to their shares in the assets of the firm. But Chanun Ram whose liability was personal was arrested in the execution of the decree of Ralli Brothers, and he then sought the protection of the Insolvency Court and was adjudged an insolvent on the 4th of November, 1912. The Court

(1) (1877) 3 Cal., 738=2 C. L. R. 440
(2) (1920) 158 P. R. 1919=54 I. C. 931.

then appointed a Receiver and the latter took possession of his property. Chanun Ram's minor son filed objection against this action of the Receiver, but the District Judge dismissed the same on the 20th of March, 1919. He then instituted the present suit, contending that the mortgage as well as the adjudication order was inoperative as against his interest in the joint family property because, the debts which necessitated the mortgage and later on compelled Chanun Ram to appear in the Insolvency Court had been incurred in *satta bazi*, *i. e.*, in transactions of a speculative character. The contesting defendants, *i.e.*, the Receiver and the mortgagees, pleaded *inter alia* that the order of the District Judge in the insolvency proceedings was final and a complete bar to the suit, and that the properties of Chanun Ram, whether ancestral or self acquired, vested in the Receiver. On these pleadings the Trial Court framed preliminary issues of which the only vital one was to the following effect:—Did the joint family property of the plaintiff and his father vest in the Receiver (?) and was the plaintiff not competent to maintain this suit to protect his interest therein?

This was decided against the plaintiff on the authority of *Harmukh Rai Munna Lal* v. *Radha Mohan* (2) and the suit was dismissed with costs.

The contention that the learned Counsel for the plaintiff-appellant most strenously urges is that the insolvency of the father could not have had the effect of vesting in the Receiver the interest of the son in the co-parcenary property, and in support of this proposition he relies on the ruling of their Lordships of the Privy Council in *Sat Narain* v. *Beheri Lal* (3). That was a suit for pre-emption by a Hindu whose father had been adjudged an insolvent under the Presidency Towns Insolvency Act of 1909, and the question that arose for determination in that case was "Does an order of adjudication against a father vest in the Official Assignee his son's interest in the joint family property." That question was answered in the affirmative by a Full Bench of the Lahore High Court but on appeal their Lordships of the Privy Council came to the contrary conclusion, and in doing so they examined and took into consideration all the case-law on the point, as well as Ss. 2, 17, 23 and 52 of the Presidency Towns Insolvency Act and s. 200 of the Civil P. C. of 1882, which was re-produced as s. 60 in the C. P. C. of 1908. Their Lordships made it clear that their answer to the question was based entirely on the interpretation of the said sections of the Insolvency Act, and that they did not intend to say one word which might have the effect of disturbing and raising doubts as to decisions under s. 266 of the C. P. C. of 1882, or under s. 60 of the present Code, and with regard to the cases of *Fakirchand Motichand* v *Motichand Hurruckchand* (4), *Rangayya Chetti* v. *Thanika Challa Mudali* (5), *Nunna Brahmayya Sethi* v. *Chidaraboyina Venkitaswamy* (6), their Lordships took care to observe that they were partnership cases and were not directly in point. In the present case, the question directly involved is that of the liability of the son for the debts incurred by the father in the course of the business which he carried on as the manager of his family, and the answer to it depends on the general well-recognized principles of Hindu Law, which would apply all the same even if the son's interest in the co-parcenary property was not affected by the adjudication order against the father. It may be conceded that, so far as the rights of a Hindu son in the co-parcenary property are concerned, the effect of the order of adjudication against his father under the Provincial Insolvency Act would not be different from that under the Presidency Towns Insolvency Act, because the provisions of both the Acts on this point are almost identical with this difference, that there is no provision in the Provincial Insolvency Act corresponding to s. 52 of the Presidency Towns Insolvency Act. And it may be noted here that the following remark made by their Lordships of the Privy Council appears to be of general applicability.—

"It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and, from the female members, their right to maintenance,

(2) (1920) 153 P. R. 1919=54 I. C. 931.
(3) A. I. R. 1925 P. C. 18=6 Lah. 1=52 I. A. 22=47 M. L. J. 857=1925 M. W. N. 1=23 A. L. J. 85=6 L. R. P. C. 1=21 M. L. W. 375=27 B. L. R. 135=29 C. W. N. 797 (P. C.).

(4) (1893) 7 Bom. 438.
(5) (1896) 19 Mad. 74.
(6) (1903) 26 Mad. 214.

and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors."

In the present case, however, as already stated the question is one of the liability of the son for the debts incurred by the father. The principles of Hindu Law on this point are embodied in ss. 198 and 200 of Mulla's Hindu Law, 4th Edition, pages 244 and 245 respectively. The relevant portions of these sections may be cited here :—

" 198. *Power of manager to contract debts for family.*—The manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business. Where such debts have been incurred, the other co-parceners, whether they be adults or minors, are liable, but to the extent only on their interest in the joint family property."

" 200. *Alienation by manager of co-parcenary property.*—The manager of a joint Hindu family has power to sell or mortgage, 'on reasonable commercial terms', joint family property so as to bind the interests of adult as well as minor co-parceners in the property, provided that (*a*)* * * * * * (*b*) in the case of minor members, the sale or mortgage is made for a legal necessity including debts incurred for family business, or for the benefit of family."

Now, there is no allegation in the plaint that the father incurred the debts for immoral purposes. All that is stated is that the debts were incurred in speculative transactions. But speculative transactions cannot be said to be immoral and there is no denying the fact that these were made in the ordinary course of the business of the firm on which the plaintiff's family was represented by his father. As held in *Amar Nath* v. *Rustomji* (7), the onus of proving that the debts were incurred for immoral purposes lay on the son, but he did not even assert that they were incurred for an immoral purpose. It was, therefore, not shown that the mortgage was not binding on the plaintiff, and the latter's interest in the co-parcenary property being liable for the debts incurred by the father, the Official Receiver is competent to proceed against all the co-parcenary property because he represents all the creditors and his position is that of a judgment-creditor who can attach and sell the co-parcenary property to recover the debts incurred by the father or manager of the family property in the ordinary course of the business of the family. That the co-parcenary property is available for such debts is well-recognised. The plaintiff is, therefore, not entitled to any relief even if his interest in the co-parcenary property did not vest in the Receiver.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(7) (1918) 15 P. R. 1918=24 P. W. R. 1918=43 I. C. 678=112 P. L. R. 1918.

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* A. I. R. 1926, Lahore 43.

MOTI SAGAR, J.

Kesho Das —Plaintiff—Appellant.

v.

Tulsi Dass—Defendant—Respondent.

Second Appeal No. 1672 of 1923, decided on 6th February, 1924, against a decree of the Addl. Judge, Lahore, dated 11th June, 1923.

*(a) *Contract Act*, s. 23—*Champerty—Agreement bona fide to assist claim believed to be just is legal but not one which is inequitable to the party financed or is for improper objects.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the proper y itself, would be assisted in this manner But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party financed ; or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor. but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them. 2 Cal. 233 Foll. Where the reward stipulated was out of all proportion to the actual expenses incurred, *held* that the agreement was unconscionable and therefore illegal as against public policy. [P. 44, C. 2, P. 45, C. 1.]

Badri Das—for Appellant.

Tek Chand and *Mehar Chand*—for Respondent.

Judgment.—The facts of the case out of which this second appeal has arisen are simple enough. There were two persons, Nihal Das and Kishen Das who were in possession of certain lands in the villages of Ram Thamma, Maman and Kiampur in the Chunian Tahsil of the Lahore District in which Sant Ram, defendant No. 2, who died during the pendency of the suit, claimed a half share. Sant Ram wanted to institute a suit for the recovery of his share in those lands but had no funds of his own to prosecute the suit. On the 9th of February, 1910 he entered into an agreement with the present plaintiff Kesho Das by which, in consideration of the latter agreeing to supply him with money for the expenses of the litigation, he undertook to give him a certain share in the lands. The main features of the agreement were that Kesho Das was to be responsible for all the expenses of the litigation, that he was also to be responsible for the costs of the opposite party if the suit failed, and that if the suit succeeded, he was to become owner of one-half of the land situated in the village Ram Thamma at once, and of the other half in that village and of land in the other villages, after the death of Sant Ram. It was further agreed that Sant Ram was not to compromise the case without the consent of Kesho Das. In July 1910 Sant Ram accordingly instituted a suit for possession of 350 *kanals*, 6 *marlas* of land situated in the three villages above named. This suit was eventually compromised on his taking a total area of 258 *kanals*, 10 *marlas* in the village Ram Thamma and on his giving up his claim in the other two villages. In June 1912, shortly after the compromise, Sant Ram mortgaged one-half of this holding to one Arjan Das for a sum of Rs. 1,000. Kesho Das thereupon brought two suits, one for possession of 129 *kanals*, 5 *marlas* to which he was immediately entitled under the agreement of February 1910 and the other for a declaration that the mortgage made in favour of Arjan Das was invalid and that it would be ineffectual after the death of Sant Ram so far as his (the plaintiff's) rights under the agreement were concerned. Both these suits were also compromised, the plaintiff having accepted immediate possession of 112 *kanals* out of the Ram Thamma land in lieu of 129 *kanals*, possession of which had been sued for by him, and his having agreed to become liable for the charge of Rs. 1,000 created in favour of the mortgagee, Arjan Das in respect of the other area of 129 *kanals* which was to come to him (Kesho Das) after the death of Sant Ram. In March 1920 Sant Ram executed a deed of gift in favour of Tulsi Das, the present respondent, in respect of this other area of 129 *kanals* stating therein that Tulsi Das was his *chela*, that he had been serving him as such for the last six or seven years and that the donor cancelled the agreement of February 1910 so far as Kesho Das's rights to succeed to him after his (Sant Ram's) death were concerned. The plaintiff Kesho Das thereupon brought the present suit in March 1921 for a declaration that the gift was invalid and that it would have no effect on his rights under the agreement after the death of the donor. Sant Ram died during the pendency of the suit and the plaintiff Kesho Das then made an application that Jagan Nath, his (Kesho Das's) son, be brought on the record as the legal representative of Sant Ram on the ground that the deceased had appointed him his *chela* some ten or twelve years before the institution of the suit. This application was rejected by the Trial Court after enquiry, it having been found that Jagan Nath was not the *chela* of the deceased. On the merits, both the Courts below dismissed the suit holding that the plaintiff had already been sufficiently recompensed by the award of 112 *kanals* of Ram Thamma land and that he was consequently not entitled to any further relief. Against this decision the plaintiff has now preferred a second appeal to this Court, and I have listened to lengthy arguments by Counsel on both sides. The law applicable to this case is very clearly laid down in the case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) where their Lordships of the Privy Council observe as follows:—

> A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, would be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be

(1) (1876-77) 2 Cal. 233=4 I. A. 23=8 Sar. 654 P. C.

made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

The latter part of this passage is clearly applicable to the present case, and the sole question for determination is whether the agreement was or was not so unfair and unconscionable in its inception as to be inequitable against the opposite party. It is argued that *prima facie* there was nothing unfair about the agreement and that the subsequent conduct of Sant Ram shows that he, at any rate, never thought that it was so. It is pointed out that the plaintiff Kesho Das undertook not only to assist the deceased Sant Ram with money for the expenses of his litigation, but also became responsible for the costs of the opposite party if the former was unsuccessful in his suit. It is further pointed out that the present defendant Tulsi Das was not in existence at the time the contract was entered into and that he is, therefore, not entitled to raise any objection as to the inequitable nature of the transaction. Next, very urgent stress is laid upon the fact that the agreement was re-affirmed by the deceased in 1912 when a suit for the cancellation of the mortgage effected by him was compromised and an undertaking given by the present plaintiff that he would also become responsible for the repayment of the money to the mortgagee. It is urged that all these circumstances indicate that the plaintiff was quite fair in his dealings and that there was an honest desire on his part to help the deceased. This may very probably be correct, but this is not the real point in the case. The plaintiff may have been quite fair in his dealings and the contract may not, therefore, be void as contrary to public policy. The question, however, is whether the reward which the plaintiff was to get under the contract was or was not so much out of all proportion as to be considered unconscionable and to disentitle him from claiming any further relief. It is admitted that the suit, which the deceased Sant Ram instituted, related to about 354 *kanals* of land in three different villages. The agreement with the plaintiff was that he would be entitled to get half of the land as soon as the suit was decreed and the rest after the death of the then plaintiff Sant Ram. The expenses of the litigation, even if the case had gone up to the Chief Court, could not have exceeded Rs. 1,000. In return the plaintiff was to get practically the whole of the land which was then in suit though, of course, possession of one-half was to be postponed till after the death of the plaintiff. It appears to me that the plaintiff must have represented to the deceased the likelihood and the necessity of an extensive litigation, a representation which was wholly unwarranted by the facts. As a matter of fact the proceedings in the suit were brief and simple and could in no circumstances have cost the plaintiff more than Rs. 500 or Rs. 600. The Court-fee required for the plaintiff was not much and the suit having been compromised, the fees paid to Counsel could not have been very heavy. In such circum-tances there can possibly be no doubt as to the unconscionable nature of the bargain and I concur with the learned Judge of the Court below that the plaintiff is not entitled to any further relief.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926, Lahore 45.

FFORDE, J.

Sohan Singh —Accused —Petitioner.

v.

Emperor —Respondent.

Criminal Revision No. 2121 of 1923, decided on 28th March, 1924, from the order of the Dist. Mag. Sheikhupura, dated 6th September, 1923.

(a) *Criminal P. C., s. 110—Six categories are provided by the section—Prosecution must charge and prove specific offence against the accused—Evidence of general ill-repute is not sufficient to base an order under the section.*

S. 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. When a person is sought to be proceeded against under this section it must be made clear as to which sub-section he is charged with. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that the accused habitually commits one of the crimes

referred to in sub-sections (*a*) to (*d*) inclusive, or that he habitually commits or attempts to commit or abets the commission of offences involving a breach of the peace (*e*) or is so desperate and dangerous as to render his being at large without security hazardous to the community (*f*). It must be specifically stated under which of these categories the accused's case is alleged to come The omission to do so is a serious hardship to the accused inasmuch as he receives no notice of the precise case which he has to meet. It is not enough to charge a person generally of having committed an offence under s 110, Criminal P.C. without specifically stating under which of the sub-sections the case is alleged to fall Moreover the evidence must prove the accused person to come within one or more of the descriptions set out in the section. General evidence of the accused's bad character and of his association with people of bad character does not bring his case within the provisions of s. 110. Evidence of general ill repute is not sufficient to base an order under s. 110, nor can the accused person be condemned upon suspicion.

[P. 46, C. 1 & 2.]

B. A. Cooper—for Petitioner.

Judgment.—The petitioner in this case has by an order of a Magistrate of the First Class been restricted to the limits of the village Ghazi Munara for a period of two years. The order purports to have been made under the combined provisions of s. 110, Criminal P. C., and the Restriction of Habitual Offenders Punjab Act, 1918.

An appeal from this order was brought to the District Magistrate who confirmed the order of the First Court.

The order of the District Magistrate is now before me upon a petition for revision under s. 439, of the Criminal P. C.

The main ground for revision relied upon by Counsel for the petitioner is that the District Magistrate "has committed a material irregularity in not deciding in which paragraph of s. 110 of the Criminal P. C., the case of the petitioner falls" and, further that the prosecution has failed to prove an offence under that section.

In my opinion the order of the District Magistrate is bad on both these grounds. S. 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. It seems fairly obvious upon general principles that when a person is sought to be proceeded against under this section it must be made clear as to which sub-section he is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that the accused habitually commits one of the crimes referred to in sub-ss. (*a*) to (*d*) inclusive, or that he habitually commits, or attempts to commit, or abets the commission of offences involving a breach of the peace [sub-s. (*e*), or is so desperate and dangerous as to render his being at large without security hazardous to the community [sub-s. (*f*)]. It must be specifically stated under which of these categories the accused's case is alleged to come. That has not been done in the present case, and the omission to do so is obviously a serious hardship to the accused person inasmuch as he receives no notice of the precise case which he has to meet. It is not enough, as in the present case, to charge a person generally of having committed an offence under s. 110, Criminal P. C., without specifically stating under which of the sub-sections the case is alleged to fall.

The evidence moreover must prove the accused person to come within one or more of the descriptions set out in the section, that is to say, he must be proved to be by habit a robber, house-breaker, thief or forger (*a*) and (*d*), or by habit a Receiver of stolen property knowing the same to have been stolen (*b*), or that he habitually protects or harbours thieves or is the agent of receiver of stolen property (*c*) and so forth. The evidence in the present case does not come anywhere near providing the necessary proof to justify a conviction under s. 110. In the words of the District Magistrate' "The evidence against the accused in the lower Court was that he was suspected in seven different cases from 1916-1922. The witnesses who depose to these various suspicions are 40. All these witnesses depose to the fact that the accused is a bad character and keeps company with other people of bad character." In other words the entire evidence against the accused is to the effect that he is suspected of having committed various offences, but there is no proof that he has ever been convicted of any offence. In addition to this there is general evidence of the accused's bad character and of his association with people of bad character. This does not bring the case within the provisions of s. 110. Evidence of general ill repute is not sufficient to base an order under s. 110 nor can the accused person be condemned upon suspi-

cion. The order, in my opinion, is clearly bad and should be quashed.

I accordingly accept the revision and set aside the order in question.

Order quashed.

A. I. R. 1926, Lahore 47 (1).

CAMPBELL, J.

Firm Bhogi Lal—Trikam Lal —Defendants—Petitioners.

v.

Firm Amar Nath—Lajpat Rai —Plaintiffs—Respondents.

Civil Revision No. 711 of 1924 decided on 20th February, 1925, from an order of the Dist. Judge, Amritsar, dated 13th October, 1924.

Civil P. C., s. 115—Erroneous decision of appellate Court as to first Court's having jurisdiction over a suit, cannot be revised.

An appellate judgment deciding (even erroneously) that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court. [P. 47, C. 1.]

Badri Das—for Petitioners.

Jai Gopal Sethi—for Respondents.

Judgment.—The weight of authority in the Punjab is in favour of the view that an appellate judgment deciding (even if erroneously) that the Court of first instance had jurisdiction to hear the suit, is not open to revision by the High Court, *vide Dewlat Ram* v. *Asa Ram* (1), *Arur Singh* v. *Bua Ditta* (2) and *Chhubu Mian* v *Har Charan Das* (3). I hold that on this preliminary objection the petition fails, and I dismiss it with costs.

Application dismissed.

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(1) (1886) 46 P. R. 1886.
(2) (1911) 4 P. R. 1911=45 P. L. R. 1911=26 P. W. R 1911.
(3) (1913) 119 P. R. 1912=101 P. L. R. 1913=48 P. W. R. 1913.

A. I. R. 1926, Lahore 47 (2).

FFORDE, J.

Mamrez and others —Accused -Appellants.

v.

Emperor —Respondent.

Criminal Appeal No. 118 of 1924, decided on 28th March, 1924, against an order of the Mag. F. C., Mianwali, dated 15th January, 1924.

(a) *Penal Code* ss. 71, 394, 397—*Consecutive sentences.*

Consecutive sentences in respect of convictions under ss 394 and 397 are illegal, if they are based on the same set of facts. [P. 47, C. 2.]

B. A. Cooper - for Appellants.

Bhajan Lal —for Respondent.

Judgment.—Having heard all that Counsel has to say on behalf of the appellants, and having examined the evidence, I am satisfied that the decision of the Court below as to the guilt of the appellants is correct.

In view, however, of the provisions of s. 71 of the Indian Penal Code I am not satisfied that the learned Magistrate was empowered to pass consecutive sentences in respect of convictions under ss. 394 and 397. Both convictions are based on the same set of facts. It seems to me that the case falls within the third clause to s. 71 of the Indian Penal Code which reads as follows :—

"Where several acts, of which one or more than one would, by itself or themselves, constitute an offence constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tried him could award for any of such offences."

As, in my opinion, the imposition of consecutive sentences in the present case is not legal, I accept the appeal to the extent of making the sentences to run concurrently. In other respects the appeal stands dismissed.

Appeal partly dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1926, Lahore 48.

SCOTT-SMITH AND ZAFAR ALI, JJ.

Mohar Singh —Accused—Appellant

v.

Emperor—Respondent.

Criminal Appeal No. 385 of 1924, decided on 25th March, 1925, from the order of the S. J., Gurdaspur, dated 24th March, 1924.

Penal Code s. 397—Section applies only to person actually causing grievous hurt.

The section only applies to the person who actually causes grievous hurt or is himself armed with a deadly weapon. 21 All. 263 Dist. 28 All 404 15 P. R. 1901 Cr.; and 16 P. R. 1901 Cr. Foll.

Des Raj Sawhney —for Respondent.

Judgment.—A dacoity was committed on the night between the 16th and 17th December, 1923, in the house of Lahori Mal at Barnala in the Gurdaspur District and a large number of ornaments of gold and silver were stolen. Grievous hurt was caused to two of the villagers by the dacoits, and simple hurt to others. There are said to have been 13 dacoits of whom 10 were jointly tried by the Sessions Judge of Gurdaspur. He convicted nine of them and acquitted one by name Mela. Gujar, one of the dacoits turned King's evidence whilst Billi and Ali Muhammad were said to be absconding at the time of the trial. Subsequently, Ali Muhammad was apprehended and tried separately and convicted, and there is a separate appeal by him before us which is disposed of by a separate judgment. The nine persons who have been convicted have filed separate appeals through the Jail Authorities. The judgment of the learned Sessions Judge is an extremely clear one. It gives in detail the statement of Gujar approver and describes the way in which a clue to the perpetrators of the dacoity was obtained. The evidence against the appellants is in the first place that of the approver. This has been corroborated as against each and every one of the appellants by either the finding of stolen property in their possession or by the fact that they gave information which led to the recovery of the stolen property from other persons to whom they had entrusted it. As regards Mehr Singh, appellant, it must, however, be remarked that he is said to have sold some stolen property to Inayat Ullah (P. W. No. 54) which is not produced. This consisted of a pair of gold *budkis* which Inayat Ullah melted down; the gold resulting from this operation has been produced. Mehr Singh was identified by Lahori Mal as one of the dacoits at an identification parade which was duly held in the presence of a Magistrate. We see no reason to doubt that this parade was properly held.

As regards the ornaments produced by or at the instance of the various appellants the evidence is that both of Police officers and of respectable gentlemen whose testimony we see no reason to reject. Mehnga and Tehla, appellants, are brothers, residents of the village Bhaini Bangar. Tehla not only stated that no ornaments were found from his possession but that he had no *kotha* in the village of Bhaini Bangar and that he lived elsewhere. The witnesses for the prosecution, however, stated that Tehla's *kotha* was shut up and searched in accordance with law. One of these witnesses was Mohamed Ali (P. W. No. 35) *Lambardar* of the village. No questions were put to the witness in cross-examination with a view of showing that it was not Tehla's house which was shut up, but some one else's. Moreover D. Ws. Nos. 1 and 3 clearly stated that Tehla had a *kotha* in the village, though he had only returned thither five or six days before the dacoity. The appellants have all denied the finding of stolen property in their possession or the production of stolen property by them or by other persons at their instance; but the evidence in proof of these facts is entirely reliable and overwhelming. In our opinion the evidence of the approver has been sufficiently corroborated as against each of the appellants and we maintain their convictions.

The learned Sessions Judge was of opinion that as some of the dacoits were armed with deadly weapons and as grievous hurt was caused by some of them, the least sentence that could be passed on any one of them, whether he actually caused grievous hurt or not, or whether he was armed with a deadly weapon or not, was seven years having regard to s. 397, Indian Penal Code. The Allahabad High Court in the case reported as *Queen-*

Empress v. *Mahabir Tewari* (1) held that the words "such offender" in the section include any person taking part in the dacoity. But subsequently in the same year in the case reported as *Queen-Empress* v. *Senta* (2) the same High Court laid down that the section applies only to those persons taking part in the dacoity who themselves use deadly weapons or cause grievous hurt. This view was followed in the case reported as *Emperor* v. *Nageshwar* (3) and it has also been followed by the Madras High Court. The Punjab Chief Court in the cases reported as *Chatar Singh* v. *Emperor* (4) and *Crown* v. *Mohana* (5) followed the earlier Allahabad ruling. In our opinion the section only applies to the person who actually caused grievous hurt or was himself armed with a deadly weapon. We, therefore, consider that it was open to the Court to award lesser sentences than seven years' rigorous imprisonment. The sentences awarded, however, are by no means excessive except perhaps in the case of Kaka who is, according to the record, a youth of only 20 years. Having regard to his age we think a lesser sentence will suffice and we accept his appeal and reduce his sentence to three years' rigorous imprisonment including two months' solitary confinement.

The appeals of the other appellants are dismissed.

Appeals dismissed.

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(1) (1899) 21 All. 263=1899 A. W. N. 76.
(2) (1899) 28 All. 404 note=1899 A. W. N. 186.
(3) (1906) 28 All. 404=1906 A. W. N. 61=3 Cr. L. J. 322.
(4) 15 P. R. 1901 Cr.
(5) 16 P. R. 1901 Cr.

A. I. R. 1926 Lahore 49

SHADI LAL, C. J.

Dhawa —Accused-Petitioner.

v.

Emperor—Respondent.

Criminal Revision No. 470 of 1924, decided on 16th May 1924, on a report by the Dist. Mag., Gurgaon, dated 13th March 1924.

(a) *Penal Code*, s. 273—*Selling milk adulterated with water is not an offence.*

Milk is not rendered noxious by being mixed with water. The mixture of milk and water is often used as drink in the summer. So a person who exposes for sale milk adulterated with water is not guilty of an offence under s. 273.

[P. 50, C. 1.]

Facts.—The accused keeps a confectioner's shop at Hodal. On 31st January 1923 at about 9 P. M. he was found offering for sale milk with water of greater quantity than the milk itself, when Dr. Harbhagwan Das visited his shop at the said hour at night. The Doctor submitted a report for the prosecution of the accused and the Sub-Divisional Officer, Palwal, sent the case to a Magistrate, Second Class, for trial under s. 273, Indian Penal Code, who convicted the accused and sentenced him to pay a fine of Rs. 5. The accused subsequently lodged an appeal in the Court of the Sub-Divisional Officer, Palwal, with appellate powers who dismissed it on 14th December 1923. The accused has now filed an application for revision of the Sub-Divisional Officer's order in the Court of the District Magistrate. The facts of the other two connected cases are also similar to it and the accused in those cases have similarly applied for revision of the Sub-Divisional Officer's orders.

Grounds.—The questions for decision are (1) Whether the Sub-Divisional Officer in his capacity as an Appellate Court is subordinate to the District Magistrate for purposes of s. 435 etc., (2) Whether a conviction under s. 273, Indian Penal Code can be upheld when all that is proved is that milk exposed for sale in a shop was more than half water.

As for (1) there appears to be no provision of law preventing the District Magistrate examining a record of the Sub-Divisional Officer when acting as an Appellate Court.

As for (2) there is nothing noxious about the water itself, and presumably milk and water mixed in any proportions whatever cannot be noxious either. The result might not be very nourishing for healthy persons and, if sold as pure milk, such a mixture might involve the seller in a charge of cheating but not in a charge under s. 273 Indian Penal Code There is no evidence that any one was cheated by the sale of this mixture of milk and water. This applies to cases Nos. 12 and 14 of 1924.

The 3 cases are, therefore, forwarded to the High Court for orders under s. 438, Criminal P. C.

Order.—The facts found by the Magistrate do not constitute an offence under s. 273, Indian Penal Code. It is true that the accused exposed for sale milk adulterated with water, but there is no evidence on the record that the mixture was noxious or injurious as food or drink. Milk is not rendered noxious by being mixed with water, indeed the mixture of milk and water is often used as drink in the summer.

I accordingly accept the application for revision and setting aside the conviction and sentence, direct that the fine, if realised, be refunded to the petitioner.

Application accepted.

A. I. R. 1926 Lahore 50

FFORDE, J.

Sawan Singh and others—Accused—Petitioners.

v.

Emperor through Hazara Singh—Complainant—Respondent.

Criminal Revision No. 225 of 1925, decided on 17th April, 1925, from an order of the S. J., Lahore, dated 17th November, 1924.

(a) *Criminal P. C., s. 437—Revision Court should not direct further inquiry after discharge unless it is perverse or foolish or based on incomplete record of evidence.*

Speaking generally, further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish, or is based upon the record of evidence which is obviously incomplete. It is not sufficient for a Court to merely say that the Trial Judge has not gone fully into the case and to declare that a further enquiry is necessary. Before ordering a further enquiry the Court of Revision should state in what respect the Trial Judge's conclusions are either foolish or perverse or otherwise unsatisfactory, and if the case is sent back on the ground that the decision of the Trial Court has been arrived at upon an incomplete record this should be stated. 10 P R 1911 Foll. [P. 51, C. 1 & 2.]

(b) *Criminal P. C., s. 70—Summons effected on mother of accused is not valid.*

Issue of summons effected by serving upon the mother of the accused is not warranted by the Code. [P. 50, C. 2.]

Parkash Chand—for Petitioners.

Harbhajan Das—for Respondent.

Judgment.—*Musammat* Lachho, her husband Sawan Singh, her father Narain Singh and her mother *Musammat* Jindo, were tried by Mr Chanan Mal, a Magistrate of the First Class, invested with s. 30 powers, upon a complaint framed under the provisions of s. 494, Indian Penal Code, *i. e.*, for bigamy. The complaint is as follows :—

"Some four years ago, I, the complainant, was married to *Musammat* Lachho, who lived with me for some time. In the month of *Katak*, *Sambat* 1979, accused Nos. 2 and 3, who are the parents of *Musammat* Lachho took her away from my house with a dishonest motive. *Musammat* Lachho had ornaments worth Rs 800 with her at the time when she left me. In *Chet* of year 1978 accused Nos. 2 and 3 married *Musammat* Lachho with accused No. 1 on receiving a consideration of Rs. 1,200....."

The learned Magistrate took the evidence of all the witnesses for the prosecution amounting in all to eleven. These witnesses were fully examined and cross-examined, and the accused were then called upon to make their statements which they did. Having heard the whole of this evidence, the learned Magistrate came to the conclusion that a *prima facie* case had not been established against the accused and discharged them.

The complainant Hazara Singh, who claims to be the legal husband of *Musammat* Lachho, applied to the Sessions Judge in revision under the provisions of s. 436, Criminal P.C., praying that the order of the Magistrate be set aside and the case be sent back for further enquiry. On that application the learned Sessions Judge made an order that the record should be returned to the District Magistrate with a request that he should direct some subordinate Magistrate to make further enquiry into the complaint. The accused persons have now applied to this Court on its revisional side praying that the order of the Sessions Judge be set aside as being against law.

Mr. Parkash Chand, who appears for all the four petitioners, contends that, so far as *Musammat* Lachho is concerned, the order of the Sessions Judge has an additional defect inasmuch as the petitioner was not legally served with notice of the proceedings in the Sessions Court. This objection appears to me well-founded. The notice was effected by serving *Musammat* Lachho's mother and such service is not warranted under the Criminal P. C.

Apart, however, from this defect in the case of one of the petitioners, I do not consider that the judgment of the Sessions Judge warrants the order which he has passed for further enquiry. In *Emperor* v. *Kiru* (1), Kensigton, J., who delivered the judgment of the Full Bench, expressed himself as follows :—

"No invariable rule can be laid down, but speaking generally, further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish, or was based upon the record of evidence which was obviously incomplete."

This rule was applied by Abdul Raoof, J., in *Nabi Bakhsh* v. *Emperor* (2).

The learned Sessions Judge has not found the judgment of the Trial Court to be perverse or foolish. The Trial Judge, who had the advantage of having the witnesses before him and of being in a position to judge of their veracity by their demeanour in the witness-box, came to the conclusion that the prosecution evidence was manufactured. He refers in his judgment to a discrepancy between the evidence of Sant Ram (P. W. No. 11) and the other witnesses as to the date on which the alleged first marriage was held. The learned Sessions Judge is inclined to disagree with the Trial Court as to whether such a discrepancy is material, as the Trial Court has held it to be. There is nothing either perverse or foolish in the conclusion which the Trial Court came to upon this piece of evidence. The learned Sessions Judge has not referred to any particular piece of evidence, other than that which I have just mentioned, in respect of which the Trial Judge can be said to have drawn a foolish inference. It is not sufficient for a Court to merely say that the Trial Judge has not gone fully into the case, and to declare that a further enquiry is necessary. Before ordering a further enquiry the Court of Revision should state in what respect the Trial Judge's conclusions are either foolish or perverse or otherwise unsatisfactory, and if the case is sent back on the ground that the decision of the Trial Court has been arrived at upon an incomplete record this should be stated. In the case under consideration the learned Sessions Judge does not allege that the Magistrate arrived at his decision without dealing with all the evidence which was placed before him. He only says that in his opinion the lower Magistrate did not go, so far as his (the Magistrate's) judgment shows, fully into the case. But the Magistrate does not appear to have based his judgment upon an incomplete record of evidence, nor does the learned Sessions Judge allege that he has done so.

Acting upon the principle laid down in *Emperor* v. *Kiru* (1) I must set aside the order of the Sessions Judge directing further enquiry.

Order set aside.

(1) (1911) 10 P. R. 1911 Cr =24 P.R. 1911 Cr.= 19 Cr L J. 364 =11 I. C. 132=205 P. L. R. 1911.
(2) (1920) 1 Lah. 216=109 P. L. R. 1920=8 P. W. R. 1820 *or.*=56 I. C. 777=21 Cr. L. J. 521.

A. I. R. 1926 Lahore 51

ZAFAR ALI, J.

Muhammad Sadiq and others—Accused-Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 250 of 1925, decided on 30th April 1925, against an order of the Magistrate, F. C. Kasur, dated 19th February 1925.

(a) *Criminal P. C. s.* 342—*Omission to examine accused at the close of prosecution evidence vitiates trial.*

In a trial for an attempt to commit murder the Magistrate examined the accused after taking some evidence and then framed a charge against them. After doing so he recalled the witnesses, that had already been examined, to enable the accused to cross-examine them and then examined the remaining two prosecution witnesses. After taking the evidence of these two witnesses he did not question the accused as he was required to do by s. 342. [P. 51, C. 2, P. 52, C. 1.]

Held that the omission vitiated the trial.

(b) *Evidence Act, s.* 159—*Statement of injuries, copy of, can be used to refresh memory but not as substantive evidence.*

A copy of the statement of injuries recorded in the register of medico-legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be treated as evidence. 9 Cal. 455 Ref. [P. 52, C. 1.]

Brij Lal—for Appellants.

Order.—The learned Counsel for the appellants who have been convicted by a s. 30, Magistrate of an attempt to commit murder contends that the trial was vitiated by the Magistrate's omission to examine the accused at the close of the prosecution evidence and before calling on them for their defence. The Magistrate examined the accused after taking some evidence and then framed a charge against them. After doing so he re-called the witnesses, that had already been examined, to enable the accused

to cross-examine them and then examined the remaining two prosecution witnesses. After taking the evidence of these two witnesses he did not question the accused as he was required to do by s. 342 of the Criminal P. C. to give them an opportunity of explaining the evidence against them given by these two witnesses. Thus the Magistrate failed to do what he was bound to do under s. 342 of the Criminal P. C. and the learned Counsel for the appellants contends that the accused were seriously prejudiced by this omission. The rulings of almost all the High Courts are that failure to so examine an accused is not mere irregularity but an illegality which vitiates the trial. The learned Counsel further points out that the Magistrate did not examine the medical witness properly inasmuch as he allowed him to put in a copy of the statement of injuries recorded in his register of medico-legal cases and accepted it as evidence instead of examining him in respect of those injuries. The medical witness could use the entries made by him in the register for the purpose of refreshing his memory but a copy of those entries could not be treated as evidence. In *Roghuni Singh* v. *Empress* (1), it was held that a *post mortem* report was not evidence and that a medical man in giving evidence may refresh his memory by referring to that report but that the report itself cannot be treated as evidence and that no facts could be taken therefrom. In the present case also the Magistrate ought to have examined the witness instead of admitting his record of the description of the injuries as evidence.

I, therefore, set aside the convictions and sentences and order re-trial.

One of the accused Ahmad Din is only 15 years of age and another Wazir is aged twenty only. Both these need not be detained in custody and may be released on furnishing bail in the amount of Rs. 1,000 each with one surety. The rest of the appellants will be transferred to the judicial lock-up.

The case should now go to some other s. 30 Magistrate for trial.

Conviction set aside.

(1) (1883) 9 Cal. 455=11 C. L. R. 569.

A. I. R. 1926 Lahore 52.

MOTI SAGAR, J.

Ahmad Gul through Mt. *Adal Bibi*—Plaintiff—Appellant.

v.

Rahim Khan and others—Defendants—Respondents.

Second Appeal No. 2 of 1923, decided on 21st January 1924, from a decree of the Dt. J. Attock, at Campbellpur, dated 9th August, 1922.

Co-sharers - One Co-sharer building on common land without other's consent—Injury not irremediable by partition—Demolition of the building cannot be ordered.

The mere circumstance of a building erected on common land without the consent of the co-sharers and despite their protest even, is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected unless it could be shown that the erection of that building had actually caused such material and substantial injury as could not be remedied on a partition of joint land. [P. 53, C. 2.]

K. J. Rustomji—for Appellant.

Jai Gopal Sethi—for Respondents.

Judgment.—A return has now been received to the order of remand made on the 15th of May, 1923, and the report of the learned District Judge is that the eastern portion of the house shown towards the north of E F G in the plan on the record is old and that its demolition should not, therefore, be ordered. As to the rest, his finding is that it has been constructed after the institution of the suit, and the sole question for decision is whether in the absence of proof of special damage to the plaintiff a mandatory injunction should be issued directing the removal of the said building. It is admitted by Mr. Rustomji that his client has entirely failed to prove any special damage by the erection of this building, but his contention is that, in the case of joint property, when one of the co-owners builds over it without the consent of the other co-owners, the latter are entitled to have the building removed even if no material or substantial injury is established. Reliance has been placed in support of this contention on *Shadi* v. *Anup Singh* (1), *Ghayas-ud din* v. *Ghulam Abbas* (2), *Jadunath Lal* v. *Bachhu Lal* (3) and *Manji* v. *Ghulam Muhammad* (4). In my opinion none of these cases is in

(1) (1890) 12 All. 436=1890 A. W. N. 95 (F. B.).
(2) (1914) 2 I. C. 854.
(3) (1914) 50 P. W. R. 1914=25 I. C. 431=145 P. L. R. 1914.
(4) (1920) 1 Lah. 249=57 I. C. 207.

point and the facts are clearly distinguishable.

In *Shadi* v. *Anup Singh* (1) the defendant set up an adverse title to the land which was the subject-matter of dispute in that case and claimed it as his exclusive property. His case was that the land belonged to him and that he had consequently a right to exclude the other co-sharers from any participation in the enjoyment thereof. The plaintiff on the other hand contended that the defendant was ousting him, a co-sharer, from a portion of the common land by erecting certain buildings upon it and that he had no right to do so. It was held by the High Court that the defendant had no right to build and that the plaintiff was entitled to a perpetual injunction restraining him from building on the land as exclusive owner at any future time.

In *Ghayas-ud-din* v. *Ghulam Abbas* (2) also the facts were very similar to those reported as *Shadi* v. *Anup Singh* (1). A co-sharer in the village bought the house of a tenant in the same village at an auction-sale, and shortly before the institution of a suit he began to construct a *pakka* two storied building on the site of that house. The plaintiffs who were also co-sharers, sued for demolition of the new building and for injunction restraining the defendant from building on the site of the said house. The site was admittedly the common land of all the co-sharers. It was held that the other co-sharers could sue for demolition of the construction and for injunction restraining the defendant from building on the site. It will be observed that in this case also the defendant was setting up an exclusive title in the land by reason of purchase, and the case was, therefore, clearly governed by the rule laid down in the Full Bench ruling reported as *Shadi* v. *Anup Singh* (1).

In *Manji* v. *Ghulam Muhammad* (4) the dispute related to a piece of vacant site which had been in long occupation of certain co-sharers but subsequently transferred by sale to two other co-sharers shortly before the institution of the suit. The plaintiffs alleged that the plot in dispute was part of the common land and that the defendants who had taken exclusive possession under their deeds of sale, had illegally commenced to make constructions thereon. It was held that the plaintiffs were entitled to the injunction claimed even though material or substantial injury had not been established. In this case the plaintiffs' cause of action was the defendants' allegation of exclusive ownership under colour of the sale-deeds executed by two of the inhabitants of the village *abadi*. It was never contended that, even assuming that the land belonged to all the co-sharers in the village, the plaintiffs had no right to eject the defendants without proving special damage or injury.

The case reported as *Jadunath Lal* v. *Bachhu Lal* (3) was decided by a Single Judge and it is not at all clear from the short judgment delivered in that case what exactly the facts of the case were. I do not think that the rule laid down in that case can serve as an authority for the broad proposition that in every case where one co-sharer builds upon common land without the consent of the other co-sharers, even though the land may have been in his exclusive possession for a very long time, the others can have the building removed even in the absence of any appreciable injury.

In my opinion the present case is clearly governed by the rule laid down in the cases reported as *Hidayat Ali Khan* v. *Basit Ali Khan* (5) and *Majju* v. *Teja Singh* (6) where it has been held that "the mere circumstances of a building erected on common land without the consent of the co-sharers and despite their protest even, is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected, unless it could be shown that the erection of that building had actually caused such material and substantial injury as could not be remedied on a partition of the joint land."

The plaintiff has admittedly failed to show that any special injury has been occasioned to him by the erection of the building in question, and I am of opinion that in these circumstances he is certainly not entitled to the mandatory injunction prayed for.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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(5) (1892) 54 P. R. 1892.
(6) (1918) 29 P. R. 1918=114 P. W. R. 1918=44 I. C. 844=118 P. L. R. 1918.

* A. I. R. 1926 Lahore 54

SHADI LAL, C. J. AND FFORDE, J.

Mohammad and others—Convicts—Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 1108 of 1923, decided on 4th April 1924, from an order of the S. J., Shahpur at Sargodha, dated 31st August 1923.

* (a) *Evidence Act, s. 32 (3)—Statement may be proved against third persons if reference to third persons is not foreign to the portion of the statement against the declarant's interest.*

So far as a statement against the pecuniary or proprietary or other interest of the person making it is concerned, such statement may be given in evidence against third persons provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. But although the whole statement of a deceased person is admissible in evidence, the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth, also the circumstances under which it came to be made, and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility.

(b) *Criminal P. C., s. 162—Statement made by any one to police officer during investigation can be used only in strict accordance with s. 162.*

A statement made by any person to a Police Officer in the course of a criminal investigation can only be used at the trial in strict accordance with the provisions of s. 162.

(c) *Criminal P. C., s. 172 (2)—Object of sub-section is to enable Court to direct Police Officer giving evidence, to refresh his memory or to question him as to contradictions between his evidence and the recorded statement or for clearing up obscurities in evidence or to bring out relevant facts.*

The object of sub-section 2 is to enable the Court to direct the police officer who is giving his evidence, to refresh his memory from the notes made by him in the course of his investigation of the case, or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court. If used for the latter purpose, the provisions of ss. 145 and 161 of the Evidence Act shall apply. The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordane with these statutory provisions, no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or enquiry.

Abdul Quadir, B. R. Puri, Sagar Chand, J. L. Kapur, and *R. C. Soni*—for Appellants.

Jai Lal—for the Crown.

Ffrode, J.—Seven persons, namely, Muhammad, Yaru, Asghar, Gul Jahanian, Umra, Sher Bahadur and Khan Muhammad, have been tried by the Sessions Judge of Shahpur under the provisions of s. 396 of the Indian Penal Code of having committed a dacoity with murder on the night of the 26th or early morning of the 27th December 1922. Of these persons, Umra, Muhammad, Asghar, Gul Jahanian and Yaru have been sentenced to death, and Sher Bahadur and Khan Muhammad have been acquitted. The first five convicts now appeal against their convictions and sentences, and the Crown appeals against the acquittal of Sher Bahadur.

The story of the prosecution is that on the night or early morning in question these men with others came to the village of Mitha Tiwana for the purpose of carrying out a scheme of robbery which had been suggested by Umra to a certain Misri who in turn, arranged to procure bandits who were to help in carrying out the enterprise. The Crown case depends mainly upon the evidence of *Mt.* Sahib Devi (P. W. No. 3), the discovery of various portions of the booty under circumstances implicating the respective accused persons, the evidence of a tracker, and a statement by Misri alleged to have been made to Lala Buta Ram, Inspector of Police in the Criminal Investigation Department (P. W. No. 22).

Mt. Sahib Devi's evidence is shortly as follows:—She says that on the night in question she was sleeping in her house with her children when some one pushed the door which was chained from inside. Her husband was away at Khushab. When the door was first pushed, she thought that her husband had returned. Presently, however, one of the shutters fell on the ground and a man stepped inside and stood by the head of her *charpoy*. She asked him who he was, whereupon the intruder told her to keep quiet. Another person then entered the room and put his hand on her mouth. On her removing his hand he caught her by the throat. A third man then came in and struck her with a *dang* on the right side. He was followed by

two others. As the witness cried out for help, the man by the head of the *charpoy* drew a knife whereupon the witness offered her jewelry if they spared her life. At this stage two more men came in making seven in all. The witness then accompanied them into her inner *kotha* with a lantern She showed the two *dabbas* containing jewelry and a small box containing both jewelry and money. This the robbers proceeded to remove. The robbers then asked the witness to produce cash from the house and demanded the keys of the safe. Upon her explaining that she had no keys and had already shown them all the valuables in the place, they again threatened her life, but ultimately appeared to come to the conclusion that she was speaking the truth. Having looted such articles as they could lay their hands upon, including clothes and jewelry, the intruders disappeared by the stairs leading to the top of the house. The witness states that the dacoits were with her for an hour or three-quarters of an hour. She had ample opportunity of studying their features and was subsequently able to identify Asghar, Muhammad, Gul Jahanian, Umra and Yaru, and explained the part which each of these persons took in the proceedings described. She identified these five persons before the Tahsildar at Mitha Tiwana and she also identified them before the Committing Magistrate. In addition she recognized, as property stolen from her room, various articles of jewelry and clothing subsequently produced by the accused.

This woman was subjected to a long and searching cross-examination by three of the Counsel for the defence. This cross-examination, including questions by the Court, takes up some five pages of printed matter in the paper-book before us. But the witness throughout this exhaustive test remained unshaken in her evidence, and I can see no reason to doubt the truth of her statements.

While these events were taking place on *Mt.* Sahib Devi's premises, two persons, one named Samanda, who is absconding, and another described as a man of Jabbi, the former armed with a file and the latter armed with an ordinary gun were keeping guard on the roof. It has been proved that shots were fired from one of the roofs which caused the death of two youths, Sarup Singh and Makhan Singh.

Evidence of the circumstances under which various ornaments, etc., forming part of the stolen booty, were produced by various members of the raiding party is given by, amongst others, Sher Muhammad (P. W. No. 23), a pensioned *jamadar*. This witness also was subjected to a very long and searching cross-examination by Mr. Puri and Mr. Ghani, and was also closely questioned by the Court, and again, I can find no reason for doubting the credibility of the witness. He proves that each of the five persons, Asghar, Umra, Yaru, Gul Jahanian and Muhammad produced, from different hiding places, articles afterwards identified as having been stolen in the raid in question under circumstances which indicate the complicity of each of these men in the robbery.

The evidence of the production of certain ornaments is specially incriminating. For instance, as regards a golden *kadhi* stolen from *Mt.* Sahib Devi's house, Umra produced one piece, Gul Jahania another piece, and Yaru a third piece, of a golden *chaupkali* Umra produced four pieces, Yaru three pieces and Asghar two pieces, of a golden *kanth mala*, Umra produced nine pieces, Yaru eight and Asghar twelve, of a golden *kantha*, Umra produced one piece and Yaru another. Umra again produced one *pathri* or a golden *nauratkha*. Gul Jahanian one *dholni* of the same, Yaru another *dholni* and Asghar two small *tawitris*. Of a golden *kantha*, one piece was produced by Sher Bahadur and another by Umra. Umra produced three pieces of a silver *jhebe*. Umra produced two *kubes* and one *nali*, while Yaru produced four *kubes* and a *nali*. It appears from this that certain stolen ornaments were broken up and distributed amongst these five persons. Muhammad took a number of witnesses from Mitha Tiwana to a place called *ghatti* where in a dry *nala* he dug up an earthen pot containing four pieces of clothing which were subsequently identified as the property of Jiwan Das. Other witnesses corroborate the evidence of the discovery of the incriminating articles and it is unnecessary to recapitulate it ; their evidence is of a highly significant and reliable character and, in my opinion, is an important link in the damning chain of evidence produced by the prosecution.

Finally, there is the evidence of Lala Buta Ram (P. W. No. 22) who proves a detailed statement made to him by Misri showing the manner in which the dacoity

was planned and the part taken in it by certain of the accused. According to Misri's statement, he and Umra carried out the robbery with the aid of Gul Jahanian, Khan Muhammad, Asghar, Muhammad and some other persons whom he names as Samanda, Batkala, Shera, Alu, Nura and Allah Yar. Of the persons concerned in the present appeals, Misri does not papear to have named either Sher Bahadur or Yaru. Yaru is a first cousin of Misri, and it is quite probable that the latter substituted another name in place of this man. It is true he mentioned his own brother Muhammad, but it was after Muhammad's tracks had been found and identified. The omission of Sher Bahadur's name by Misri is not explained. So far as this piece of evidence is concerned Sher Bahadur, therefore, is not affected by it.

It is urged by the defence that, Misri being dead, second-hand proof of his evidence is inadmissible: and it is clear that unless Misri's statement comes within the scope of s. 32 (3) of the Indian Evidence Act it could not be given in evidence at all. Section 32 of the Act provides that "Statement, written or verbal.... made by a person who is dead...are themselves relevant facts" in certain cases. One of these cases is "When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages" (sub-s 3). There is no doubt that the statement in question, so far as Misri is concerned, would have exposed him to a criminal prosecution or to a suit for damages, and, therefore, would be admissible as a piece of evidence in any proceeding in which such evidence was relevant to the issue or issues being tried in such proceeding. But the Counsel for the defence urged that only that portion of the statement which affected Misri himself is admissible under this sub-section and that those portions of the statement which affect other persons should be excluded. His argument shortly, is that so much of Misri's statement as refers to the participation of other persons in the crime is not a statement which would expose or would have exposed Misri to a criminal prosecution or to a suit for damages, and, therefore, does not possess that supposed guarantee of truth upon which the admissibility of such evidence is based. The Counsel for the Crown, on the other hand has argued that where a statement, a portion of which comes within the purview of sub-s. (3), contains matter which does not come within that purview but which, read as a whole, makes a consecutive narrative, the whole of such statement must be admitted. This raises a question of great importance to the administration of criminal law in this country. It is not only of importance in the present case but in a great many other cases. It frequently occurs that a witness is tendered in evidence to prove that a man, who is deceased, made a statement to the effect that he took part in a certain crime, and in the course of that statement declared that other persons had participated with him in that crime. In criminal proceedings against those other persons in respect of that crime the Crown case is often largely dependent upon the statement of the deceased person implicating the accused, and if the statement of the deceased is not admissible as against the accused the prosecution would in many cases fail. I do not suggest that in the present case the statement of Misri is essential to support the convictions, as I am satisfied that the rest of the evidence on the record establishes the guilt beyond any reasonable doubt. As the question, however, has been raised and argued at considerable length, and as the Government Advocate is anxious that a decision should be given on this point of law, I have thought it necessary to examine all the authorities which have any bearing on the point and to state what I conceive to be the law.

The first part of sub-s. (3) of s. 32 of the Indian Evidence Act enacts the well-known principle of the English Law of Evidence established in *Higham* v. *Ridgway* (1). The principle laid down in that case has been followed by a long line of authorities in England most of which are referred to in Vol. II of the 12th Edition of Smith's Leading Cases in the notes to *Higham* v. *Ridgway* (1). In *Gleadow* v. *Atkin* (2), Bayley, J., states the rule as follows:—"An entry by a man who is dead, will be evidence as to strangers, if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it: or if the entry either charges him with

(1) (1803) 10 East. 109=10 R R. 235.
(2) (1833) 1 C. & M. 410=3 Tyr. 289=2 L. J. Ex. 153.

the receipt of money for a third person, or imports that a debt, which would otherwise be due to him, is paid."

In *Smith* v. *Blakey* (3) Blackburn, J., makes the following remarks : " No doubt, if any part of the entry is against the interest, the whole is admissible in evidence, as was held in the well-known case of *Higham* v. *Ridgway* (1)."

In *Reg* v. *Overseer of Birmingham* (4), Cockburn, J., states " I should be prepared to say, that as soon as it is established, which it now is, on the authority of *Higham* v. *Ridgway* (1) and the other cases, that you may receive the declaration of the deceased person, as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so as far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration."

In *Davies* v. *Humphreys* (5), Parke, J., (afterwards Baron Parke) said : —" The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry and connected with it."

Hayes, J., in *Queen* v. *Exeter* (6) expressed himself as follows :—" Having regard to the great changes that have in recent times, been made in admitting the evidence of the interested witnesses, when alive, it would be most objectionable to lay any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer, and where the Courts are frequently obliged to supply the want of evidence by presumptions."

In Sir James Stephen's Digest of the Law of Evidence under Art. 28, the learned author declares that "the whole of any such declaration, and of any other statement referred to in it is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements not referred to in, or necessary to explain such declarations are not deemed to be relevant merely because they were made at the same time or recorded in the same place."

It is clear from these, and other authorities which it is not necessary to refer to in detail that so far as a statement against the pecuniary or proprietary interest of the person making it is concerned such statement may be given in evidence against third persons, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant.

This principle of English Law has been embodied in the Indian Evidence Act together with an extension of that principle which English Courts have refused to adopt, namely, the inclusion of statements which would have exposed the maker to a criminal prosecution or to a suit for damages. It follows, therefore, that this extension, enacted in sub-s. (3) of s. 32 of the Evidence Act, must be subject to same principles of law which in England have been held to apply to the principle embodied in the first part of the sub-section. I must accordingly hold that the whole of Misri's statement so far as it refers to or explains the part which he himself admits to having taken in the crime, is admissible in evidence against such of the accused in the present case as he names in that statement. I need hardly add that although in cases of this kind the whole statement of a deceased person is admissible in evidence the value which the Court will attach to such evidence will depend in each case upon a variety of cricumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth also the circumstances under which it came to be made; and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility.

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(3) (1867) 2 Q. B. 326 =8 B. & S. 157=36 L. J. Q. B. 156=15 W. R. 492.

(4) (1861) 1 B. & S 763=31 L. J. M. C. 63=8 Jur. (N. S.) 37=5 L. T. 309=10 W. R. 41=121 E. R. 897=124 R. R. 736.

(5) (1840) 6 M. & W. 153=9 L. J. Ex. 265=4 Jur. 250 ; 151 E. R. 381=55 R. R. 547.

(6) (1869) 4 Q. B. 341.

There is one other matter which I feel it my duty to refer to, although I do so with considerable reluctance, that is, to comment on the judgment of the Sessions Judge. The judgment is unique in this respect, that in the case of each convict elaborate reasons are given why the evidence for the prosecution should not be believed and then having apparently satisfied himself that the case presented for the Crown does not warrant the conviction the learned Sessions Judge proceeds to convict five of the accused and to sentence them to death. But the matter does not rest there. In order to discredit the evidence of the Crown witnesses the Sessions Judge has throughout his judgment relied upon entries in the Police diaries which were not made evidence in the only manner in which they could be so made, namely, under the provisions of s. 162 of the Criminal P. C., and he has in many instances misstated the contents of these diaries. At page 162 of his judgment commencing from line 48, the Sessions Judge criticised the evidence of *Mt.* Sahib Devi on material which is not evidence on the record. Not only has he had recourse to the Police diaries for this purpose, in direct violation of the provisions of the Criminal P.C, but he has gone so far as to incorporate in his judgment a report alleged to have been sent by Lala Buta Ram to the Superintendent of Police on the 28th of December. This document is described as a report and is a rough summary of the circumstances of this crime, which was then, in course of investigation, furnished by a Police Officer to his superior. The Police Officer who made the report was not cross-examined upon it. It was not referred to in the course of the trial, and it has not been made, nor could it have been made, substantive evidence in the proceedings. It has not been translated nor does it appear anywhere upon the printed record. On examining the document, however, I find that it bears an endorsement "read out and admitted in evidence and transferred to the file of the Sessions Court." This endorsement is signed by the Sessions Judge. It is clear that the statement under the hand of the Sessions Judge that this report had been read out and admitted in evidence is false, and I find it hard to understand how it came to be made. It is upon this report, and upon entries alleged to occur in the Police diaries, that the Sessions Judge has thought fit to cast doubt upon the truth of some of *Mt.* Sahib Devi's statements made in the witness-box. The statements in question appearing in the *ziminis* have not been in any way made evidence and do not appear upon the record The same procedure of comparing the statements of witness made upon oath in Court with previous statements of the same witness alleged to have been recorded in the Police diaries has been adopted by the Sessions Judge with regard to a number of other witnesses. The irregularities of a like nature, which occur throughout this judgment, are too numerous to be dealt with here, and indeed are not material to the decision of these appeals. Other highly improper comments appear in the course of the judgment, one of which appears at page 168 to the effect that a certain witness, namely, Officiating Sub-Inspector Muhammad Nawaz, "has reverted and is under a cloud at present."

In many parts of the judgment the evidence is misstated, as for instance, at pp. 166-167, the Sessions Judge, states :— "According to the prosecution there were bullet marks at four places, though unfortunately only one bullet has been produced." In point of fact it has been proved that four bullets were produced, one by Ghulam Rasul P. W. No. 41 and three by P. W. No 49, Tola Ram.

At page 169, the Sessions Judge, states that *Mt.* Sahib Devi was not asked to identify the sword which has been exhibited as P. 27. On referring to her evidence at page 11, line 42, I find that she has stated as follows :—" The sword P. 27 is the same which one of the accused had.

It would take too long to state in detail the many irrelevancies, inaccuracies and improprieties (including undeserved strictures upon Police Officers) which appear in the judgment in question, and I need only say that, if the learned Judge was sincere in his criticism of the evidence for the prosecution given in Court, it is hard to understand how he come to convict the persons under trial. The practice which he has adopted of comparing statements made by witnesses in Court under oath, with statements which they are alleged to have made to the Police during the course of the investigation held by the Police prior to the trial, cannot be too strongly condemned.

A statement made by any person to a Police Officer in the course of a criminal investigation can only be used at the trial in strict accordance with the provisions of s. 162 of the Crimina P. C. That section before it was amended by the Criminal P. C. Amendment Act (XVIII of 1923) — which came into force on the 1st September, 1923, after the decision of the Trial Court in the present case—provided that no written statement made to a Police Officer in the course of an investigation shall be used as evidence, subject to the proviso that when any witness is called for the prosecution whose statement has been taken down in writing, the Court shall on the request of the accused refer to such writing and may then, if it thinks it expedient in the interest of justice, order a copy to be furnished to the accused and such statement may be used to impeach the credit of the witness in manner provided by the Indian Evidence Act, 1872. In other words, a statement made to a Police Officer could only be made evidence when used for the purpose of cross-examining the person who made the statement. The amended section has clearned up a number of misapprehensions, which seem to have prevailed as to the scope of this section, by enacting that no statement whether contained in a Police diary or otherwise, nor any part of it, shall be used for any purpose at an enquiry or trial in respect of any offence under investigation at the time when such statement was made, except that when a witness is called for the prosecution, the Court shall, on the request of the accused, furnish him with a copy of the statement of any such witness for the purpose of testing the credit of the witness in the manner provided by s. 145 of the Indian Evidence Act. There is a further proviso that the Court may exclude from the copy of the statement furnished to the accused any matter which it thinks is not relevant to the subject-matter of the trial, or, is not essential in the interest of justice, and which in the public interests it is inexpedient to disclose. The confusion as to the legitimate use of Police diaries at criminal trials is possibly due in some measure to the rather ambiguous phraseology of s. 172 of the Criminal P. C. (which has not been touched by the amending Act). Sub-s. 2 of this section provides that any Criminal Court may send for the Police diaries of a case at the trial " and may use such diaries not as evidence but to aid it in such enquiry of trial." The object of this sub-section is to enable the Court to direct the Police Officer who is giving his evidence, to refresh his memory from the notes made by him in the course of his investigation of the case, or to question him as to contradictions which may appear between statements so recorded and the evidence he has given in Court. If used for the latter purpose the provisions of ss. 145 and 161 of the Indian Evidence Act shall apply. The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordance with these statutory provisions no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or enquiry. As I have already pointed out in the case before us the Trial Court has based its conclusions of fact upon statements alleged to appear in the diaries of Police Officers to the disregard of the legal evidence given at the trial, namely, the sworn testimony of witnesses in Court. It might appear on an examination of these Police diaries that the statements therein contained do not contradict in any essential particulars the evidence given by the witnesses in Court, but this is not a matter for this Court to consider. We have only to deal with the legal evidence properly brought upon the record and upon the whole of that evidence I am clearly satisfied that the appellants, Umra, Muhammadu, Asghar, Gul Jahanian and Yaru have been rightly convicted.

I would accordingly dismiss the appeal of the five appellants and confirm the sentences passed upon them.

Shadi Lal, C. J.—I concur in the judgment prepared by my learned colleague and desire to make only a few observations on the question of law debated before us. The general rule of the law of evidence is undoubtedly to the effect that witnesses should depose to the facts within their own knowledge and not to those which they have only heard stated by other persons. In other words, the evidence, which can be admitted by a Court

of Law must be direct and not second hand.

There are, however, several exceptions to this general rule, and one of the exceptions makes declarations against interest admissible in evidence. The interest involved must, according to the English Law, be one of a pecuniary or proprietary nature; no other interest will suffice. But the Indian Law, as laid down in sub-s. (3) of s. 32 of the Indian Evidence Act, extends the scope of this exception and puts a penal interest on the same footing as a pecuniary or proprietary interest.

There can be no doubt that Misri's statement would have exposed him to a criminal prosecution and also to a suit for damages, and that the statement in so far as it is prejudicial to the penal interest of the maker is admissible in evidence. The question arises whether the rest of the statement, which is not against his interest, can be admitted along with the portion which is adverse to his interest. Now, if the matter were *res integra*, I would answer the question in the negative. The reason for the exception to the rule against second hand evidence is that a man is not likely to make a false statement against his own interest. Self-interest is supposed to be the best guarantee of truth. But this reason does not wholly apply, when a person, while making a declaration prejudicial to his own interest says something which is injurious to other persons.

Cessante ratione cessat ipsa lex.

The English Courts have, however, laid down in a series of judgments that the declaration may be accepted, not merely as to the specific fact against the interest, of the declarant, but also as to all connected facts which, though not against his interest are necessary to explain, or are expressly referred to by the declaration against interest. As observed by Lord Blackburn in *Smith* v. *Blakely* (3), the statement is admissible as evidence, not only of the precise fact which is against interest, but of all matters involved in or knit up with the statement. But disconnected facts even though contained in the same document or statement, are inadmissible. This is the principle enunciated by the Courts in England with respect to the scope of the declarations against pecuniary or proprietary interest, and the same rule must be adopted in India as governing the scope of all the declarations rendered admissible by sub-s. (3) of s. 32 of the aforesaid Act.

I accordingly hold that Misri's statement inculpating the prisoners has been rightly admitted in evidence, and I endorse the view of my learned colleague on all other matters discussed in his judgment.

Appeal dismissed.

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*A. I. R. 1926 Lahore 60.

MARTINEAU, J.

Hazara Singh and others —Applicants.

v.

Emperor —Opposite Party.

Criminal Revision No. 1842 of 1923, decided on 3rd January, 1924, on reference by S. J., Hoshiarpur.

Criminal P. C., s. 231—*Charge amended—Accused has absolute right to re-call and cross-examine witnesses.

If a charge is amended the accused is entitled to re-call and cross examine any of the prosecution witnesses and not only those witnesses on the basis of whose evidence the charge was amended.

Facts.—The applicants were charged in the Court of the Additional District Magistrate under s. 216 Criminal P. C. for harbouring one Karam Singh. In the original charge, it was not stated that Karam Singh was wanted by the Police for an offence under s. 302 Indian Penal Code. The charge was, therefore, amended subsequently so as to bring the case under the first part of s. 216, Indian Penal Code. The Counsel for the applicants wanted to cross-examine the witnesses, but the lower Court refused to grant them opportunity to re-call any witnesses except those on the basis of whose evidence the amendment of the charge was made.

The accused were charged under s. 216, Indian Penal Code and the charge was subsequently amended and further cross-examination of prosecution witnesses was disallowed by Sheikh Mahbub Bakhsh, exercising the powers of an Additional District Magistrate of the First Class in the Hoshiarpur District, by order, dated 20th August, and 25th September, 1923.

The accused are on bail.

Grounds.—An application for revision of the above proceedings has been now filed. It is contended that the applicants should not have been charged under s. 216, Indian Penal Code and that the amendment of the charge at late stage was prejudicial to them. It is also urged that the lower Court has, in any case, erred in not

allowing the applicants to re-call such witnesses as they liked for further examination. The first ground has I think, no force. The lower Court had wide powers of amendment under s. 227, Criminal P. C., and there is no justification for interference at this stage. The second contention, however, seems correct. Under s. 231, Criminal P. C., the applicants had the right to "re-call or re-summon and examine with reference to such alteration or addition (in the charge) any witness who may have been examined." The right is thus not restricted to the re-calling of those witnesses only who have deposed to the subject-matter of the alteration or amendment in the charge. The other witnesses also may conceivably be in a position to depose to facts in connection with such alteration or amendment. All that the Court can do is to restrict the examination of the witness to the alteration or amendment in the charge.

I, therefore, submit the records to the Hon'ble High Court with the recommendation that the orders of the Additional Magistrate, dated 15th September, 1923 with reference to the re-summoning of the witnesses be set aside.

Judgment.—I agree with the learned Sessions Judge. The Magistrate was wrong in refusing to allow the accused to re-call for cross-examination witnesses other than those on the basis of whose evidence the charge has been amended and I direct that the accused be allowed in accordance with s. 231 of the Criminal P. C. to re-call and examine with reference to amendment any witness who has been examined.

Reference accepted.

A I. R. 1926 Lahore 61.

MARTINEAU, J.

Mt. Babo—Convict – Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 298 of 1924, decided on 16th May, 1924, from an order of the Mag., First Class with powers under s. 30 Criminal P. C., Mianwali, dated 28th March 1924.

Arms Act, Ss. 20 and 19—Keeping ammunition and parts of arms hidden under clothes falls under s. 20 and not under s. 19

Keeping ammunition and parts of arms in a bag hidden under a chaddar or hidden under the clothes falls clearly under s. 20 and not merely under s. 19 of the Act 44 P. W. R. 1912 Cr. 1 P. W. R. 1914 Cr. Diss.

Abdul Aziz— for Appellant.

R. C. Soni—for Respondent.

Judgment.—Two women named Babo and Kaki have been convicted of offences under s. 20 of the Arms Act and sentenced to five years' rigorous imprisonment each. Their appeals (Nos. 298 and 299 of 1924) may be dealt with on one judgment. Counsel for the appellants does not dispute the fact that ammunition and parts of arms were found on Babo in a bag which was hidden under a *chaddar* that she was wearing and that parts of a gun were found on Kaki, hidden under her clothes. I think it is clear that the cases of both women fall under s. 20 of the Arms Act and not merely as contended by Counsel for the appellants under s. 19 and I am unable to agree with the view of the law that was taken in *Ibrahim* v. *Emperor* (1) and *Gahna* v. *Emperor* (2).

But I do not think that heavy sentences are called for in these cases. Babo and Kaki were not alone but were in a party numbering seven men, six women, and seven children.

These people were Powindas from Ghazni and were going along with a number of camels, sheep and goats when they were stopped and questioned by the Police. One of the party was Babo's husband Shadi. He was one of the persons prosecuted and it is highly probable that the arms and ammunition had been in his possession or in the possession of other men in the party, and that when the party came near the Police Shadi he or the men with him handed the articles to the women Babo and Kaki in the hope that the Police if they searched any body, would search the men only and that the arms and ammunition would thus escape detection.

In these circumstances I reduce the sentence on each of the appellants to one of three months' rigorous imprisonment.

Sentence reduced.

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(1) (1912) 9 P. R 1912 Cr.=128 P. L. R. 1913=44 P. W. R. 1912 Cr.=18 I. C. 265=14 Cr. L. J. 41

(2) (1914) 33 P. L. R. 1914=1 P. W. R. 1914 Cr.=24 I. C. 594=15 Cr. L. J. 506.

A. I. R. 1926 Lahore 62 (1).

MOTI SAGAR, J.

Ramsaran Dass—Plaintiff-Petitioner.

v.

Firm Ram Lal-Ram Labhaya—Defendants—Respondents, and another.

Civil Revision Petition No. 592 of 1923, decided on 15th December 1923, against an order of the Small Cause Court Judge, Amritsar, dated 7th July 1923.

(a) *Civil P. C., Or. XXVI r. 15—Expenses of commission may be made as costs in the suit but cannot be realised by attachment.*

It is the duty of the Court before the Commission is issued to see that the Commissioner's fee and diet money of the witness has been duly deposited. If the party at whose instance the Commission is issued declines to pay, the proper thing for the Court to do is to make the amount costs of the suit and enter it in the decree. But the Court has no jurisdiction to realise such amount by attachment of the property of the party liable.

M. L. Puri—for Petitioner.

Judgment.—In this case a Commission was issued at the request of the petitioner for the examination of a certain witness at Delhi. The petitioner neither deposited the fee of the Commissioner nor the diet money of the witness. Several adjournments were granted by the Commissioner, and though the witness was present the petitioner failed to appear and examine him. The Commission was consequently returned by the Commissioner as unexecuted. The petitioner wanted the Court to re-issue the Commission, but this application was refused. In my opinion the learned Judge of the Court below was fully justified in refusing to accede to this prayer and no grounds have been made out for interfering with his order. It appears that on the date the application for re-issue of the Commission was refused, the Court also passed an order to the effect that the petitioner should deposit the fee of the Commissioner and the diet money of the witness in Court, and that if he failed to do so the money may be realised from him by attachment. This order appears to be wholly without jurisdiction and must be set aside. It has been held in *Tadhin Proshad Singh* v. *Sardar Coomar Narayan Singh* (1) that such an order should not be executed as a decree because the Civil P.C. does not provide for the issue of any judicial process for realisation of the amount so ordered to be paid by one of the parties. It was the duty of the Court before the Commission was issued to see that the Commissioner's fee and diet money of the witness had been duly deposited. Now, if the petitioner at whose instance the Commission was issued declines to pay, the proper thing for the Court to do is to make the amount costs of the suit and enter it in the decree.

I accept the application and set aside the order of 7th of July 1923 only in so far as it directs the realization of the money by attachment.

Application accepted.

(1) (1905) 10 C. W. N. 234.

A. I. R. 1926 Lahore 62 (2).

HARRISON, J.

Sundar Singh and others—Defendants—Appellants.

v.

Bhan Singh—Plaintiff—Respondent.

Second Appeal, No. 2885 of 1924, decided on 20th April 1925, against a decree of the Dist. J., Jullundur, dated 28th July, 1924.

Evidence Act, s. 115—Attestation in token of consent and also again after reading the document to the witnesses estops attestor from questioning the validity of the document.

Where thumb marks of witnesses are impressed on a document in token of consent and as attestation and the document is read and explained to them at the time of registration and again their thumb marks are impressed.

Held that it is not a mere attestation but is a distinct and clear acquiescence which binds the attestors and estops them from questioning the validity of the document. A. I. R. 1922 P. C. 20; A. I. R. 1923 All. 28 Dist.

Faqir Chand—for Appellants.

Mehr Chand Mahajan for Dalip Singh—for Respondent.

Judgment.—The plaintiff in this case, one Bhan Singh, brought a suit based on a Will alleged to have been executed by his mother's brother Wazir Singh in his favour. The defendants were the four collaterals of Wazir Singh who in the ordinary course of events would have succeeded him. The suit has been decreed as regards three and as regards the fourth it has been dismissed, the reason being that whereas all the three attested the Will the fourth did not. Two of three collaterals have appealed.

A second suit was instituted to recover the value of the crop admittedly sown

by the late Wazir Singh and alleged to have been cultivated by the plaintiff and seized on maturity by the four defendants. A decree was given for one-half only, the finding being that these allegations were established and as no appeal was presented by the plaintiff to the District Judge, this decree stands so far as he is concerned. The collaterals have appealed and this judgment will dispose both of that appeal and of the appeal in the main case.

A third suit was instituted by two of the reversioners for a declaration that their thumb marks on the Will had been obtained by fraud and also for a declaration that they were entitled to their share of Wazir Singh's estate. This suit was dismissed and no appeal preferred.

I take first the appeal of the three reversioners. Counsel urges that a mere attestation of a document is not in itself sufficient to constitute acquiescence. He furthere contends that even if there was acquiescence inasmuch as the Will was in favour of a relation who normally was not entitled to succeed, that acquiescence must be ignored. He quotes and relies on *Udai Bhan Singh* v. *Gujendra Singh* (1) in which an appeal was dismissed as concluded by a finding of fact by the District Judge. This does not help him as here also there is a finding of fact against the appellant. He also relies on *Pandurang Krishnaji* v. *Markandeya Tukaram* (2) for his main proposition and he wishes to draw an analogy from the Hindu Law where the position is as explained in *Chuni Lal* v. *Nanda* (3) that unless all the reversioners agree to an alienation by a Hindu widow the whole of the alienation is bad. The facts of this case are wholly different. Wazir Singh wishing to benefit his sister's son executed this Will and it is recited in the clearest possible terms that the reversioners, defendants Nos. 2 to 4 have given their consent:—"*Barazi warsan jaddi* Hardit Singh, Pal Singh *wa* Santas Singh *yeh wasiyat tahrir kar dihai jinke nishanat angusht thi sabat hain.*" The endorsement shows that the Sub-Registrar read out and explained the document to the testator in the presence of two out of these three reversioners and had thereupon attached their thumb-marks for a second time. This, in my opinion is not a mere attestation in the sense in which the words are used in *Pandurang Krishnaji* v. *Markandeya Tukaram* (2) but is a distinct and clear acquiescence which binds these three reversioners and estops them from questioning the validity of the Will. The other point has no force, in my opinion, and there would be no meaning in acquiescence or in estoppel, if at a later stage it was possible to upset that acquiescence by showing that it affected the course of events. Mr. Fakir Chand's argument as I understand it is that the only form of acquiescence which can be given is to recognise the inheritance of the natural heir. I, therefore, dismiss this appeal with costs.

As regards the second appeal about the crop it is urged in the first place that the suit should have been tried by a Revenue Court, but this has been definitely dropped. The second point is that the suit is clearly one for damages for wrongful occupation. This was also dropped and the only point urged by Mr. Fakir Chand is, that Sundar Singh has succeeded in the main suit as he did not acquiesce and, therefore, no decree should have been passed against him. The finding is that the crop was own by the late Wazir Singh and cultivated by the plaintiff and this finding being based on evidence I do not see how the question of title arises. All that has been decreed is that one-half of the value of the crop seized by the collaterals is to be paid to the plaintiff who on the findings is entitled to the whole. I dismiss this appeal also with costs.

Appeal dismissed.

(1) A. I. R. 1923 All. 28.
(2) A. I. R. 1922 P. C. 20.
(3) (1888) 174 P. R. 1888.

A. I. R. 1926 Lahore 63.

SHADI LAL, C. J. AND ZAFAR ALI, J.

Said Nur —Accused —Appellant.

v.

Emperor —Respondent.

Criminal Appeal No. 18 of 1925, decided on 14th February, 1925, from an order of the S. J., Attock at Campbellpur, dated 21st November, 1924.

(a) *Penal Code, ss. 302 and 391—In a robbery two persons out of four armed with weapons committed murder—Each is guilty of murder.*

Where four persons armed with deadly weapons fully prepared to commit murder in the event of resistance and two of them actually committed murder before any resistance was offered to them. *Held* that each of the robbers is equally guilty of the offence of murder 1925 P. C. 1 (P. C.) Foll.

Khurshaid Zaman —for Appellant.

Abdul Rashid —for Respondant.

Judgment.—On the night of the 6th June, 1924, shortly after sunset, the house of one Kalu Shah in the village of Ichhral in the District of Attock was raided by a gang of four robbers who were armed with rifles, daggers and *dangs*. One of the offenders stood in the doorway of the courtyard, and two of them seized Kalu Shah and one of these two men stabbed him three times with a dagger and killed him on the spot. The culprits then molested Kalu Shah's wife, *Musammat* Bhag Bhari, and his daughter-in-law, *Musammat* Ishar Devi, and stripped them of their ornaments. After collecting their loot they made a pile of quilts and set fire to it. Having tied the wearing apparels and ornaments into bundles they left the place with their booty including two fire arms stolen from the house and went out of the village without any interference or opposition from the villagers who were evidently too terrified to come near them.

It appears that this gang of four men committed two more robberies on the following two nights and that in the last robbery one of the offenders was killed and another wounded. The search for the wounded man led to the arrest of the prisoner Said Nur, and it was in pursuance of the information supplied by him that another member of the gang, Hazrat Gul, was arrested in the month of August. Hazrat Gul has turned King's evidence on acceptance of an offer of pardon and has given a detailed version of the conspiracy which led to the commission of the crime, of the persons who participated therein and of the various incidents which took place on the night in question.

The approver fully implicates the appellant Said Nur, and his evidence receives corroboration from the testimony of *Musammat* Bhag Bhari and *Musammat* Isher Devi who identify the prisoner as one of the four persons who entered their house and committed the robbery. It is beyond dispute that on the 14th June, 1924, when the prisoner was arrested in his house he gave to the Police a coat P No. 1 and a waistcoat P No. 2, and these garments are entered in the list of the stolen articles given by Kalu Shah's son Gurditta Mal on the 8th June, and have been identified by him to be his property. The convict lays claim to both the coat and the waistcoat, but he has produced no evidence in support of his claim. It appears that a sewing machine was also recovered from a *kasi* in pursuance of the information supplied by him, but in the list of the stolen articles the entry relating to the sewing machine does not bear any serial number, and we are doubtful whether it was entered in the list as originally given by Gurditta Mal There is, however, no reason to doubt the evidence of the witness Kamal P. W. No. 10 who saw four persons going towards Ichhral on the evening of the 6th of June, and who deposes that the appellant Said Nur was one of those four persons.

The evidence of the approver, corroborated as it is by the testimony of *Musammat* Bhag Bhari and *Musammat* Ishar Devi, and further confirmed by the recovery of two stolen articles leaves no doubt whatsoever that Said Nur was one of the four persons who committed the robbery at the house of Kalu Shah. It is, however, contended that he did not inflict any injury on the deceased and cannot, therefore, be convicted of an offence under s. 302, Indian Penal Code. It is true that the approver does not attribute to Said Nur any part in the assault on Kalu Shah, but there is ample evidence that the prisoner was in the courtyard when Kalu Shah was being stabbed and the approver says that he was armed with a rifle which he fired at one of the women but missed the aim. There can be no doubt that all the four persons, armed as they were with deadly weapons, went to the house fully prepared to commit murder in the event of resistence and the evidence shows that two of them actually killed Kalu Shah before any resistance was offered to them. On these facts the case is governed by the rule laid down by their Lordships of the Privy Council in their recent judgment in *Barendra Kumar Ghosh* v. *Emperor* (1) and each of the robbers is equally guilty of the offence of murder.

For the aforesaid reasons we uphold the convictions of the appellant under Ss. 302 and 394, I. P. C. ; and confirming sentence of death, we dismiss the appeal.

Appeal dismissed.

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(1) 1925 P. C. 1=52 Cal. 197=52 I. A. 40=29 C. W. N. 181=1925 M. W. N. 26=8 Pat. L. R. Cr. 1=6 L. R. P. C. Cr. 1=27 Bom. L. R. 148=6 P. L. T. 169=23 A. L. J. 314=41 C. L. J. 240=48 M. L. J. 543=26 Cr. L. J. 431 (P. C.).

* A. I. R. 1926 Lahore 65

SHADI LAL, C. J., AND
LE ROSSIGNOL, J.

Punjab Akhbarat and Press Co., Ltd., Lahore—Appellants.

v.

C. M. G. Ogilvie—Respondent.

Letters Patent Appeal No. 175 of 1924, Decided on 23rd December 1925, against the judgment of Division Bench, D/-9/10th April 1924, in Civil Appeal No. 1667 of 1923.

(a) *Letters Patent (Lahore), Cl. 10—Right of appeal given by Cl. 10 is not destroyed merely because the Judges, though differing on merits, made a joint order regarding decree to be passed.*

Clause 10 confers a right of appeal and that right is not extinguished simply because the Judges while considering the effect of their dissent on the result of appeal, joined in making an order that the decree should be framed in a particular way : 10 *Cal.* 108 *Dist.*; 34 *All.* 13; 30 *Mad.* 169 (*F. B.*); 32 *Mad.* 95 (*F. B.*); 28 *Cal.* 517; 43 *Cal.* 332; *A. I. R.* 1922 *Cal.* 141; *A. I. R.* 1925 *Cal.* 845 (*F. B.*) and 3 *Bom.* 204 *Ref.*

There would hardly be any case in which the dissenting Judges would not be required to concur in an order disposing of the appeal in accordance with the opinion of the one Judge or the other : *A. I. R.* 1924 *P. C.* 50, *Rel. on.* [P. 67. C. 1, P. 68, C. 1]

* (b) *Letters Patent (Lahore), Cl. 10—Cl. 10 is not confined to the only points on which the Judges differed.*

The use of the word "wherever" in Cl. 10 is not intended to confine the scope of the appeal to the point or points on which there is a disagreement between the Judges : 1 *All.* 181 (*F. B.*); 20 *C. W. N.* 210 *Foll*; 32 *Mad.* 95 (*F. B.*); 11 *M. L. J.* 10 (*F. B.*); *A. I. R.* 1925 *Bom.* 118 *Ref.* and *A. I. R.* 1925 *Cal.* 598, *Dist.*

When once the right of appeal is established, the appellant can raise, not only the points upon which the Judges have differed, but also those on which they have agreed. [P. 68, C. 2; P. 69, C. 1]

* (c) *Civil P. C., S; 98—Appeal from Subordinate Court heard by a Bench of two Judges—Judges differing in opinion—Procedure is regulated by S. 98—All other cases are governed by Letters Patent (Lahore), Cl. 26.*

Where an appeal is heard by a Bench composed of two Judges who differ in opinion the decision of the appeal is regulated by S. 98, Civil P. C., if the appeal is from a Subordinate Court under the Civil Procedure Code or any local or special statute. In all other cases the decision is governed by Cl. 26, of the Letters Patent, (Lahore) : 45 *Bom.* 718 (*P. C.*) *Expl.* [P. 69, C. 1]

(d) *Practice—Precedent—Judgments should be construed with due regard to particular fact.*

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found : *Quinn* v. *Leatham*, (1901) *A. C.* 495, *Foll.* [P. 69, C. 2]

(e) *Civil P. C., S. 98 (2)—Confirmation of decree is rule and its modification is exception—No complete agreement between the Judges—Case is governed by rule in S. 98 (2).*

The principle adopted by the Legislature in S. 98 is that the decree of the Subordinate Court must be confirmed unless the majority of the Judges composing the appellate Bench concur in varying or reversing such decree. In other words, the confirmation of the decree appealed from is the rule, and its modification or reversal is only an exception. Where there is no complete agreement beween the two Judges as to the variation or reversal of the decree passed by the trial Court, the case is governed by the general rule embodied in sub-S. (2) of S. 98 of the Code, and the decree of the Court of first instance should be confirmed: 41 *Mad* 943, *Dist.* [P. 71, C. 1]

(f) *Civil P. C., S. 107—Appellate Court will not insist on deciding a case finally if any party objects.*

An appellate Court will not insist on deciding a case finally if the appellant is satisfied with the order of remand proposed by the Court, although it is possible for the Court to so decide the case; 3 *Bom.* 204 and 45 *Bom.* 718 (*P. C.*), *Foll.* [P. 72, C. 1]

Bakshi Tekchand, Lala Jagan Nath Agarwal, R. B. Lala, Badri Das and *Mehr Chand Mahajan*—for Appellants.

C. Noad and *Amar Nath Chona*—for Respondent.

Shadi Lal, C. J.—On the 5th June 1923, the Subordinate Judge of Lahore passed a decree in favour of the plaintiff awarding him Rs. 100 by way of damages for a libel published in the "Bande Matram" newspaper, of which the defendants were the publishers and proprietors. Against that decree the plaintiff preferred an appeal to the High Court which was heard by a Division Bench composed of Martineau and Moti Sagar, JJ. The learned Judges differed in their opinion as to the quantum of damages, and, on the 9th April 1924, they delivered their dissentient judgments: Mr. Justice Martineau held that the appeal should be accepted and the amount of damages enhanced to Rs. 10,000; while Mr. Justice Moti Sagar concurred in the conclusion of the trial Judge and expressed the opinion that the appeal should be dismissed except as regards costs.

The learned Judges, however, reserved for consideration the question whether the decision of the appeal should be governed by S. 98 of the Civil P. C. or by Cl. 26 of the Letters Patent constituting this Court; and on the 10th April

they decided in favour of the applicability of Cl. 26, with the result that in accordance with the opinion of the senior Judge of the Division Bench the appeal was accepted and the plaintiff was granted a decree for Rs. 10,000 with costs in both the Courts.

From the judgment enhancing the damages the defendants have brought the present appeal under Cl. 10 of the Letters Patent, and Mr. Noad, for the respondent, raises the preliminary objection that as the learned Judges, who heard the appeal preferred by the plaintiff, have concurred in holding that the opinion of the senior Judge should prevail under Cl. 26, and as the judgment sought to be impeached is in accordance with that view, there is no judgment of two Judges equally divided in opinion which could be the subject of an appeal to the High Court under Cl. 10. Now, the tenth clause of the Letters Patent, in so far as it is relevant to the question before us, runs as follows: "And we do further order that an appeal shall lie to the High Court of Judicature at Lahore from the judgment of one Judge of the said High Court, or of one judge of any Division Court constituted in pursuance of section one hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment . . . . . of two or more Judges of the said High Court or of any such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case, shall be to us . . . . . in our Privy Council, as hereinafter provided."

Put briefly the question is whether we have in this case a judgment of two or more Judges of the High Court who were equally divided in opinion. Now, it is beyond dispute that there were two Judges who heard the appeal; that they were equally divided in opinion on the merits of the appeal, namely, the amount of the damages to be recovered by the plaintiff which was practically the only matter in controversy between the parties; and that they agreed only as to the result which should flow from that division of opinion. On that point they declared that the view of the senior Judge should prevail, and that a decree be drawn up in accordance with that view. Mr. Noad contends that, when the learned Judges had pronounced on the 9th April, their conflicting opinions on the merits of the case it was unnecessary for them to declare the result of opinions on the fate of the appeal; and that a ministerial officer of the Court could have prepared a decree in conformity with the opinion of the senior Judge. The learned counsel, however, admits that the pronouncement made by the Judges on that date gave the defendants a right of appeal under Cl. 10 and I cannot accept the contention that the mere fact that the Judges sat together on the following day to record an order, which, according to the learned counsel, was wholly unnecessary, destroyed that right of appeal.

Our attention has been invited to several decided cases, but most of them deal with the vexed question as to the meaning which should be attached to the expression "judgment" as used in the Letters Patent and are hardly relevant to the present discussion. There is only one case cited by Mr. Noad which may be said to have some bearing upon the issue before us. In *Hurbans Sahay* v. *Thakoor Pershad* (1) a Division Bench of the Calcutta High Court consisting of two Judges having concurred in a decree, a review of judgment was obtained; and the senior Judge limited the review to one point, but his collegue was inclined to let the whole case be re-opened on review. The result, however, was that the judgment passed on appeal was confirmed except on one point on which both the Judges agreed in modifying it. An appeal was brought under the Letters Patent from the final decree thus drawn up, but it was dismissed on the preliminary ground that the Judges of the Division Bench having concurred in the decree no appeal lay under the Latters Patent. The judgment of the Division Court which heard the appeal under the Letters Patent is a short one and contains no discussion on the subject. Nor does it clearly indicate the exact reason which led the Court to dismiss the appeal. The only thing which can be gathered from the judgment is that the fact that one of

(1) [1884] 10 Cal. 108=13 C. L. R. 285.

the Judges was inclined to differ from his collague as to the points on which the case should be re-opened on review did not, in the opinion of the Court, entitle the parties to an appeal under the Letters Patent from the order limiting the case to one point. It is to be observed that both the Judges had concurred in the first decree and the question of the extent to which the review should be carried was a matter within their discretion, and it is not clear whether that fact influenced the decision of the Court. Whatever the ratio decidendi may be, the judgment in *Hurbans Sahay's* case (1) is distinguishable from the present case. Here the Judges composing the Division Bench have entirely disagreed on the vital issue between the parties, and neither of them has yielded to the other. There can be little doubt, and indeed it is admitted by the learned counsel for the respondent, that, on the 9th April 1924, there was, to use the phraseology of the Letters Patent, a judgment of a Division Court in a case in which the Judges composing the Court were equally divided in opinion: and that Cl. 10 conferred a right of appeal from that judgment. Was that right extinguished simply because, on the following day, the Judges, while considering the effect of their dissent on the result of the appeal, joined in making an order that the decree should be framed in terms of the opinion of the senior Judge?

I am not prepared to accede to the contention of the learned Government Advocate that it was unnecessary for the Judges to make any order after the 9th April, and that the decree could have been prepared by a ministerial officer of the Court on the basis of the opinion of the senior Judge without any direction from the Court. Surely, a Ministerial Officer was not competent to decide whether the decree should conform to the opinion of the senior Judge under Cl. 26 of the Letters Patent or to that of the junior Judge under S. 98 of the Civil P. C. who confirmed the decision of the Court below. That matter was bound to be decided by the Judges themselves, and in order to avoid an *impasse* they had to agree as to the effect of their dissentient opinions on the appeal before them. If they had continued to dissent from each other even on the result which followed from their conflicting opinions on the merits of the case, there could have been no disposal of the appeal so far as they are concerned. Indeed, we find that in numerous cases the Judges of the Division Bench, while differing in opinion on the merits, have agreed to make a joint order stating the result of their dissent, and the mere circumstance that they concurred in making such an order has never been held to deprive the aggrieved party of the right of appeal conferred upon him by the Letters Patent. As instances of such cases I would cite *Dori* v. *Jiwan Ram* (2), reported on appeal in *Jiwan Ram* v. *Tondi Singh* (3); *Roop Laul* v. *Lakshmi Dass* (4), reported on appeal in *Lakshmi Dass* v. *Roop Laul* (5); *Sheikh Mahamad Rauther* v. *British India Steam Navigation Co.*, (6), reported on appeal in *Sheikh Md.* v. *B. I. S. N. Co. Ltd.* (7): *Lala Suraj Prosad* v. *Golab Chand* (8); *Ram Narain Singh* v. *Chota Nagpur Banking Association* (9): *Mohini Kanta Saha Chaudhuri* v. *Manindra Chandra Neogi* (10); *Purna Chandra Chatterji* v. *Narendra Nath Choudhry* (11); and *Shivlal Khubchand* v. *Appaji Bhivrav* (1); reported on appeal in *Appaji* v. *Shivlal* (13).

It is true that no objection was taken, so far as appears in any of these cases, that the concurrence of the Judges of the Division Court in the final order declaring the result of the appeal deprived the aggrieved party of the right of preferring an appeal to the High Court under the Letters Patent; but as observed by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (14): "When a long series of cases extending over long period of time, when parties were represented by eminent counsel, are decided in a way where if a plea, which was evident, had been taken and upheld, the decision

(2) [1910] 32 All. 265=7 A. L. J. 133.
(3) [1912] 34 All. 13.
(4) [1906] 29 Mad. 1.
(5) [1907] 30 Mad. 169=17 M. L. J. 19=2 M. L. T. 4 (F. B.).
(6) [1907] 30 Mad. 79=16 M. L. J. 573=1 M. L. T. 387.
(7) [1909] 32 Mad. 95=4 M. L. T. 110=18 M. L. J. 497 (F. B).
(8) [1901] 28 Cal. 517=5 C. W. N. 640.
(9) [1916] 43 Cal. 332.
(10) A. I. R. 1922 Cal. 141.
(11) A. I. R. 1925 Cal. 845 (F. B.).
(12) [1878] 2 Bom. 654.
(13) [1879] 3 Bom. 204.
(14) A. I. R. 1924 P. C. 50.

would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad." The preliminary objection, if sustained, would render practically nugatory the provision of the Letters Patent which gives a right of appeal to the High Court from the judgment of a Division Bench where the judges are equally divided in opinion; for, as I have already pointed out, there would hardly be any case in which the dissenting Judges would not be required to concur in an order disposing of the appeal in accordance with the opinion of the one Judge or the other. I accordingly overrule the preliminary objection.

The learned counsel for the respondent also contends that, if an appeal lies to this Court, it lies only on the point on which the Judges of the Division Bench have differed and that it is not open to the appellants to impeach their concurrent finding that the decision of the appeal is governed by Cl. 26 of the Letters Patent and not by S. 98 of the Civil P. C. Now, Cl. 10 of the Letters Patent gives a right of appeal "from the judgment of two or more Judges of the said High Court, or of any such Division Court, wherever such are equally divided in opinion.....", and it is perfectly plain that the expression "judgment" means the whole of the judgment and not a portion of it. It will be observed that Cl. 10 provides for appeals in three cases: (1) from the judgment of a single Judge of the High Court an appeal lies to the High Court; (2) from the judgment of two or more Judges of the High Court, who are equally divided in opinion, and do not constitute a majority of the Court, an appeal lies to the High Court; (3) from any other judgment of the High Court an appeal lies to the Privy Council. The language of the clause places these classes of appeals on the same footing and makes no distinction between the scope of one class and that of another class. While Cl. 29 imposes certain restrictions on the right of appeal to the Privy Council, there is no law which restricts the scope of the appeals of the first two classes or suggests that the Judges of the Division Bench hearing the appeal are not entitled to deal with all the points which were determined by the Court from whose judgment the appeal has been preferred. Nor do I think that the use of the word "wherever" was intended to confine the scope of the appeal to the point or points on which there is a disagreement between the Judges. The matter was fully discussed by a Full Bench of the Allahabad High Court in *Ram Dial* v. *Ram Das* (15), and I endorse the rule laid down in that judgment that the appeal given to the High Court under Cl. 10 of the Letters Patent is not confined to the point or points on which the Judges of the Division Bench differ in opinion.

The judgment in *Nundeeput Mahta* v. *Alexander Shaw Urquhart* (16), on which the learned Government Advocate places his reliance, no doubt decides that where the Judges composing a Division Bench agree in their finding on a certain point the High Court has no power in an appeal under Cl. 15 (corresponding to Cl. 10 of the Letters Patent of this Court) of the Letters Patent to question that finding. That judgment has, however, been dissented from, not only by the Allahabad High Court in *Ram Dial* v. *Ram Das* (15), but also by the Calcutta High Court in *Upendra Nath Bose* v. *Bindesri Prosad* (17), and can no longer be regarded as a correct exposition of the law.

The rule that the appeal under the Letters Patent lies from the whole of the judgment and is not restricted to the point or points on which the Judges composing the Division Bench have differed has been affirmed by the Madras High Court in *Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.* (7), and *Kunhunni* v. *Sri Vallabhan* (18), and by the Bombay High Court in *Velji Bhimsey and Co.* v. *Bachoo Bhaidas* (19). It is true that there are observations in *Probhat Chandra Barma* v. *King-Emperor* (20), to the effect that the High Court, while hearing an appeal under the Letters Patent, is not competent to consider the question of the correctness of the decision of a Division Bench upon a matter upon which both the Judges have agreed, but the observations were no more than mere obiter dicta. The question for determination in that case was whether the decision of the High Court on reference under S. 66, sub-S. (2) of the Indian Income tax Act (XI of 1922) was a "judgment"

(15) [1875] 1 All. 181 (F. B.).
(16) 13 W. R. 209=4 B. L. R. 181.
(17) [1915] 20 C. W. N. 210=22 C. L. J. 452.
(18) [1901] 11 M. L. J. 10. (F. B.).
(19) A. I. R. 1925 Bom. 118.
(20) A. I. R. 1925 Cal. 598.

within the meaning of the Letters Patent, and the Judges answered that question in the negative. After holding that no appeal was competent, the learned Judges proceeded to make the observations mentioned above which were not only obiter dicta, but did not represent even their considered opinion. As I have pointed out, the Calcutta High Court in the case of *Upendra Nath Bose* (19), had definitely laid down the rule, that when once the right of appeal is established, the appellant can raise, not only the points upon which the Judges have differed, but also those on which they have agreed; and it is obvious that the casual remarks made by the Judges of the Division Bench in the case of *Probhat Chandra Barma* (20), without any reference to the rule already enunciated by their own Court, cannot be treated as an authority for the view.

There can, therefore, be no doubt that the language of Cl. 10 of the Letters Patent and the consensus of judicial opinion are in favour of the appellants and they are entitled to challenge the correctness of the conclusion that the decision of the appeal was governed by Cl. 26 of the Letters Patent and not by S. 98 of the Civil Procedure Code.

Coming now to the merits of the question as to whether, in the event of the difference between two Judges, the procedure prescribed by Cl. 26 or that enacted by S. 98, should be followed, I find that all the High Courts have laid down the proposition that, where an appeal is heard by a Bench composed of two Judges who differ in opinion the decision of the appeal is regulated by S. 98 of the Code of Civil Precedure if the appeal is from a subordinate Court under the Civil Procedure Code or any local or special statute, and in all other cases the decision is governed by the Letters Patent. This was certainly the view taken by the High Courts prior to the pronouncement made by the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab* (21), and I do not think that that pronouncement has modified the law on the subject. It must be remembered that the action, which gave rise to that appeal, was tried on the original side of the High Court, and that it was under the Letters Patent that an appeal was preferred against the judgment of a Single Judge to a Division Bench. The learned Judges constituting the Division Bench differed in their opinion. The Chief Justice, the senior of the two Judges, held that the appeal should be allowed, but his colleague, on the other hand, agreed with the trial Judge. Now, the appeal being under the Letters Patent the procedure prescribed therein for governing the difference of opinion between the two Judges, composing the Bench was applicable to the case. The learned Judges, however, apparently in view of S. 98 of the Civil Procedure Code, referred the matter to two other Judges for decision, with the result that the appeal was ultimately dismissed. Their mistake was rectified by the Privy Council who set aside the decree of the appellate Court and remitted the case to the High Court to be decided in accordance with the rule prescribed by the Letters Patent.

Now, it may be conceded that the judgment of their Lordships of the Privy Council is couched in general terms and makes no distinction beeween appeals presented to the High Court from the decree of Subordinate Courts and those preferred under the Letters Patent from the judgments of one or more Judges of the High Court; and it is therefore, contended that the judgment as it stands embraces all cases and that it is immaterial whether the appeal is from a Subordinate Court or from the High Court itself. But as observed by Lord Halsbury in *Quinn* v. *Leatham* (22), "every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

As has been already pointed out, their Lordships of the Privy Council were dealing with a case which had been heard by a Division Bench of the Bombay High Court on an appeal under the Letters Patent, and their decision that in the event of a difference between two Judges the opinion of the Senior Judge should prevail applies only to cases of

(21) [1921] 45 Bom. 718=48 I. A. 181=14 L. W. 7=29 M. L. T. 350=(1921) M. W. N. 408=23 Bom. L. R. 623=19 A. L. J. 409=33 C. L. J. 488=25 C. W. N. 605=40 M. L. J. 519 (P. C.).

(22) [1901] A. C. 495=17 T. L. R. 749=65 J. P. 703=50 W. R. 139=85 L. T. 289=70 L. J. P. C. 76.

that description and the general observations made by them were not intended to alter the law which had already been laid down with respect to appeal from Subordinate Courts. Indeed they stated in that very judgment that the proposition which they were laying down was not novel in India ; and they would not have made this observation if they had intended to dissent from the interpretation which the High Courts in India had placed upon S. 98 of the Civil Procedure Code.

The judgment of the Privy Council in *Bhaidas's* case (21), has been considered by the High Courts in several cases, and it has been repeatedly held that the rule enunciated in that case governs only appeals within the High Courts, namely, from the judgment of one or more Judges of the High Court to a Division Bench of the same Court, and that S. 98 of the Civil Procedure Code provides for a difference of opinion in appeals from Subordinate Courts; vide inter alia, *Pandy Dagdu* v. *Jamnadas Chotumal* (23) ; *Hitendra Singh* v. *Rameswar Singh* (24) ; *A. Venkatasubbaiah* v. *C. Venkatasubbamma* (25) ; and *Prafulla Kamini Roy* v. *Bhobani Nath Roy* (26).

The learned counsel for the respondent has not invited our attention to a single judgment by any High Court in which the rule in *Bhaidas's* case (21), has been made applicable to an appeal from a Subordinate Court. There are no doubt observations to the contrary in *Suresh Chandra Mukerjee* v. *Shiti Kanta Banerjee* (27), but they were merely obiter dicta and have since been expressly dissented from by a Division Bench of the same High Court in the case of *Prafulla Kamini Roy* (26).

If the matter were res integra, I would be inclined to adopt the view that the clause of the Letters Patent prescribing the method of procedure in the event of a difference of opinion between two Judges composing a Division Bench governs all appeals heard by the High Court, and that it is immaterial whether they are appeals within the High Court itself or from Courts of inferior jurisdiction. Clause 11 of the Letters Patent, which ordains that the High Court of Judicature at Lahore shall be a Court of appeal from the civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, expressly recognizes the jurisdiction to hear appeals from Subordinate Courts as one of the functions of the High Court ; and Cl. 26 declares that "any function which is hereby directed to be performed by the High Court of Judicature at Lahore, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof appointed or constituted for such purpose in pursuance of S. 108 of the Government of India Act, 1915 ; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there is a majority: but, if the Judges be equally divided then the opinion of the senior Judge shall prevail." It would, therefore, appear that the rule prescribed by Cl. 26 embraces all decisions given by the High Court in the exercise of any of the functions which the Letters Patent direct the High Court to perform, and the duty of hearing appeals from Subordinate tribunals is one of these functions.

It is, however, unnecessary to dwell upon the subject any longer, because in view of the clause in the Letters Patent declaring all the provisions contained therein subject to the legislative powers of the Indian Legislature, the Courts in India have, since the pronouncement of the Privy Council in *Bhaidas's* case (21), unanimously endorsed the proposition, which they had enunciated before that pronouncement that the procedure in determining an appeal from a Subordinate Court is regulated by S. 98 of the Civil Procedure Code, and that in the event of a difference of opinion between two Judges hearing the appeal the decree appealed from must be confirmed unless the difference is upon a question of law, and in that case the Judges have the discretion to refer that question to one or more of the other Judges of the Court. Accordingly I hold that the present case, which was heard by a Division Bench on an appeal from a

(23) A. I. R. 1923 Bom. 218.
(24) A. I. R. 1925 Patna 625.
(25) A. I. R. 1925 Mad. 1032.
(26) A. I. R. 1926 Cal. 121.
(27) A. I. R. 1924 Cal. 855.

decree of a Subordinate Judge, is governed not by Cl. 26 of the Letters Patent, but by the provision of the Civil Procedure Code.

The learned Government Advocate, however, urges that even if S. 98 of the Code be held to apply to appeals from Subordinate Courts, the present case is not covered by the language of that section because the Judges of the Division Bench, while differing on the question of the quantum of damages, concurred in holding that the plaintiff was entitled to recover all the costs incurred by him in the Court of first instance, and to that extent they agreed in varying tha decree appealed from. The learned counsel contends that a case of this description, in which the Judges agree on one point and differ on the other, does not fall within the ambit of S. 98; and that, in the absence of any provision in the Code governing such a case, the procedure prescribed by the Letters Patent should be followed. I am unable to accede to this contention. Sub-section (2) of S. 98 enacts that "where there there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed." The principle adopted by the Legislature is that the decree of the Subordinate Court must be confirmed unless the majority of the Judges composing the appellate Bench concur in varying or reversing such decree. In other words, the confirmation of the decree appealed from is the rule, and its modification or reversal is only an exception. To satisfy the requirements of the exception the majority of the Judges constituting the Division Bench must concur in the entire judgment which seeks to vary or reverse the decree of the Subordinate Court. A judgment cannot be dissected into two portions, one portion to be treated as a judgment concurred in by the Judges of the appellate Court, and the other embodying their dissentient opinions. The sub-section contemplates that the whole of the judgment varying or reversing the decree appealed from should be accepted by the Judges composing the Division Bench, and if there is no such judgment, the exception does not apply and the general rule must prevail.

Mr. Noad for the respondent places his reliance upon the judgment of Seshagiri Ayyar, J., in *Manavikraman Tirumalpad* v. *Collector of the Nilgiris* (28), which gives expression to the opinion that S. 98 is inapplicable to a case in which the Judges of the appellate Court agree in varying the decree of the Court below on one point, but disagree as to the rest. It is, however, clear that the observations of the learned Judge, which were obiter dicta, were dissented from by his colleagues who adopted the opposite view. In my opinion the language of this section clearly indicates that there must be a complete agreement between the two Judges composing the Division Bench before the decree of the lower Court can be disturbed, and a partial agreement is obviously not a complete agreement and can only result in the dismissal of the appeal unless the difference of opinion relates to a question of law and that question is referred to one or more of the other Judges of the Court. In the present case there was no complete agreement between the two Judges as to the variation or reversal of the decree passed by the trial Court, and the case was consequently governed by the general rule embodied in sub-S. (2) of S. 98 of the Code, and the decree of the Court of first instance should have been confirmed.

The logical result of this conclusion is is that the judgment, against which this appeal has been preferred, should be set aside and the case should be remitted for decision in accordance with law.

The learned counsel for the respondent, however, asks us to hear him on the question of the amount of damages to be awarded to his client and to determine that question in this appeal. While we are perfectly ready to undertake the duty of determining this question and should like to settle the dispute between the parties finally, the learned advocate for the appellants does not consent to our adopting that course and insists upon our following the usual procedure of allowing this appeal and leaving it to the plaintiff to prefer an appeal from such decree as may be passed after the remand. There can be no doubt that if the appeal is allowed and the case is remanded for decision according to the law contained in S.98 of the Code, the defendants-appellants

(28) [1918] 41 Mad. 948=24 M. L. T. 155=8 L. W. 261=(1918) M. W. N. 540=35 M. L. J. 110.

would derive some advantages. They would, in that case, not only be entitled to the refund of the Court-fee affixed by them to their memorandum of appeal, but would have also the advantage of appearing in the appeal of the plaintiff as respondents with concurrent findings on a question of fact in their favour. Moreover it would be open to the plaintiff to reduce if he so wishes, his claim for damages which he prefers on appeal from the judgment which may be given after the remand. Be that as it may, I consider that, though it would be desirable to adjudicate upon the merits of the real question in controversy between the parties, we cannot compel the appellants to argue the question of damages when they are entitled to have their appeal accepted on the ground that under S. 98 of the Code of Civil Procedure the decree of the Court of first instance should have been confirmed. It will be observed that the course insisted upon by the appellants was followed by the Bombay High Court in *Appaji Bhivrai* v. *Shivlal Khubchand* (13) which case is on all fours with the present case. The same procedure was adopted by their Lordships of the Privy Council in the case of *Bhaidas Sivdas* v. *Bai Gulab* (21).

For the aforesaid reasons I would accept the appeal and setting aside the decree against the defendants remand the case for decision in accordance with the rule contained in S. 98, Civil Procedure Code. The Court-fee on the memorandum of appeal shall be refunded and other costs shall be borne by the parties incurring them.

Le Rossignol, J.—The main point for determination in this appeal is whether, in the event of difference between two Judges of this Court sitting as an appellate Bench from the decree of a Subordinate Court, Cl. 26 of the Charter of this Court or S. 98 of the Code of Civil Procedure governs the procedure.

Were there no weight of authority to the contrary I should hold that the Charter overrides the Code, not by reason of the ruling in *Bhaidas Shivdas* v. *Bhai Gulab* (21), but on the following reasoning.

The Civil Procedure Code is made applicable to High Courts by S. 117 of the Code, but S. 4 maintains the supremacy of any special jurisdiction or power conferred, or any form of procedure prescribed, by any other law for the time beipg in force. Now, Cl. 11 of the Charter of this Court, one of the clauses which deal with civil jurisdiction of this Court, recognizes this Court's jurisdiction to hear appeals from Subordinate Courts, and Cl. 26, prescribes the course to be adopted in the event of difference between Judges performing any function either on the original or the appellate side authorised by the Charter. C. 37 has been referred to as in effect cancelling or counterbalancing S. 4 of the Code, but I interpret it to mean nothing more than that the provisions of the Charter are subject to the legislative powers of the Indian Legislature and may be altered thereby. But until they are so expressly altered, and I can find no such express alteration either in S. 98 of the Code or elsewhere, the Charter remains intact.

However that may be, I agree with my learned Chief that we should not adopt a view contrary to that at which the other High Courts have arrived after much argument and conflict. I concur in his conclusions on this and the other points arising in the appeal and in his reasons for these conclusions.

By the Court.—The appeal is accordingly accepted. The decree against the defendants is hereby set aside and the case is remanded for decision in accordance with the rule prescribed in S. 98 of the Code. The Court-fee on memo. of appeal shall be refunded and other costs shall be borne by the parties incurring them.

Case remanded.

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SHADI LAL, C. J., AND ZAFAR ALI, J.

Bikha Ram—Convict—Petitioner.

v.

King-Emperor—Opposite party

Criminal Revision No. 1729 of 1924, Decided on 23rd December 1925, against an order of the S. J., Ferozepore, D/- 3rd December 1924.

(a) *Penal Code, S. 489-B—"As genuine."*

The words "as genuine" govern only the verb "uses" and not any other verb. [P 73, C 2]

(b) *Penal Code, S. 489-B—Object of section is to stop circulation of forged notes.*

The object of the legislature in enacting the section is to stop the circulation of forged not

by punishing all persons who, knowing or having reason to believe them to be forged, do any act which would lead to their circulation. [P. 73, C. 2]

(c) *Penal Code, S. 489-B—Person knowingly selling as well as buying forged note is guilty.*

A person who knowingly sells a forged note to another is guilty under S. 489-B, whether the purchaser knows it be forged or not [P. 73, C. 2]

J. G. Sethi—for Petitioner.

C. H. Carden Noad—for the Crown.

Shadi Lal, C. J.—There is ample evidence in support of the finding of the learned Sessions Judge that the petitioner Bhika Ram sold a forged currency note of Rs. 50 to one Jas Karan for a sum of Rs. 25 ; and that at the time of the sale both the parties knew that the note was, not a genuine note, but a forged one. The question for consideration is whether Bhika Ram is guilty of an offence described in S. 489-B of the Indian Penal Code.

Now, the aforesaid section runs as follows :

"Whoever sells to, or buys or receives from, any other person or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Mr. Sethi a for the applicant, contends, that in order to satisfy the requirements of the section it is necessary to prove that the accused sold the forged currency note as a genuine one, and that, as this essential ingredient of the offence has not been established, the accused is entitled to an acquittal. This contention is based upon the assumption that the words "as genuine" in the section go, not only with the verb "uses" which immediately precedes them, but also with all other verbs used in the opening portion of the section. The interpretation sought to be placed upon the section would reduce the law to an absurdity. The section, if construed in the manner suggested by the learned counsel for the applicant, would punish the following persons :

(1) Whoever sells to any other person as genuine any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(2) Whoever buys from any other person as genuine any forged or counterfeit currency note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(3) Whoever receives from any other person as genuine any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(4) Whoever traffics in, as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(5) Whoever uses as genuine any forged or counterfeit currency-note or bank-note knowing or having reason to believe the same to be forged or counterfeit.

Now, we fail to understand how a person can buy or receive as genuine a forged currency-note knowing the same to be forged. This is obviously a contradiction in terms.

There is no decided case on the subject but we are clear that the words "as genuine" govern only the verb "uses" and not any other verb. It is true that when a person sells a forged note as a forged note, he practises no deception upon the buyer who enters into the transaction with his eyes open ; and such a seller should not be subjected to any criminal liability. It appears, however, that the object of the Legislature in enacting this section was to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe them to be forged, do any act which would lead to their circulation. Judged by this test the sale of a forged note as a forged note is as reprehensible as a sale of a forged note as a genuine one. A person, who purchases for value a forged note knowing it to be forged, is ordinarily expected to make money out of the transaction by circulating the note as a genuine one. It is possible that a perfectly honest man, such as a mere collector of curios who does not intend to put the instrument into circulation, may come within the ambit of the section, but such exceptional cases cannot furnish any argument for modifying the plain meaning of the enactment.

We consider that the petitioner, who knowingly sold a forged note to a person who also knew it to be forged, is guilty under section 489-B of the Indian Penal

Code. It appears, however, that he was released on bail by this Court in December 1924; and that the punishment imposed upon him includes a fine of Rs. 500. Having regard to these facts we reduce the term of imprisonment to the period already undergone. The application for revision is accepted pro tanto, and the order of the Sessions Judge modified accordingly.

Order modified.

✻ A. I. R. 1926 Lahore 74

LE ROSSIGNOL AND FFORDE, JJ.

Mir Dad and *others*--Convicts—Appellants.

v.

The Crown—Opposite Party.

Criminal Appeal No. 638 of 1925, Decided on 20th November 1925, from the order of the S. J., Gujranwala, D/- 22nd May 1925.

✻ *Penal Code, S. 105—Right of private defence of property ceases after the offender has effected his retreat, or before the retreat. property is recovered, or assistance of public authority is obtained—After retreat is effected the right cannot again revive whenever the property is traced.*

As soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists but, until the offender has so completed his retreat the right of private defence of that property continues until the property has been recovered, i. e., during the retreat of the offender, or until the assistance of the public authorities is obtained. Right of defence cannot de revived so as to allow stolen property, whenever seen again in the possession of anybody, may be taken by owner from that person by the use of all the violence not extending to the causing of death which may be found necessary. The reason why a person is permitted to take the law into his own hands during the retreat of a thief with stolen property is that there is no doubt regarding the identity of the thief and the right to the property; also because the owner of the property is entitled to maintain his possession and to prevent the completion of the removal of the property from his possession. A very different state of things, however, arises if the owner of a stolen article be permitted to take the law into his own hands at any subsequent time and to use violence against any person who may or may not be an innocent holder in order to retrieve from his possession similar article which may or may not be the one stolen. If serious disorders are to be avoided the right of private defence must be strictly confined within the limits fixed by statute. 3 *N. L R.* 177 *Dissented.* [P 75 C 2]

Mian Muhammad Shafi—for Appellants.

Des Raj Sawhney—for the Crown.

Le Rossignol, J.—In this appeal and the connected appeals 23 persons appeal against a sentence of transportation for life passed upon them on their conviction under S. 302/149 of the Indian Penal Code. These appellants come from Chak No. 12 in Jhang district where it marches with the boundary of the Gujranwala district. They are in the main Asis and kokaras, whilst the complainant party belong to the Sarganas, Bhattis and Chuchaks dwelling just within the Gujranwala boundary, and it is both admitted by the parties, and found by the learned Sessions Judge, tnat by reason of cattle thieving, the one from the other, the parties are old enemies.

In the fight with which this appeal is concerned the Gujranwala party lost one man, Rahman, killed by gun fire, while four others, namely, Shahabli, Mughli, Jallu and Qaimi, were seriously injured, and the appellants have been convicted of the murder of Rahman and sentenced as mentioned above.

On the night of the 1st August 1924, eleven buffaloes belonging to Muhammad Shah were stolen from Chak No. 12. The next morning a tracking party was organised which followed the tracks of the stolen cattle up to the villages of Chakkiwala and Shah Muhammad where a fight took place and the aforementioned casualties resulted. Of the tracking party five men were injured, namely, Sohani, Lehra, Mir Dad, Shama Din and Mali, but their hurts were not serious and, in the case of Sohani, at any rate, appear to have been self-inflicted.

It is common ground that on reaching the village of Machhonika, some four miles from the complainants' village, the tracking party halted and their leader Karm Shah went off to the local thana of Pindi Bhattian to secure Police aid. For reasons which have not been satisfactorily explained the police failed to supply him with help till about 4-30 in the afternoon, i. e., more than two hours after his arrival at the thana, but at about that hour Karm Shah accompanied by two policemen, Pohle Khan and Sohan Singh, returned to Machhonika to find on arrival there that the tracking party had not waited but had gone on. The story for the prosecution is that Karm Shah being well-mounted galloped ahead in search of his

tracking party, found them in Chakkiwala village and seeing his further progress obstructed by the complainants opened fire with his gun and shot Rahman and another man. Other members of his party also are said to have used guns against the complainant party. Having wrought this mischief Karm Shah is said to have returned with the tracking party to Machhonika and to have met the policemen, Pohle Khan and Sohan Lingh, on the road. At that time he still held his gun and reported that his party had been assaulted and was therefore retreating.

The story for the defence is that on reaching Chakkiwala village the appellants other than Karm Shah saw their stolen cattle, attempted to seize them, were attacked by a very large number of the residents of that village, received some injuries and then retreated. Their story does not include any explanation of the manner in which Rahman was killed and the other members of the complainants' party received gunshot and other wounds.

The learne i Sessions Judge finds that the appellants were admitedly members of the tracking party and holds that the track party constituted an unlawful assembly, that they had come prepared to use force and to overcome any resistance that might be offered by the opposite party, and that each member of the tracking party knew that the prosecution of the common object of the party was likely to result in the causing of death or such injury as was likely to cause death.

On behalf of the appellants it has been contended, firstly, that Karm Shah was not present at the time of the fight, that the evidence that he was present is untrustworthy, being the evidence of interested persons or enemies, and secondly, that the remaining appellants though admittedly members of the tracking party deserved acquittal on the ground that in following up the tracks of the stolen cattle they were merely acting legally in defence of their stolen property which right of defence continued until the property stolen had been recovered.

I shall deal at once with this plea of the right of defence of property stolen. S. 105 of the Indian Penal Code supplies the statute law on the subject. That section runs. "The right of private defence of property against theft continues till the offender has effected his retreat with the property or, either the assistance of the public authorites is obtained, or the property has been recovered." This I take to mean that as soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists but that, until the offender has so completed his retreat the right of private defence of that property continues until the property has been recovered, i. e.. during the retreat of the offender, or until the assistance of the public authorities is obtained.

In order to avoid the conclusion that the successful retreat of the thief with the property puts an end to the right of private defence in respect of such property, it has been suggested that that right of defence may be revived and that the stolen property, whenever seen again in the possession of anybody, may be taken by owner from that person by the use of all the violence not extending to the causing of death which may be found necessary. This theory to my mind receives no support from the statute law and, if true, it constitutes a very serious derogation from the principle that no man shall be his own justiciar. I take it that the reason why a person is permitted to take the law into his own hands during the retreat of a thief with stolen property is that there is no doubt regarding the identity of the thief and the right to the property ; also because the owner of the property is entitled to maintain his possession and to prevent the completion of the removal of the property from his possession. A very different state of things, however, arises if the owner of a stolen watch be permitted to take the law into his own hands at any subsequent time aud to use violence against any person who may or may not be an innocent holder in order to retrieve from his possession a watch which may or may not be the stolen watch. If serious disorders are to be avoided the right of private defence must be strictly confined within the limits fixed by statute.

Now, in this case on the showing of the appellants the stolen cattle had been removed from the scene of the

theft long before the tracking party set out from their Chak, and on their own showing if the complainants were the thieves the stolen cattle had reached the thieves' village; in other words, the thieves had effected their retreat with the stolen property and even if the accused did see their cattle in the complainants' village they were not justified in using violence to recover those cattle, far less in inflicting death for the purpose of recovering them.

It is common ground that on reaching the village of Machhonika the tracking party came to know that the complainants were collected in large number in their village and were determined to bar their way. This knowledge notwithstanding, the tracking party armed with one gun, if not more, pushed on and came into collision with the complainants and in that fight killed one man and wounded others of the complainant party. For these reasons I think that the appellants with the exception of Karm Shah, whose case I shall subsequently deal with, have been rightly convicted; but to hold that each member of the party had reason to know that death was likely to be caused to his opponents is to take an extreme view of the case. In my opinion the most that can be held on the established facts is that each member of the party knew that grievous hurt was likely to be inflicted as the result of their unlawful assembly, and the prosecution of the common object.

For the foregoing reasons I would accept the appeal of all the appellants other than Karm Shah and alter their conviction to one under S. 326/149 read with S. 38 of the Indian Penal Code, and reduce the sentence in each case to seven years' rigorous imprisonment.

Turning now to the case of Karm Shah, I note the finding of the learned Judge that the members of the complainant party, who were engaged in the fight, though not necessarily lying witnesses, are interested and, therefore, not to be relied upon implicitly; and he bases the conviction of Karm Shah on what he regards as the corroborative evidence of the two policemen, Pohle Khan and Sohan Singh, who accompanied Karm Shah from Pindi Bhattian Thana to Machhonika village. According to the account of the policemen, one of them had no separate mount and the party, including Karm Shah, took about an hour to cover some four miles between the Thana and Machhonika. It is hard to believe that so long a time was spent in covering so short a distance. However that may be, it is quite clear that on arriving at Machhonika and finding his party had gone on, Karm Shah, who was well mounted and who is an expert rider, could easily have reached the scene of the fight, some 3 or 4 miles away, within a few minutes and could have been present at the time of the fight. It may be thought strange that, having secured the aid of the police, he would have left them behind, but there is really nothing extraordinary in this, for he knew that the police were following him and his anxiety to rejoin his party must have weighed far more with him than his wish to be actually accompanied by the police. On the other hand, the story told by the two policemen as to their subsequent doings is not altogether satisfactory. One would have thought that in a flat country they would have followed straight in the track of Karm Shah instead of making a detour to Chak Sabu as they say they did. It does not further seem probable, that after meeting Karm Shah returning with his party, they should not have returned at once to the thana and made a report, that they should have gone to village Maksuda where they seem to have had nothing to do, and then to have found their way to the scene of the fight. Moreover, there cannot be the slightest doubt that the complainant party had great influence at the local police thana. The fight took place at about 6 p. m. and the report at the thana some 4 miles off, was made only at 10 p. m. In view of the fact that other persons are said to have used shot guns and have been either discharged or acquitted and in view of the general tendency to assign to the leader the most serious part in any offence committed, I think that there is just a doubt whether Karm Shah was present at the time of the collision in Chakkiwala. He appears to have attempted to contract evidence that his gun at the time of the offence was not in his possession but with a gunsmith in Chiniot, but this evidence is not conclusive, for if he was not present at the time of the shooting his gun may have been used by some one of his

party. For these reasons I would accept the appeal of Karm Shah and acquit him.

Fforde, J.—I agree with the views expressed by my learned colleague and with the conclusions both of law and of fact at which he has arrived, and I will only add a few words as to the effect of of S. 105, Indian Penal Code.

Sir Muhammad Shafi has strongly argued that upon a true construction of this section no offence has been established against the appellants. He contends that at the time the affray took place the appellants were acting in the exercise of the right of private defence of property and accordingly cannot be deemed to constitute an unlawful assembly, and therefore cannot be held responsible for any acts of violence which were not proved against them individually. He contends that even if the opposite party are found to have effected their retreat with the stolen animals, the pursuers were entitled to recover the animals by force until the assistance of the public authorities had been obtained, and that until such assistance had been obtained, or the property recovered, the pursuing party were entitled to use any force short of inflicting death for the purpose of getting the animals back from the thieves. In support of this proposition he has referred us to the case of *Jarha Chamar* v. *Surit Ram* (1) in which the additional Judicial Commissioner of the Central Provinces in the course of his judgment expressed the view that in the case of theft "the right continues for the recovery of the property even after the theft has been accomplished". In illustration of his view the learned Judicial Commissioner gives the illustration which has been adopted by both Mr. Gour and Mr. Ratanlal in their valuable works on the Indian Penal Code. According to this view if a thief steals a watch and makes good his escape with it, the owner may recover the watch from the thief-using for that purpose such force as the case allows-should he discover him in possession of it the next day, the next month, or the next year. With great respect to the learned Judicial Commissioner I can find no warrant for such a proposition either in the Indian Penal Code or at common law. This, is my opinion, is not a correct interpretation of the effect of S. 105 Indian Penal Cade. According to that section the right of private defence of property against theft, that is to say, the right of the owner of the property to recover the stolen article from the thief by violence only continues until.,

(1) the offender has effected his retreat with the property, or (2) either, (a) the assistance of the public authorities is obtained, or, (b) the property has been recovered.

In other words, if the thief has effected his retreat with the property, or if the assistance of the public authorities has been obtained, or if the property has been recovered, the owner of that property has no right to proceed with violence against the thief. To take the illustration given in the authority referred to. If A runs away with B's watch, B may chase him and seize his watch from him, using for that purpose such violence short of inflicting death as may be necessary for the purpose of recovering the property stolen. But if B fails to capture A and recover his watch, his right to recover the article by violence has ceased. Similarly, if instead of pursuing A, B invokes the aid of a policeman for that purpose and the policeman captures A, B cannot intervene with violence for the purpose of recovering his article; and, again, if B by any means whatsoever recovers his watch, he cannot then proceed to use violence to the thief.

In the present case it is clear from the evidence that the thieves had effected their escape with the stolen cattle, and the duty of the owners when they failed to recover the animals in the course of the pursuit was to wait until Karm Shah had returned with the police. Instead of donig this, the pursuing party took the law into their own hands, with the result that one of the opposite party was killed and several injured. For these acts all the persons taking part in the unlawfuf attempt to recover the animals by violence must be held liable and though the present appellants may possibly not have inflicted any of the injuries sustained by the opposite party they are legally responsible for the violence of their associates, for there can be no doubt that the intent of all was to proceed to the length

(1) [1905] 3 N. L. R. 177=7 Cr. L. J. 49.

of inflicting at least grievous hurt in the endeavour to recover the stolen animals.

Appeal accepted : sentences reduced.

A. I. R. 1926 Lahore 78

HARRISON, J.

Narain Das and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Misc. Criminal Appeal No. 160 of 1924, Decided on 25th January 1925, for transfer of the case from Mag., First Class, Lahore, to some other Court.

Criminal P. C., S. 526—Protracting proceedings by examining one witness daily is sufficient ground for transfer.

Where the trying Magistrate ordered that he would examine only one witness a day during the trial and thus prolonged the trial of the case.

Held : that this is a sufficient ground for transfer of the case from that Magistrate to another.

[P 78 C 2]

Moti Sagar and *Mehta Amin Chand*—for Petitioners.

Order.—This application for transfer discloses a peculiar and deplorable state of things. The case was challaned under the Excise Act and came up on the 1st of October 1924, when the only witness for the Crown was examined and the charge was framed. The accused were ordered to put in their list of defence witnesses on the following day, they having stated that they did not wish to re-call and further cross-examine the one witness, and the 15th of October was fixed for the examination of their witnesses. On that date a note was written by the Magistrate to the effect that it was stated that the Crown wished to withdraw the case, but it was not disclosed by whom the statement was made. He, therefore, adjourned the case to the 30th of October for that doubtful matter to be cleared up. On the 30th of October the Crown applied for adjournment as correspondence was in progress with the revenue authorities. The case was adjourned to the 6th of November and again to the 21st of November when the accused were ordered to put in a list of defence witnesses to be summoned for the 6th of December. The list was put in and on the 6th of December two witnesses were examined and a note was recorded by the Magistrate stating that two hours were devoted to this work and that re-examination was fixed for the working day, i. e., the 8th and on the 8th after re-examining the one witness the Magistrate wrote an order saying : "I cannot devote any more time to this case to-day. I shall take it up from day to day. Defence want Mr. Brady to-morrow. Summon him for to-morrow."

Mr. Amin Chand, who appeared in the trial Court, tells me that the Magistrate was asked by counsel what was the exact meaning of the words "from day to day" and was told that one witness would be examined each day and not more, and this is borne out by the subsequent events. On the 9th one witness was examined, on the 11th one, on the 12th one, about an hour being spent on this work every day. On the 12th the accused put in an application through their counsel pointing out that their time and money was being wasted by examination of one witness daily, and asking that one day should be fixed for recording the whole of the evidence. On this the Magistrate wrote an order regretting that it was impossible for him to do so. On this an application for transfer was presented.

I cannot imagine a more flagrant case of the direct disobedience of the clear orders of this Court as to disposal of work. I transfer the case to the Court of some other Magistrate to be named by the District Magistrate.

Mr. Moti Sagar had pointed out at the time of presenting this application that he did not wish the proceedings to start de novo. This he now wishes to qualify by saying that he will re-summon Mr. Brady only and any documentary evidence which may be allowed by the trying Magistrate.

Transfer allowed.

A. I. R. 1926 Lahore 79

SHADI LAL, C. J. AND HARRISON, J.

Muhammad Din and *another*—Accused —Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 11 of 1925, Decided on 9th April 1925, from an order of the S. J., Attock at Cambellpore, D/-11th December 1924.

Criminal P. C., S. 510—Prosecution must show that things reaching chemical examiner were things sent—Failure to do so is not merely a technical defect.

Failure by prosecution to adduce evidence connecting the parcels containing the blood-stained clothes which reached the Chemical Examiner, with those that were alleged to be despatched and referred to at the trial or rather to show that they were despatched is not a mere technical defect. [P 80, C 1]

Ram Lal and *Gobind Ram* — for Appellants.

Sagar Chand—for Opposite Party.

Judgment. — Muhammad Din, Fazal Elahi and Ahmadji were charged with murdering Fazal Hussain on the night between 16th, 17th September 1924. Ahmadji was acquitted and disagreeing from the opinion of the assessors, the learned Sessions Judge convicted both Muhammad Din and Fazal Elahi and sentenced them to death. The appeal of both these men is before us and we have also to consider the question of confirmation of the death sentences.

The evidence in the case is somewhat meagre and consists of the statement of an approver, Nawab son of Gulab, which is found to be corroborated in three ways: (1) by the evidence of Nawab Kumhar who is said to have seen the three accused and the approver at about the time the murder was committed; (2) evidence regarding motive for the crime and (3) the fact that the clothes of all four were found on examination to be marked with stains of human blood. The story told is that Muhammad Din discovered the deceased Fazal Hussain, a young man of 18, in a most compromising situation with his wife. He took no action at the moment but discussed the matter with the approver Nawab and planned to commit the murder with the help of Ahmadji and Fazal Elahi. The victim was lured to the railway station by Fazal Elahi. The other three men there overtook them, and he was murdered near the station, his throat being cut by Ahmadji while the others held him down. The money which he had on him, amounting to Rs. 60 was then divided. The corpse was left lying near a water-course, where it was discovered on the following day, and the murderers dispersed. The approver was arrested that same evening and made a full confession the following morning. The clothes and a knife, which he produced, were sent to the Assistant Surgeon at Hazro and their examination showed that they were stained with marks of blood as were the clothes of the three men, whom he implicated.

The case for the defence has been very ably presented before us by Diwan Ram Lal. He criticizes in turn every branch of the evidence. He points out that so far as the motive is concerned the only evidence is the statement of the approver. The existence of an intrigue between the deceased and the wife of Muhammad Din is indignantly denied by the former's mother and, although it may be said truly that she does not wish to blacken the character of her dead son, the fact remains that there is nothing but the approver's word for the existence of this intrigue and that it cannot have been known generally in the village as the police only came to hear of it when the approver appeared at 5 p. m. on the 18th. With the exception of the statement made by the approver, there is not a word on the subject in the length and breadth of the police diaries.

Perhaps the most telling criticism is that of the evidence regarding the blood-stained clothes. This point has been misunderstood by the Sessions Judge. It is stated that the stains were seen when the Sub-Inspector removed the clothes on the 18th and made them into parcels and sent them by constable Abdul Qadir to the Assistant Surgeon at Hazro. Hazro is four or five miles distant from the village. Exhibit P. O. shows that these parcels were despatched from the thana of Hazro on the 21st and reached the Assistant Surgeon on the 22nd. There is thus a gap of three days which is wholly unexplained. It is true that the parcels were sealed but in an important matter of this sort it is absolutely essential to show that ordinary diligence was exercised and that the ordinary procedure was followed. If the parcels were sent direct to the Assistant

Surgeon, as the evidence shows, it is not explained how they came to go to the thana at all and the failure to explain what happened during these three days is a most important omission. Not only is this so but we have no evidence connecting the parcels which reached the Chemical Examiner, with those which were despatched by the Assistant Surgeon or rather to show that they were despatched. This is not a mere technical defect and was not treated as such in the cases reported as *Queen-Empress* v. *Autal Muchi* (1) ; *Ofel Molla* v. *Emperor* (2); and *In re Chukkapalli Ramayya* (3). The evidence, therefore, showing that the clothes of the accused were stained with human blood is very far from satisfactory.

The evidence of the one wajtakkar witness remains. He tells an extraordinary story to account for his leaving his village to go to Burhan and returning from there after attending a ceremony, which he describes as the jenaza or funeral of a man whom he did not know and who had died some 13 or 14 days before. What is more important is that the map shows that the place at which he states that he saw the accused is nowhere near the direct route from his village Malak Mala to Burhan. Both these villages are on the far side of the kass or water course which runs to the south of Barazai village, and no explanation has been given of how he came to cross this kass and go to the point which he says he reached.

Finally the story told by the approver bristles with improbabilities. It is said and admitted that Muhammad Din lent Rs. 60 to Fazal Hussain with a view to inducing him to leave the village and go to the station to start on a trading expedition. Nobody knew of this fact except Muhammad Din himself and perhaps the approver and yet, when the corpse was discovered and everybody was enquiring about the murder Muhammad Din came forward and drew attention to himself by disclosing the fact, he having had the strongest motive for committing the crime, which motive was unknown to the village. It is highly improbable that this man on discovering his wife with her [illegible]er in compromising circumstances w[illegible]ld have taken no action on the spot, and it is also improbable that, had the murder been planned in the way it is stated that it was, the corpse should have been left lying in the open for everybody to find.

An attempt has been made to corroborate the approver's story by the statement of his father. It is said that after the murder he was given Rs. 14 as his share of the money found on Fazal Hussain. He then went home and proceeded to wake up his father to entrust these Rs. 14 to him. Had the approver been a little child, to whom a present had been given, it is possible that he would have waken up his father or his mother to tell them of his good fortune, but for a full grown man of 25 years of age to behave in this way after committing a murder is, to say the very least, most extraordinary.

We find, therefore, that there is no sufficient corroboration of his highly improbable story and we accept the appeal and acquit both Muhammad Din and Fazal Ilahi.

Appeal accepted.

(1) [1884] 10 Cal. 1026.
(2) [1914] 18 C. W. N. 180=15 Cr. L. J. 147.
(3) [1910] M. W. N. 77 = 7 M. L. T. 314 = 11 Cr. L. J. 222=20 M. L. J. 657.

A. I. R. 1926 Lahore 80

MOTI SAGAR, J.

(*Muhammad*) *Umar Hayat Khan Tiwana*—Vendee—Appellant.

v.

Sardar Khan—Plaintiff and *another*—Vendor — Respondents.

Second Appeal No. 1731 of 1923, Decided on 21st January 1924, from a decree of the Dist. J., Shahpur, at Sargodha, D/- 11th April 1923.

(a) *Civil P. C., O. 41 R. 27—Court can admit additional evidence on the application of a party.*

The jurisdiction of an appellate Court under O. 41 R. 27 (1) (b) to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it but under the words " or for any other substantial cause " an appellate Court has full discretion to admit further evidence upon the application of a party: *A. I. R. 1923 P. C. 128, Foll.*
[P 81, C 1]

M. L. Puri—for Appellant.

Judgment.—The sole question for decision in this appeal is whether the learned District Judge was justified in admitting fresh evidence on appeal. The facts are briefly these :

The plaintiff brought a suit for pre-emption on the ground that he was a collateral of the vendor and that his right of pre-emption was consequently superior to that of the vendee. He produced two witnesses in support of this allegation who were disbelieved by the Munsif, and the suit was dismissed. On appeal the learned District Judge admitted the pedigree-table prepared at the time of settlement in evidence, and held that the plaintiff's relationship with the vendor has been sufficiently proved and that his right of pre-emption was superior to that of the vendee. The appeal was accordingly accepted.

The defendant-vendee has now come up in second appeal to this Court, and the only point urged on his behalf is that the learned District Judge was not justified in admitting fresh evidence in appeal, and that the procedure adopted by him was contrary to the provisions of O. 41, R. 27, Civil P. C. In my opinion there is no force in this contention and the appeal must fail. It has now been definitely laid down by their Lordships of the Privy Council in the case reported as *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1), that the jurisdiction of an appellate Court under O. 41, R. 27 (1) (b) of the Civil P. C., to admit additional evidence is not confined to cases in which the Court itself discovers a lacuna or defect and requires evidence to fill up or remedy it, but that under the words " or for any other substantial cause " an appellate Court has full discretion to admit further evidence upon the application of a party. In the present case it has not been shown that the discretion was improperly exercised, and I must consequently uphold the order passed by the learned District Judge.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

L. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

(1) A. I. R. 1923 P. C. 128.

1926 L/11 & 12

A. I. R. 1926 Lahore 81

ABDUL RAOOF, J.

Khan Zaman Khan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 219 of 1924, Decided on 19th March 1924, against an order of the S. J., Attock, at Campbellpore, D/- 2nd January 1924.

Criminal P. C., S. 439—Case against accused doubtful—Accused discharged—Order of discharge is not foolish and perverse.

Where after fully considering the evidence in the case the Magistrate comes to the conclusion that the evidence against the accused is doubtful and orders his discharge, his order of discharge cannot be said to be foolish and perverse so as to justify a re-trial. [P. 82, C. 1.]

Jagan Nath Bhandari and *M. S. Bhagat*—for Petitioner.

Zafrulla Khan—for Respondent.

Judgment. — The learned Sessions Judge has set aside the order of discharge and ordered re-trial of the petitioner Khan Zaman upon two grounds:

(1) That the medical evidence shows that one of the five incised wounds was caused by a hatchet and four by a knife, and that this pointed to two assailants; and

(2) That the Magistrate in his judgment says that Azam alone of the four prosecution witnesses was inimical to Khan Zaman; while in his order of discharge he says that all the prosecution witnesses are against him.

After carefully considering the evidence and the circumstances of the case I am constrained to hold that the learned Sessions Judge was not justified in ordering a re-trial in this case. The medical evidence does not definitely state that one of the wounds was caused by a hatchet and four by a knife.

All that is stated is that the injuries had been caused with some sharp edged weapon such as a big knife and that the injury No. 3 might have been caused with a hatchet. The first ground, therefore, cannot be sustained.

As regards the second ground the following facts appear. Mir Alam (P. W. No. 4) is the real brother of the complainant Karam Khan, and Khushal Khan is also a close relation of the complainant, being a khalu (mother's sister's husband). Azam Khan has himself admitted that

there is enmity between him and Khan Zaman. The Magistrate in his order of discharge says that the witnesses were against Khan Zaman: that is to say, antagonistic towards him. It is impossible to say that the Magistrate was not justified in taking this view. If after considering the evidence he came to the conclusion that the case against the petitioner, Khan Zaman, was doubtful, one cannot find any fault with him. It cannot be said that his judgment was foolish and perverse. The case clearly comes within the rule laid down in *Nabi Bakhsh* v. *Emperor* (1).

I, therefore, accept this petition for revision and set aside the order of re trial of the petitioner.

Petition accepted.

(1) [1920] 1 Lah. 216=21 Cr. L. J. 521=109 P. L. R. 1920.

A. I. R. 1926 Lahore 82

MOTI SAGAR, J.

Amritsaria —Plaintiff—Petitioner.

v.

Gamun—Defendant—Respondent.

Civil Revision No. 537 of 1923, Decided on 23rd January 1924, for revision of the decree of the Sub.-J., Third Class, Nawashahr, D/- 12th March 1923.

Civil P. C., O. 32, R. 9—Suit by minor through next friend—Subsequent discovery of the minor being a major—Amendment of plaint by removal of next friend when time-barred—Suit should not be dismissed.

A suit was instituted in the name of the plaintiff shown as a minor and the plaint was signed and verified by his next friend. It subsequently transpired that the plaintiff was a major at the time when the suit was instituted and his next friend had no authority to act on his behalf. At the time when the plaint was amended by removing the name of the next friend the suit had become barred by limitation.

Held: that the plaintiff should have been allowed to go on with the case and the suit should not have been dismissed merely because the plaint had not been signed and verified by him on the date when it had originally been instituted.

B. D. Qureshi—for Petitioner.

Shamair Chand—for Respondent.

Judgment.—I am of opinion that this application must succeed. The learned Judge of the Court below following *Sheorania* v. *Bharat Singh* (1), has dismissed the plaintiff's suit, holding that the amendment of the plaint was improper and that the claim was time-barred. The suit was originally instituted in the name of the present plaintiff Amritsaria. He was shown in the plaint as a minor and the plaint was signed and verified by his father Dheru who was acting as his next friend. It subsequently transpired that the plaintiff, Amritsaria, was a major at the time when the suit was instituted and his father Dheru had no authority to act on his behalf. The plaint was then amended and Dheru's name was removed from the record. The learned Judge of the Court below has held that the person who signed and verified the plaint was not duly authorized by Amritsaria in that behalf and there was no proper presentation of the plaint. He has also found that when the plaint was amended the suit had become barred by limitation and he accordingly dismissed it with costs.

In my opinion the learned Judge of the Court below has not taken a correct view of the matter and his decision ought to be set aside. When the learned Judge found that the plaintiff was not a minor he very rightly gave an opportunity to the latter to amend his plaint and to elect whether he would proceed with the suit or not. But the plaint having been amended Amritsaria should have been allowed to go on with the case and the suit should not have been dismissed merely because the plaint had not been signed and verified by him on the date when it had originally been instituted. If the decision of the lower Court is upheld the result would be that the plaintiff would lose the whole of his cause of action.

I accept the petition and return the case to the lower Court for decision on the merits. No order as to costs in this Court.

Application accepted.

(1) [1897] 20 All. 90=(1897) A. W. N. 203.

✻ A. I. R. 1926 Lahore 83

MARTINEAU AND JAI LAL, JJ.

Daya Ram—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 454 of 1925, Decided on 16th July 1925, from the order of the S. J., Ludhiana, D/- 21st April 1925.

✻ *Criminal P. C., S. 512—Finding that accused has absconded is not necessary.*

Section 512 requires only that before the Court records the depositions of the witnesses for the prosecution under this section, it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, but it does not require that a finding should be given to that effect : 41 *All.* 60, *Foll.* [P. 83, C. 2.]

Abdul Aziz—for Appellant.

Abdul Rashid—for Opposite Party.

Martineau, J.—The appellant, Daya Ram, a Jat of Sudhar, in the Ludhiana District, has been sentenced to death for the murder of one Mangal Singh, whose death was caused by numerous incised wounds on the head. The case for the prosecution is briefly as follows :

On the morning of the 4th February 1922 Mangal Singh got drunk in a drinking bout at the house of a friend named Nigahiya (P. W. 4) at Sudhar, and was afterwards brought by Nigahiya and Indar (P. W. 15) to the shop of Pala Ram (P. W. 7), where he lay down. Shortly afterwards the appellant came to the shop and called out to Mangal Singh. The latter did not reply and the appellant then went into the shop and with a chhavi, the blade of which he had concealed under his arm, he dealt Mangal Singh a number of blows on the head and neck. The assault was witnessed by Atma Singh (P. W. 2) and Pala Ram's uncle Thakar Das (P. W. 3), who were sitting at the shop. They raised an outcry, and Thakar Das went and informed Pala Ram, who was at his house at the time. Meanwhile the appellant left Pala Ram's shop and went to the Sath, where several men were sitting and attacked one of them, named Sucha Singh (P. W. 10), with his chhavi, one blow striking Sucha Singh on the arm. Two other men, Sawan Singh (P. W. 11) and Sham Singh (P. W. 12), managed to seize the chhavi from the appellant, who then ran away and absconded for nearly three years. The murder appears to have been committed in consequence of an altercation which had occurred when Mangal Singh, shortly before coming to Pala Ram's shop, met the appellant and asked him whether a camel which the appellant had with him was a stolen one.

We see no reason for rejecting the evidence of Atma Singh and Thakar Das, who have deposed to having witnessed the commission of the murder by the appellant. Mangal Singh was found lying dead in Pala Ram's shop, and Pala Ram's evidence shows that Atma Singh and Thakar Das at once told him and the other people who collected that the appellant had committed the murder.

Thakar Das' deposition is that which he made before the Honorary Magistrate of Raikot in 1922 in the proceedings taken under S. 512 of the Criminal Procedure Code, as he could not be found at the time of the magisterial enquiry or of the trial in 1925. It is contended for the appellant that the statement made by Thakar Das in those proceedings is inadmissible, because no finding was given in them, that the accused person had absconded and that there was no immediate prospect of arresting him. But the section requires only that before the Court records the depositions of the witnesses for the prosecution it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, and not that a finding should be given to that effect. The Honorary Magistrate in the proceedings of 1922, before he took down the depositions of the witnesses in regard to the murder, took the statements of two constables, who had searched for the accused and had not been able to find him. Those statements afforded the proof that was required, and the fact that the Honorary Magistrate issued a proclamation against the appellant under S. 87 of the Criminal Procedure Code would show that he was satisfied with the proof given. Counsel for the appellant has referred to *Wahid* v. *Empress* (1), *Ghurbin Bind* v. *Queen-Empress* (2), and *Emperor* v. *Rustam* (3). In the first of those cases no evidence had been taken as to the accused person having absconded, and in the second the

(1) [1883] 21 P. R. (Cr.) 1883.
(2) [1884] 10 Cal. 1097.
(3) [1915] 38 All. 29=13 A. L. J. 1043=16 Cr. L. J. 801.

deposition recorded had not been recorded under S. 512, Criminal Procedure Code, against the absconder, but had been recorded in the ordinary course of proceedings against other persons. Those two cases are therefore not in point. In the third case the learned Judges expressed the opinion that the language of S. 512 showed that the Court which records the proceedings must first of all record an order that in its opinion it has been proved that the accused person has absconded and that there is no immediate prospect of arresting him; but a different view on this point was taken by the same Court in *Emperor* v. *Bhagwati* (4). In the present case it was proved in the proceedings taken against the appellant under S. 512, Criminal Procedure Code, in 1922, that he had absconded and that there was no immediate prospect of arresting him, and we hold therefore that Thakar Das' statement taken in the proceedings under that section was admissible in evidence at the trial.

Besides the direct evidence of Atma Singh and Thakar Das in regard to the murder there are the statements of P. Ws. 10-13 as to the appellant having come to the Sath armed with a chhavi and attacked Sucha Singh. The chhavi was handed over by Sawan Singh (P. W. 11) to the Sub-Inspector on his arrival, and was forwarded to the Imperial Serologist, who found it to be stained with human blood.

The statement made by Nigahiya before the committing Magistrate was admitted in evidence under S. 33 of the Evidence Act as he was in the Malerkotla Jail. Objection has been taken to this; but even if Nigahiya's statement is excluded there is other evidence also against the appellant which is ample. Nigahiya's statement was in regard to the altercation which led to the commission of the crime, and that altercation is mentioned also by Ishat (P. W. 5) and Shera (P. W. 6).

The guilt of the appellant, who has produced no evidence in his defence, has in our opinion been clearly established We accordingly dismiss the appeal, confirming the sentence of death.

Appeal dismissed.

(4) [1918] 41 All. 60=16 A. L. J. 902=20 Cr. L. J. 6.

A. I. R. 1926 Lahore 84

ABDUL RAOOF, J.

Madan Singh and *others*—Defendants—Appellants.

v.

Puran Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 105 of 1924, Decided on 23rd March 1925, from the decree of the Dist. J., Ludhiana, D/- 15th October 1924.

Limitation Act (1908), *Ss. 5 and 12—Office not informing applicant when copy of decree would be ready—Delay in producing copy—Limitation was extended.*

Where the delay in producing a copy of the decree was due to the office not informing the applicant of the date when the copy would be ready, limitation was extended under S. 5.

[P.84,C.2.

B. A. Cooper—for Appellants.

D. S. Chand for *Harnam Singh*—for Respondents.

Judgment.—In my opinion the appellant has not been treated properly in this case. He made his first application for a copy of the decree in Urdu on the 3rd of July 1924. On the 10th July 1924, an intimation was sent to him by post telling him that he could not got a copy in Urdu and enquiring whether he wanted a copy in English. The appellant then on the 15th July 1924, expressed his willingness to take a copy in English. He was not told when the copy would be ready and when he should attend the office to take delivery of it. The learned Judge of the Court below remarks that the copy was ready by the 18th idem and finds fault with the appellant that he did not turn up to take delivery of the copy on that date. This remark would have been justified if the appellant had been told to come within three days or thereabout. He is an ignorant villager not quite conversant with the ways of the office of the Court and cannot rightly be blamed for not turning upon the 18th. Then again the office took another 15 days for deciding to send the copy by post which was eventually received by the appellant on the 25th and put in Court that very day. This was primarily a case in which the Judge should have exercised his discretion under S. 5 of the Indian Limitation Act and ought to have extended the period of limitation. I now do what the learned Judge of the Court below

ought to have done and extend the period of limitation. The appeal is accepted and the case is remanded under O. 41, R. 23 for decision on the merits. I make no order as to costs.

Appeal accepted.

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* A. I. R. 1926 Lahore 85

CAMPBELL, J.

Gahru Ram—Judgment-debtor — Appellant.

v.

Tara Chand—Decree- holder—Respondent.

Second Appeal No. 1824 of 1923, Decided on 19th December 1923, from an order of the D. J. Multan, D/- 3rd July 1923.

* *Hindu Law — Alienation — Decree against undivided son—Liability of share to attachment depends on son's right to enforce partition—In Punjab son cannot enforce partition—Hindu Law —Partition.*

A decree-holder holding a decree against an undivided son only has the right to attach and sell the undivided share in the possession of the father only if the son has the power to bring about a partition in his father's lifetime. The general rule of Hindu Law in the Punjab is that the son cannot enforce such partition. 113 *P. R.* 1886 and 58 *P. R.* 1880, *Foll.* 105 *P. R.* 1917 (F. B.), *Expl.*

[P 85 C 2]

Hargopal—for Appellant.

Judgment.—The question for decision in this second appeal is whether the interest of a Hindu son in joint family property in the possession of his father is liable to attachment and sale in execution of a decree against the son. The first Court held that it is not, on the authority of *Nathe Rai* v. *Mannu Ram* (1). The District Judge reversed this decision and relied for support on *Dhanpat* v. *Haku* (2).

In regard to this latter ruling the learned District Judge was in error in saying that a Full Bench of four Judges held a son's share in coparcenary property to be liable to attachment and sale. A Division Bench of two Judges followed the Privy Council decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (3), and held that the share and interest of one cosharer in joint ancestral estate may be sold in execution to satisfy a decree obtained against him personally, and the question arising in the case which was referred to a Full Bench of three Judges (not four) was a different one altogether. Moreover the cosharer in that case was not a son but one of four brothers, and the ratio decidendi both in it and in *Deendyal Lal* v. *Jugdeep Narain Singh* (3) was that the judgment-debtor cosharer although he might not be able to alienate or encumber his share in the joint property without the consent of the other cosharers, nevertheless had the power under law of compelling partition of his share, and, therefore, a purchaser in execution sale could acquire against him a right limited to that of compelling partition.

In the Punjab the position of a Hindu son is peculiar. It has been laid down authoritatively by a Full Bench in *Hari Kishen* v. *Chandu Lal* (4), that, although, under the Mitakshara Law a son can enforce partition in his father's lifetime, the rule of Hindu Law does not obtain in the Punjab and in every case the onus of proving that a son has such a right lies upon the person affirming it. Amongst other previously decided cases quoted with approval was *Nathe Rai* v. *Mannu Ram* (1), where it was assumed as a guiding principle that the question whether a son's interest can be attached and sold during his father's lifetime depends upon whether the son could compel partition while the father was still alive. The learned District Judge in the case before me distinguished this ruling but not very successfully. There was a remand on the question of custom, but the party alleging that the son had the power, which the strict Mitakshara Law would give him, to enforce partition, was called upon to prove that he had that power by custom, and on his failure to establish any custom his claim was dismissed.

There can be little doubt that a decree-holder has the right to attach, and sell the undivided share of a Hindu son in joint family property in the possession of the father only if the son has the power to bring about a partition in his father's lifetime. The general rule of Hindu Law in the Punjab is that the son cannot enforce such partition and it follows that the decision of the first Court in the present case was correct. I accept the

(1) [1886] 113 P.R. 1886.
(2) [1880] 58 P.R. 1880 (F. B.).
(3) [1877-78] 3 Cal. 198=4 I.A. 247=1 C.L.R. 49=3 Suther 468=3 Sar. 730 (P. C.).
(4) [1917] 105 P.R. 1917 (F. B.).

appeal with costs, set aside the order of the learned District Judge and restore that of the first Court.

Appeal accepted.

A. I. R. 1926 Lahore 86

MOTI SAGAR, J.

Muhammad Din & Sons — Plaintiffs — Appellants.

v.

B. D. Berry & Co.—Defendants — Respondents.

Second Appeal No. 995 of 1923, Decided on 12th January 1924, from a decree of the Dist. J., Lahore, D/- 6th April 1923.

Decree—Setting aside—Fraud—Absence of service is not sufficient ground—Suppression of service and false claim to defendant's knowledge must be proved.

An ex-parte decree cannot be vacated on the ground of fraud unless it is proved that there was a fraudulent suppression of summons or that the claim of the Plaintiff was false to his knowledge. Mere non-service is not a sufficient ground for a suit to set aside a decree: *A. I. R.* 1922 *Patna* 291 and 62 *I. C.* 594, *Rel. on.* [P 86 C 2 ; P 87 C 1]

B. D. Kureshi for *Gulab Din*—for Appellants.

Mehr Chand—for Respondents.

Judgment.—This was a suit for declaration that a certain decree was obtained by fraud, and for an injunction that the defendants be restrained from proceeding with the execution thereof. It appears that the dofendants filed a suit against the present plaintiff for a sum of Rs. 960 in the Court of Small Causes at Calcutta, and obtained an ex parte decree on the 3rd of May 1921. The summonses were not personally served upon the present plaintiff through the Court, but re alleged to have been sent to him by registered post. The decree was transmitted to Lahore for execution and some property belonging to the plaintiff was attached. Thereupon the plaintiff brought this suit for setting aside the decree on the ground of fraud, alleging that, the service of summonses had not been effeced upon him, and that the defendants by some means or other had fraudulently obtained an ex parte decree. The defendants denied the claim and pleaded that the plaintiff had no cause of action to maintain this suit. Both the Courts below have concurrently held that fraud had not been established and that the plaintiff was not entitled to have the decree set aside. The plaintiff has now come up in second appeal to the Court.

It has been argued on his behalf that the onus of proving that the summonses had been duly served was upon the defendants and that they have failed to discharge this onus. I am unable to agree with this contention. The defendants had obtained a decree which unless set aside would be binding upon the plaintiff. The plaintiff came into Court on the allegation that the decree had been obtained by fraud and that service of summonses had not been effected upon him. In the absence of any evidence on the record the plaintiff would be bound to fail and it would be presumed that all acts of the Court had been properly done and that the summonses had been duly served. In the present case beyond the bare denial of the plaintiff that he had been duly served, there is nothing on the record to show that this was a correct statement of facts and that the acknowledgment receipt purporting to bear his signature upon the basis of which the ex parte decree at Calcutta was passed was a forgery. The postal peon, who is supposed to have delivered the registered letter to the plaintiff, has not been produced nor has any expert evidence been produced to prove that the signatures on the receipt are not his. Some witnesses have been produced to depose that the plaintiff was not in Lahore at that time when the registered letter is alleged to have been delivered. This evidence is, in my opinion, wholly insufficient to discharge the burden of proof which heavily lay upon him, and I hold that the plaintiff has entirely failed to prove that he had not been duly served. I am further of opinion that mere non-service of summons is not sufficient to entitle plaintiff to have the decree vacated. In *Chhattra Kumari Deli* v. *Rachamohan Singari* (1), it was held that mere non-service was not a ground for a suit to set aside a decree and that it must be shown that the opposite party was guilty of fraud in causing the suppression of summons and thereby keeping the plaintiff in ignorance of the suit. In *Jagarnath Prasad* v. *Bahurani* (2), it was laid down that in a suit

(1) A. I. R. 1922 Patna 291.
(2) [1921] 62 I. C. 594.

to set aside a decree on the ground of fraud, the plaintiff to succeed must prove that the fraud was extraneous to the decree. The principle of law now seems to be firmly established that an ex parte decree cannot be vacated on the ground of fraud unless it is proved that there was a fraudulent suppression of summons or that the claim of the defendants was false to their knowledge. In the present case there is not a little of evidence on the record to prove that the defendants were guilty of a suppression of summons or that they had knowingly brought a false suit against the plaintiff in Calcutta. In my opinion the plaintiff has entirely failed to show that the defendants had committed any fraud, and the suit has been rightly dismissed.

I dismiss the appeal with costs throughout.

Appeal dismissed.

A. I. R. 1926 Lahore 87

MOTI SAGAR, J.

Muhammad Asadullah Khan—(Insolvent)—Appellant.

v.

Sant Ram and *others*—Respondents.

Misc. First Appeal No. 1294 of 1923, Decided on 18th January 1924, from an order of the Dist. J., Gujranwala, D/- 20th March 1923.

Prov. Insol. Act (1920), *S.* 38—*Composition proposed by insolvent and accepted by Receiver—Creditors not objecting—Creditors cannot be presumed to have accepted.*

The proceedings prescribed by S. 38 should be strictly followed and the mere absence of objection by creditors to a proposal submitted by the insolvent and accepted by the Receiver does not give rise to a presumption that the creditors accepted it. [P 88 C 1]

Rustomji and *Tara Singh Narula*—for Appellant.

Jagan Nath Bhandari for *Ram Chand Manchanda*—for Respondents.

Judgment.—This appeal arises out of insolvency proceedings and the facts are shortly these :

One Muhammad Asadullah was adjudicated an insolvent on the 2nd April 1917, and a Receiver was appointed to take charge of his property. The insolvent offered to place half of his land at the disposal of the Court so that the creditors may be paid out of its income and the proposal was accepted by the learned District Judge on the 12th April 1918, when the following order was passed : "Muhammad Asadullah will make over, as he agrees to do one-half of his cultivated land on 1st June 1918 to Kesar Singh, Receiver." In accordance with this order the Official Receiver entered into possession of the land, but it appears that he was unable to realize any income out of it. On the 18th June 1921, some of the creditors applied for the attachment of some moveable property belonging to the insolvent and property worth Rs. 900 was attached. The insolvent objected to the attachment on the ground that a composition had been arrived at between him and the creditors, and that as long as the composition remained in force the creditors had no right to levy attachment against any other property belonging to him. The learned District Judge was of opinion that the proposal accepted by the order dated 12th April 1918 did not amount to a scheme of composition and that the property of the insolvent had been validly attached.

Against this decision the insolvent has preferred an appeal to this Court after having obtained leave under S. 75 (iii) of the Provincial Insolvency Act. After hearing the learned counsel for the appellant, I am of opinion that the decision of the learned District Judge is correct and that this appeal must fail. Under S. 38 of the present Provincial Insolvency Act, which corresponds to S. 27 of the Provincial Insolvency Act III of 1907, if a debtor submits a proposal for composition in satisfaction of his debts, the Court fixes a date for the consideration of the proposal and is bound to issue notice to all the creditors. If on a consideration of the proposal a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, the same is deemed to have been duly accepted by the creditors. In the present case there is no evidence on the record to show that this procedure was followed and in fact it is conceded by the learned counsel for the appellant that notice did not actually issue to all the creditors. His contention is that the creditors never objected to the scheme sanctioned by the District Judge and it should, therefore, be presumed that

they consented to the arrangement. I am unable to agree to this contention. In my opinion the procedure prescribed by S. 38 of the Provincial Insolvency Act should have been strictly followed, and as it was admittedly not done the so-called composition cannot be held binding upon the creditors.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 88

SHADI LAL, C. J., AND ADDISON, J.

Rannun—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 855 of 1925, Decided on 12th January 1926, against the order of the S. J., Ludhiana, D/- 19th August 1925.

(a) *Evidence Act* (1 *of* 1872)—*Act is independent of the provisions of Criminal P. C.*

The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute. [P 89, C 1]

(b) *Interpretation of Statutes—General statute does not repeal particular one.*

It is a cardinal rule of interpretation that a general statute is to be construed as not repealing a particular one, that is, one directed to a special object or a special class of objects. [P 89, C 2]

(c) *Criminal P. C., S.* 162—*Section applies to statement of witnesses and not to those of accused and does not modify Evidence Act, S.* 27.

Section 162 applies to the statements of persons examined as witnesses by the police in the course of investigation, and not to the statement of an accused person and it does not override or modify the provisions of S. 27 of the Evidence Act. [P 90, C 1]

(d) *Evidence Act, S.* 8—*Motive can never supply want of reliable evidence of the offence.*

Motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged. [P 90, C 1]

(e) *Criminal Trial — Inference of guilt—Inculpatory facts must be incompatible with innocence of accused.*

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [P 93, C 1]

(f) *Penal Code, Ss.* 302 *and* 201—*Charge of murder—Conviction under S.* 201, *I. P. C., is legal by reason of Criminal P. C., S.* 237.

A person charged with an offence of murder can be convicted under S. 201, Penal Code, without a further charge being made against him under that section, and such a conviction is warranted by S. 237 of the Criminal *P. C: A. I. R.* 1925 *P. C.* 130, *Foll.* [P 90 C 1, 2]

C. L. Gulati—for Appellant.

Desraj Sawhney—for the Crown.

Judgment.—On or about the 16th March, One Harya, a Jat of the village Todapur in the district of Ludhiana, disappeared from his house, and it was not until the 6th April 1925, that his corpse was disinterred from the field of the appellant Rannun. The Session Judge of Ludhiana has convicted Rannun of the murder of Harya, and has sentenced him under S. 302, Indian Penal Code, to suffer the penalty of death. The medical evidence showed that Harya's death was due to asphyxia caused by strangulation, and the question for determination is whether the murder was committed by the prisoner Rannun.

Now, there is no eye-witness of the affair and the conviction rests on the following pieces of evidence :

On the 6th April 1925, the prisoner stated to the police that he had buried the body of Harya in his field.

In consequence of the information supplied by him the body was recovered from the field.

A cloth called daula was found on the corpse and weaver Sher Muhammad deposes that he made the daula in question with another daula for the prisoner's brother Santu who too was tried for the murder, but has been acquitted by the learned Sessions Judge.

It appears that Santu himself subsequently produced from his house another daula which has been identified by Sher Muhammad as one of the pair manufactured by him. The circumstances that a daula belonging to Santu was found on the corpse does not, in our opinion, materially advance the case for the prosecution so far as the guilt of the prisoner is concerned.

The learned counsel for the appellant, while conceding that the confessional statement made by his client, which led to the discovery of the body,

is admissible under S. 27 of the Evidence Act, contends that S. 162 of the Criminal Procedure Code prohibits the use of the statement in an enquiry or trial in respect of the offence which was under investigation at the time when the statement was made to the police officer. Our attention has been invited to the language of the section which, it is urged, forbids the use of a statement made by 'any person' to a police officer in the course of an investigation, and it is argued that the words 'any person' include an accused person. This contention, if accepted, would virtually repeal S. 27 of the Evidence Act, and we do not think that such a result was ever intended by the Legislature. The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute. It must be remembered that S. 27 of the Evidence Act embodies a very important rule of evidence applicable to criminal cases, and one would expect that a repeal or alteration of that rule involving such far-reaching consequences would be carried out not by a mere implication, but by an express provision to that effect. It is in the least degree improbable that the "Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be, in their literal sense, must, usually, be construed as being limited to tha actual objects of the Act, and as not altering the law beyond." Maxwell on the Interpretation of Statutes, sixth Edition, page 149. In view of this principle it was held in England in the case *R.* v. *Harrald* (1) that the enactment which gave a vote for the election of Town Councillors to every "person" of full age who had occupied a house for a certain time, and provided that the words importing the masculine gender should include females for all purposes relating to the right to vote, was intended, having regard to the general scope of the Act, to remove only that disability which was founded on sex, but not to affect that which was the result of marriage as well as sex, and therefore not to give the right of voting to married women.

As observed by Smith, J., in *Kutner* v. *Phillips* (2), a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim *leges posteriores priores contrarieas abrogant* applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied. The language of every enactment must be construed, as far as possible, in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it.

Moreover, it is obvious that, while S. 27 of the Evidence Act is confined in its operation on an incriminating statement made by an accused person in police custody, S. 162 of the Code of Criminal Procedure contains a general provision embracing all statements made by persons examined during the police investigation; and it is a cardinal rule of interpretation that a general statute is to be construed as not repealing a particular one, that is, one directed to a special object or a special class of objects. "Now if anything be certain," observes Lord Selborne in *Seward* v. *The Vera Cruz* (3), it is this: that where there are general words in a later Act, capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed,

(1) 41 L. J., Q. B. 173=7 Q. B. 361=26 L. T. 616= 20 W. R. 328.

(2) [1891] 2 Q. B. 267=60 L. J., Q. B. 505= 64 L. T. 628=39 W. R. 526=56 J. P. 54.

(3) 10 A. C. 59=54 L. J. P. 9=49 J. P. 324= 5 Asp. M. C. 386=33 W. R. 477=52 L. T. 474.

altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

Having regard to the above rules of interpretation we are of opinion that S. 162, of the Code of Criminal Procedure applies to the statements of persons examined as witnesses by the police in the course of investigation, and not to the statement of an accused person; and that it does not override or modify the provisions of S. 27 of the Evidence Act. We must, therefore, hold that the prosecution can rely, not only upon the discovery of the corpse in the field of the prisoner, but also upon the statement made by him in consequence of which that discovery was made. There is also some evidence bearing upon the motive for the murder. But motive for a crime, while it is always a satisfactory circumstance of corroboration, when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged. Now, the question is whether the two pieces of evidence mentioned above necessarily point to the conclusion that the appellant committed the murder. The fundamental rule by which the effect of circumstantial evidence is to be estimated is well established. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Can we say that these facts are incapable of explanation upon any hypothesis other than that the prisoner committed the murder? It seems to us that, while they certainly prove that he made away with the evidence of the murder by concealing the body, they do not necessarily suggest the inference that he himself committed the murder. He cannot, therefore, be convicted under S. 302, Penal Code; but he is clearly guilty of an offence described in S. 201, Penal Code. It is true that he was not charged with the commission of the latter offence but, as laid down by their Lordships of the Privy Council in *Begu* v. *Emperor* (4), a person charged with an offence of murder can be convicted under S. 201, Indian Penal Code, without a further charge being made against him under that section, and that such a conviction is warranted by S. 237 of the Criminal P. C.

We accordingly accept the appeal, so far as to alter the conviction under S. 302, I. P. C., to one under S. 201, and setting aside the sentence of death we direct that the prisoner shall suffer rigorous imprisonment for a period of seven years.

Conviction altered.

(4) A. I. R. 1925 P. C. 130.

A. I. R. 1926 Lahore 90

MARTINEAU AND MOTI SAGAR, JJ.

Neba Ram—Defendant—Appellant.

v.

Muhammad Hussain and *others*—Plaintiffs—Respondents.

Second Appeal No. 1670 of 1921, Decided on 4th June 1924, from a decree of the Dist. J., Mianwali, D/- 6th July 1921.

T. P. Act, S. 60—Two mortgages on the same property in favour of same person—Second mortgage containing covenant that first would not be redeemed unless second is redeemed—Covenant can be given effect to.

Where there are two mortgages of the same property in favour of the same mortgagee and there is a specific covenant in the latter mortgage that the first mortgage will not be redeemed unless the amount due under the second is paid, the mortgagor will not be allowed to redeem the first mortgage only: 37 *All.* 634, *Rel. on.* [P 91 C 1]

Jagan Nath and *Tek Chand*—for Appellant.

Devi Dyal, *L. C. Mehra* and *Sagar Chand*—for Respondents.

Judgment.—The plaintiffs brought the present suit for the redemption of land on payment of Rs. 700 for which sum the land had been mortgaged to Defendant No. 1 by a deed dated the 10th June 1896. The land was also mortgaged to the same defendant by a deed, dated the 13th December 1896, and the trial Court held that the amount due on that deed must be paid before the first mortgage could be redeemed, as the second deed contained a covenant to that effect. But the learned District Judge, following *Kesar Kunwar* v. *Kashi Ram* (1) held that as the debt due on the second mortgage-deed, which did not give the mortgagee a right to possession, was time-barred the plaintiff was not bound to pay it

(1) [1915] 37 All. 634=13 A. L. J. 889.

before he could redeem the first mortgage, and he allowed redemption on payment of Rs. 700. The mortgagee has filed a second appeal.

In *Nathwa* v. *Kanhiya* (2), in which the facts were similar to those of the present case, this Court dissented from the Allahabad ruling which the learned District Judge has followed, and held that the plaintiff was not entitled to redeem the first mortgage without paying the amount due on the second.

We agree with that view, and counsel for the respondents have in fact admitted that the lower appellate Court's decision is wrong and that in accordance with the stipulation contained in the deed of the 13th December 1896 the plaintiff must pay the amount due on that deed before he can redeem the earlier mortgage.

We accordingly accept the appeal, reverse the decree of the lower appellate Court and remand the case to that Court for a fresh decision to be given after the amount due to the appellant has been determined. The Court-fee paid on the memorandum of appeal in this Court will be refunded, and other costs will be costs in the case.

Appeal accepted.

(2) [1921] 3 L. L. J. 432.

✻ A. I. R. 1926 Lahore 91

ADDISON, J.

Firm, Radha Kishen-Chuni Lal — Plaintiffs—Appellants.

v.

Firm, Ahsa Mal-Ishar Das — Defendants—Respondents.

Miscellaneous First Appeal No. 1064 of 1925, Decided on 27th October 1925, from the order of the Senior Sub-J., Jhelum, D/- 26th January 1925.

✻ (a) *Civil P. C., Sch. 2, paras. 20, 21, 14 and 15—Application under paras. 20 and 21—Court can decide whether there was reference and whether there was any dispute for reference.*

On an application under paras. 20 and 21 the Court has power to decide whether there was a reference to arbitration on behalf of the parties, and whether there was any matter in dispute between the parties to be referred to arbitration. The Court's power is not confined only to deciding any objections under paras. 14 and 15. [P. 93, C. 1]

✻ (b) *Partnership — Arbitration — Reference made by one partner on behalf of firm is invalid—All partners must join—Contract Act, S. 251.*

One partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all partuers join in it. [P. 93, C. 2]

✻ (c) *Partnership—Receiver winding up partnership—Managing partner cannot refer to arbitration any question as to liability of the firm to any one—Arbitration.*

Where there is a Receiver in existence winding up the partnership affairs of a firm under the Court, and he has been given full powers to collect all outstandings and to pay debts and to distribute the surplus, it is not possible for the managing partner of the firm to refer to arbitration a question as to whether the firm owes anything to anyone. [P. 94, C. 1]

Nand Lal—for Appellants.

Dev Raj Sawhney—for Respondents.

Addison, J.—An application was made on the 13th August 1924 under Schedule 2, paragraphs 20 and 21, Civil P. C., by the firm Radha Kishen-Chuni Lal through Raunki Ram, purporting to be its manager, against the firm Ahsa Mal-Ishar Das, through Lakhmi Chand, son of Ganda Mal, described as its managing partner, to file an award dated the 13th August 1924 and to have it made a decree of the Court. The application was made the same day the award was written and when it was presented the two persons described as the managers were present as well as the arbitrator. According to the award two persons were partners of the firm Ahsa Mal-Ishar Das, namely, Lakhmi Chand, son of Ganda Mal, who purported to be its managing partner, and another Lakhmi Chand, son of Ishar Das, and the arbitrator awarded Rs. 10,743, against the firm Ahsa Mal-Ishar Das in favour of the firm Radha Kishen-Chuni Lal with interest at 12 per cent. per annum till payment. In spite of the large amount involved Lakhmi Chand, son of Ganda Mal, signed the award and also agreed that it should be filed in Court. On the 31st October 1924 it came to the notice of the Court from the statement of Raunki Ram that he had only been a paid servant of the plaintiff firm Radha Kishen Chuni Lal which had ceased to exist three years before the alleged arbitration. He also disclosed that Radha Kishen,-one of its two partners, was dead and that he had no power-of-attorney from its other partner Chuni Lal, who was his brother-in-law. In fact Raunki Ram signed the agreement to refer and

signed the award, and put in the application to the Court only on the alleged oral instructions of Chuni Lal, and it is obvious that he had no power to do these acts. The Court thereupon ordered notice to issue to the defendant firm, Ahsa Mal-Ishar Das, at Karachi, and to Chuni Lal ; but Lakhmi Chand, son of Ganda Mal, at once volunteered a statement to the Court that the defendant firm had been closed or dissolved, though he used to institute and defend suits on its behalf. He added that the shareholders were :—

Himself i. e., Lakhmi Chand, son of Ganda Mal, 0–5–4.

Lakhmi Chand, son of Ishar Das, 0-10-8.

He also said that the dealings of that firm came to him on an award Accordingly the Court summoned the other Lakhmi Chand and Chuni Lal.

Chuni Lal did not appear on the 25th November 1924, but Lakhmi Chand, son of Ishar Das did. On that date Raunki Ram further disclosed that Chuni Lal and Lakhmi Chand, son of Ganda Mal, were true brothers, so that he was the brother-in-law of both of them. By the consent award, therefore, the dissolved firm, in which Chuni Lal was a partner, got an order against the dissolved firm in which his brother Lakhmi Chand, son of Ganda Mal, was a partner to the extent of one-third, for a large sum of money with interest. Chuni Lal ultimately appeared on the 13th December 1924 and admitted that his firm was closed or dissolved some five years before and that Radha Kishen, the deceased partner, had left a minor son, who, however, had no connexion with the firm. He further said that he had orally authorized his brother-in-law Raunki Ram to act for him and that the defendant firm had been closed for three or four years. Lakhmi Chand, son of Ganda Mal, made a further statement on the 13th December 1924 that Ahsa Mal-Ishar Das was not yet dissolved and that he was full owner of that firm by both the arbitration awards though this goes against his own consent award. He admitted that Kimat Rai had been appointed by the Court of the Judicial Commissioner, Karachi, as Receiver of the firm Ahsa Mal-Ishar Das to collect outstandings and pay debts with what he collected. He also said that he had got no authority from the Receiver to enter on this arbitration and that the other Lakhmi Chand, son of Ishar Das used to give assent to what he did, though it was not asserted that he assented to this arbitration.

The other Lakhmi Chand, son of Ishar Das, appeared on the 25th November 1924 by counsel who filed a written statement and made an oral one. He objected that Raunki Ram could not carry on the suit on the oral instructions of Chuni Lal. This was certainly correct ; but when Chuni Lal came forward later, the position changed at least as far as the suit is concerned. It was further stated, (1) that there was no reference to arbitration on behalf of either of the two firms ; and (2) that there was no dispute between them so that there could be no reference. It was further explained that the firm Ahsa Mal Ishar Das was dissolved in November 1917 by an award filed in the Court of the Judicial Commissioner. Ishar Das died in February 1918 when his son and heir Lakhmi Chand, son of Ishar Das, was 13 years old. A fresh dispute arose then and the same arbitrator, Kimat Rai, settled it by a seeond award in October 1918, and it became a rule of the Court on 15th October 1919. Both the Lakhmi Chands, one being represented by his mother, then moved the Judicial Commissioner that Kimat Rai should be appointed Receiver to recover the outstandings and discharge the liabilities of the partnership, details of which were given in a list prepared by Lakhmi Chand, son of Ganda Mal, which was, however, not admitted necessarily to be correct by the other Lakhmi Chand. The Receiver finally had to distribute the surplus of the dissolved partnership between the parties, i. e., between the surviving partner Lakhmi Chand, son of Ganda Mal, and the son of the deceased partner, Lakhmi Chand, son of Ishar Das. The Judicial Commissioner accordingly appointed Kimat Rai Receiver with the powers noted above in December 1919. All this is supported and proved by the copies of the joint application of the parties concerned and the order passed by the Judicial Commissioner together with a copy of the list of assets and liabilities, referred to above, which are upon this record.

It is perfectly clear that all the parties knew the contentions marked (1) and (2) above on behalf of Lakhmi Chand, son of Ishar Das, and the Court then proceeded to determine them, after noting on the 13th December 1924 that the parties had

made the statements and given the evidence they desired. A date was then fixed for arguments, and on the 26th January 1925 the Court dismissed the application on the grounds: (1) that there was no reference to arbitration on behalf of the alleged firm, though there was an attempt by the two brothers, Chuni Lal and Lakhmi Chand, and their brother-in-law Raunki Ram, to defraud the other Lakhmi Chand; and (2) that there was no matter in dispute between the two firms to be referred to arbitration. Relying on the opening words of paragraph 21 of the Second Schedule of the Civil Procedure Code it held that that was sufficient to dispose of the application. Against this decision the plaintiff firm through Chuni Lal has filed this appeal.

The Court also appears to have commenced proceedings under S. 476, Criminal Procedure Code; for this Court was moved to stay them pending this appeal.

It was argued before me that the Court erred in not framing issues and allowing parties to produce evidence. The above discussion is sufficient to dispose of this contention. The parties knew what was in issue and said they had no further statements to make or evidence to give. A date was fixed for arguments and the case was argued on these two points, and no attempt was made to say that there was any other evidence to produce. There is thus no force in Grounds 6 and 7 of the appeal. The merits of the case were obviously not affected in these circumstances and S. 99, Civil Procedure Code, in any case applies.

It was next argued (Grounds 8 and 9) that the Court had no power to decide the two matters it did, but was confined to deciding any objections under paragraphs 14 and 15 of the Second Schedule, Civil Procedure Code. This is obviously wrong; for the opening words of paragraph 21 of the Second Schedule were inserted to set at rest this question, as to which different views had been taken by some of the High Courts: See also *Ganesh Singh* v. *Kashi Singh* (1); and *Mansa Ram Gordhan Das* v. *Mangal Sain Duni Chand* (2), (Lahore High Court); and *Dip Chand* v. *Sahibdin* (3). The case reported as *Sassoon and Co.* v. *Ramdutt* (4) is not against this view as it was a case under the Indian Arbitration Act and not under the Code of Civil Procedure. *Pokhardes Jashiomal* v. *Forbes* (5) is not in point for the same reason.

The first five grounds of appeal amount to this: that there was a valid reference of a disputed matter to arbitration on behalf of both of the firms. It was held in *Ram Bharose* v. *Kalu Mal* (6) that one partner cannot enter into an agreement to refer, the reasoning being based on S. 251 of the Contract Act. The English authorities are admittedly to the same effect. The Madras High Court has taken a similar view in *Chandooru Pannaya* v. *Vanugopala Rice Factory Company* (7) and *Chellam Chetty* v. *Ramanathan* (8). There is a full discussion of this question by the Calcutta High Court in *Muhammad Akbar* v. *Dwarka Nath* (9). In it the plaintiffs sued as legal representatives of a deceased partner to have the partnership wound up. It was held that it was the duty of the surviving partners to take all steps necessary for the completion of their unperformed engagements: see S. 263 of the Contract Act. But, after the death of one partner, it was held that a dispute between the partnership and a third party could not be referred to arbitration by the surviving partners. This decision was based on the Indian, English, and United States judicial decisions and it is on all fours with the present case.

On behalf of the appellant I was referred to *Ghaznavi and Co.* v. *Budge Budge Jute Mills* (10), in which it was held that an award was not bad for the facts that it was made against a firm without ascertaining who were the parties liable as the new Civil Procedure Code provided for suit against firms in the firm's names. That ruling obviously is of no help in the special circumstances of this case. Besides, it was a compulsory reference under the terms of the contract. Simi-

(1) [1906] 28 All. 621=(1906) A. W. N. 136.
(2) A. I. R. 1922 Lah. 149.
(3) [1911] 5 S. L. R. 92.
(4) A. I. R. 1922 P. C. 374.
(5) [1913] 6 S. L. R. 127.
(6) [1900] 22 All. 135=(1900) A. W. N. 12.
(7) [1918] 22 M. L. T. 520=7 L. W. 114=(1918) M. W. N. 51.
(8) [1920] 12 L. W. 228=(1920) M. W. N. 502=39 M. L. J. 269.
(9) [1910] 11 C. L. J. 658=14 C. W. N 1105.
(10) [1914] 25 I. C. 955.

larly, *Sukha Nand* v. *Behari Ram Ishar Das* (11) and *Firm Bishambar Mal Pala Mal* v. *Firm Ganga Sahai-Nihal Chand* (12) are obviously not in point. I, therefore, hold that there was no reference to arbitration on behalf of either of the firms named and that the application to file the award was consequently rightly dismissed under the opening words of paragraph 21 of the Second Schedule, Civil Procedure Code.

This case is even stronger than the one reported as *Mohammad Akbar* v. *Dwarka Nath* (9) as a Receiver is in existence winding up the partnership affairs of Ahsa Mal-Ishar Das under the Court of the Judicial Commissioner. It has been proved that he has been given full powers to collect all outstandings and to pay debts and to distribute the surplus. It was therefore not possible for Lakhmi Chand, son of Ganda Mal, to refer a question as to whether the defendant firm owed any thing to anyone : see Pollock and Mulla's Contract Act, 5th Edition, page 807.

It was also argued by the respondent's counsel that there could have been no matter in dispute to refer to arbitration as in the list handed over by Lakhmi Chand, son of Ganda Mal, himself to the Receiver this debt is not included and as any debt due by the dissolved firm must have been time-barred before August 1914. In the absence of any other evidence this contention must also prevail. The list in question has been proved and there is nothing to rebut it.

I have already shown that it has not been established that the whole of the business of Ahsa Mal-Ishar Das has been handed over to Lakhmi Chand, son of Ganda Mal, by the two awards referred to but that on the contrary a Receiver is liquidating this firm. Even in the award it is stated that both the Lakhmi Chands are partners in it. Likewise it is not established that Chuni Lal is the sole proprietor of Radha Kishen-Chuni Lal with full powers as regards it. If only the two brothers Chuni Lal and Lakhmi Chand, son of Ganda Mal, were meant to be involved, it would have been easy for them to get an award against one brother in favour of the other. This disposes of all the grounds argued.

(11) A. I. R. 1923 Lah. 103.
(12) A. I. R. 1923 Lah. 212.

In the result this appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 94

MOTI SAGAR, J.

Firm of Balla Mal-Rakha Mal—Plaintiffs—Appellants.

v.

Budhu Mal-Prabh Dial—Defendants—Respondents.

Second Appeal No. 1816 of 1923 Decided on 8th February 1924, from a decree of the Dist. J., Amritsar, D/- 7th May 1923.

(a) *Contract Act, S. 221—Agent cannot sell property of principal in his hands to satisfy his lien.*

Under S. 221 the rights conferred upon an agent who has a lien on the principal's property are of a very limited nature and seem to be confined to the mere right of retainer which may be used as a defence to any action for the recovery of the property brought against him or as a matter of title to re-claim the property by action if he has been unlawfully dispossessed of it; but there is no right in an agent to sell or dispose of the property without the consent of the owner in order to satisfy his lien. [P. 95, C. 2]

(b) *Contract Act, S. 107—Unpaid seller can re-sell as vendee's property only if the property in goods has passed to buyer.*

Under S. 107 an unpaid seller has a right of resale on the buyer's failure to perfrom his part of contract only if the property in the goods has passed to purchaser : Where property has not so passed, the vendor is not entitled to sue to recover loss incurred on resale, but can only sue the purchaser for damages for breach of contract.

[P. 95, C. 2]

Fakir Chand—for Appellants.

Badri Dass—for Respondents.

Judgment.—The facts of the case which has given rise to this appeal are very simple and are shortly these.

On the 17th of November 1919 the defendants purchased a kotha of gram for Rs. 4,817-4-9 and paid a sum of Rs. 480 to the plaintiffs on the same date as an advance. The plaintiffs' case is that was they who sold the kotha to the defendants and that the parties stood in the relation of buyer and seller to each other. The defendants deny this allegation and contend that they did not purchase any kotha from the plaintiffs but from some third parties, and that the plaintiffs had acted only as commission agents on their behalf in this matter.

It is common ground that the kotha was to remain in possession of the plaintiffs and that the balance of the price was to be paid on the 1st of Magh 1976 corresponding to 14th January 1920 when delivery was to be taken by the defendants; it appears that the defendants neither paid the balance of the price nor took delivery on the due date though they were repeatedly asked to do so. The plaintiffs thereupon re-sold the kotha at the defendants' risk which resulted in a loss of Rs. 670-15-9. The plaintiffs have now brought this suit for the recovery of this loss from the defendants together with interest at the rate of Re. 1-9-0 per cent. per annum.

The defendants plead that the plaintiffs as commission agents had no right to re-sell the kotha without their consent and that their (the plaintiffs') right only extended to keep the goods in their possession till their lien was satisfied. They further plead that the sale being illegal the plaintiffs have no cause of action to maintain the suit.

Both the Courts below have concurrently found that the kotha had been purchased by the defendants through the agency of the plaintiffs and that the relation of buyer and seller did not exist between the parties. They further held that the plaintiffs as commission agents had no power to re-sell, and as a result of this finding have dismissed the suit.

In the second appeal it is again urged by Mr. Fakir Chand that the kotha had been sold by the plaintiffs to the defendants and that both the Courts below have erred in holding otherwise. It is pointed out that no commission was charged by the plaintiffs at the time of the purchase of the kotha and it is urged that this fact clearly indicates that the plaintiffs were not acting as commission agents for the defendants but that the parties stood in the relation of buyer and seller to each other. This question, however, has been fully considered by the learned Judge of the Court below and his finding is that the contention of the plaintiffs that they were the sellers and not acting as commission agents on behalf of the defendants has not been established. This finding, in my opinion, is clearly a finding of fact and cannot be impugned in second appeal.

The main question to be considered is whether the plaintiffs as commission agents had or had not the right to re-sell the goods when the balance of the price had not been paid on the due date. The law on the subject is contained in S. 221 of the Indian Contract Act. That section provides that in the absence of a contract to the contrary the agent is entitled to retain goods and other property, moveable or immovable, of the principal received by him until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for to him. It will be observed that under this section the rights conferred upon an agent who has a lien on the principal's property are of a very limited nature and seem to be confined to the mere right of retainer which may be used as a defence to any action for the recovery of the property brought against him or as a matter of title to re-claim the property by action, if he has been unlawfully dispossessed of it. The case would, of course, be different if there is a contract between the parties to the contrary. In the present case no such contract between the parties has been proved and no authority has been cited by Mr. Fakir Chand in support of his contention that the party entitled to a lien can ordinarily sell or dispose of the property without the consent of the owner in order to satisfy his lien. Article 76 in Bowstead on Agency to which reference was made at the time of arguments does not, in my opinion, support the plaintiffs' contention in any way whatever. According to that article if an agent purchases goods on behalf of his principal and becomes personally liable for the price of those goods, the property in the goods as between the principal and agent vests in the agent and does not pass to the principal until he pays for the goods. If the property in the goods does not pass to the principal until the goods have been paid for, I do not see how the agent, even as an unpaid seller, can re-sell on behalf of his principal. Under S. 107 of the Indian Contract Act, an unpaid seller has a right of re-sale on the buyer's failure to perform his part of the contract only if the property in the goods had passed to the purchaser; and where property is not so passed, the vendor is not entitled to sue to recover loss incurred on re-sale, but can only sue the purchaser for damages for breach of contract: vide *Yule & Co.*

v. *Mohamed Hussain* (1), *Clive Jute Mills Co. Ltd.* v. *Ebrahim Arab* (2). I am supported in this view also by an unpublished judgment of this Court in the case of *Harbhajan Singh* v. *Ghasita Mal* (Civil Appeal No. 1264 of 1918) in which it was held that an agent, who has bought goods for a principal with his own money, does not stand to the principal in the position of an unpaid seller and has, therefore, no right to re-sell. In this view of the law the decision arrived at by the learned Judges of the Courts below is correct and the appeal must necessarily fail.

I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) [1897] 24 Cal. 124=1 C. W. N. 71.
(2) [1897] 24 Cal. 177.

✻ A. I. R. 1926 Lahore 96

ABDUL RAOOF AND ADDISON, JJ.

Punjab Commercial Syndicate and *another*—Plaintiffs—Appellants.

v.

Punjab Co-operative Bank, Limited, (in liquidation) and *others*—Defendants—Respondents.

First Appeal No. 2546 of 1921, Decided on 4th July 1925, from the decree of the Senior Sub-J., Rawalpindi, D/- 2nd July 1921.

(a) *Civil P. C., O. 6, R. 4—Fraud—Particulars must be alleged.*

When fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges: 15 *Cal.* 533 (*P. C.*), *Ref.* [P. 98 C. 2]

✻ (b) *Decree—Setting aside—Ex-parte decree based on false claim or perjured evidence cannot be set aside without fraud.*

An ex-parte decree cannot be reopened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained and it is not sufficient to allege that it was obtained on a false claim. Even if an ex parte decree is obtained on perjured evidence, it cannot be set aside on that ground: 43 *Mad.* 381, *Appl.* [P. 99, C. 2]

Nand Lal and *Amolak Ram*—for Appellants.

M. S. Bhagat and *Amar Nath Chopra*—for Respondents.

Addison, J.—On the 4th October 1917 the Punjab Co-operative Bank in liquidation filed a suit for Rs. 27,950-15-9 against Baldeo Das and his three brothers It was alleged that the defendants and their father, Kishan Chand, who died about 1909, constituted a joint Hindu family, which also carried on contract work and a brick kiln business under the name of Kishan Chand and Sons. On the father's death the eldest son, Baldeo Das, became the manager of the joint family and the business carried on by it, and in that capacity executed, on the 11th October 1911, two promissory notes in favour of the plaintiff Bank, one for Rs. 16,300, with interest at 9 per cent. per annum, and one for Rs. 3,700, with interest at 11 annas per cent. per mensem; and for the second promissory note (paragraph 4 of the plaint) deposited two sale-deeds of land by way of equitable mortgage. In paragraph 10 of the plaint, however, it was prayed that a decree for the full sum claimed should be passed against the mortgaged property as well as against the other property of the defendants and against them personally. There was thus a contradiction between the two paragraphs of the plaint, quoted above, in one place the allegation being that there was an equitable mortgage of land only as regards the second and smaller promissory note, while at the end the claim was that the total amount sued for should be a charge on the land in question. During the pendency of the suit, Thakar Das, who used to be the manager of the Bank before it went into liquidation, was examined as P. W. 3 on the 7th March 1918. He deposed that the title-deeds were handed over to the Bank when Rs. 2,000 were given to Baldeo Das, on the 21st October 1908, long before the promissory notes were taken. At that time the total advances made amounted to Rs. 12,200. He further said that the title-deeds were to be security for the whole loan advanced. The words "up to date" in the English record after "advanced" do not occur in the vernacular record. The proceedings were ex parte throughout against Baldeo Das, but the suit was contested by his three brothers, who finally entered into a compromise with the plaintiff Bank on the 7th April 1919. By this compromise the Bank gave up its claim against the three brothers while the brothers admitted that the decretal amount would be a charge on the 17 kanals 4 marlas of

land in question which was Baldeo Das's self-acquired property and which was under equitable mortgage with the Bank and that his other self-acquired property including his shares in the plaintiff Bank and his one-fourth share of the ancestral property would also be liable. As against this, the plaintiff Bank admitted that the three brothers were not joint with Baldeo Das, and that their shares in the ancestral property would therefore not be liable and that the suit as against them should be dismissed. After this compromise, a decree was passed ex parte against Baldeo Das, and by that decree a charge was created on the land in question. As the presumption was that all four brothers were joint, it is obvious that prima facie the compromise was to the advantage of all the parties.

In the meantime, the Punjab Commercial Syndicate and Krishan Lal filed a suit on the 6th May 1918 against Baldeo Das and his three brothers for Rs. 27,000. The dealings in this case also had been by Baldeo Das who did not appear, but the suit was contested by his three brothers. The Syndicate compromised with them on the 18th July 1919 in exactly similar terms to those entered into by them with the Punjab Co-operative Bank except that there was no charge upon any land, as there was no mortgage. The three brothers admitted that Baldeo Das's one-fourth share of the ancestral property and his self-acquired property should be liable, while a list of the known ancestral property was given. In return for this the Syndicate released the three brothers and their shares of the ancestral property from liability and obtained an ex parte decree against Baldeo Das only.

Then, on the 24th February 1920, the above-named Syndicate and Krishan Lal sued the above-named Bank along with Baldeo Das and his three brothers for a declaration that the words "against the land mortgaged measuring about 17 kanals" in the decree obtained by the Bank in accordance with the compromise of the 7th April 1919 should not affect the Syndicate, that was to say, that the said land was not mortgaged with the Bank for the amount of their decree, and that the Syndicate could also execute its decree against the said land. It was mentioned in the plaint that according to paragraph 4 of the Bank's plaint (as already described) it was only alleged that there was an equitable mortgage of the land as regards the smaller promissory note of Rs. 3,700, but it was not mentioned that in paragraph 10 of the Bank's plaint it was prayed that the whole sum sued for should be a charge on the land. After alluding to the compromise of the 7th April 1919, it was stated that in accordance with it the Bank by fraud obtained a decree for Rs. 27,950-15-9 against Baldeo Das on the condition that he should be personally liable, and that the decretal amount should form a charge on the land in question. In this way the other defendants, that is, Baldeo Das's brothers, got themselves absolved from liability, while in reality the land was not mortgaged with the Bank and neither the whole amount claimed nor any part of it was a charge on the land. It was further alleged that Baldeo Das's brothers entered into a compromise affecting their brother to which he was not a party, and inserted therein conditions affecting him whereas they had no power to make a compromise encumbering the land in question. The plaintiff Syndicate, therefore, claimed that they, as decree-holders, were also entitled to execute their decree against this land. These are the only allegations in the plaint. This suit has been dismissed, and it is an appeal from its dismissal, which is now before us.

The defendant Bank raised several preliminary questions and also pleaded that there was no fraud, as the land was mortgaged with them for the debt due to the Bank. The plaintiff Syndicate in their replication stated that they could bring the suit as they suffered under the decree in question and that they had a cause of action because the Bank had obtained their decree by fraud and collusion. No attempt was made further to define what the fraud and collusion was.

The Senior Subordinate Judge, who tried the case, held inter alia that, as the money realized by the sale of the disputed land was lying in Court, a suit for a mere declaration lay because the effect of a decree, if given, would be to allow the Syndicate a rateable distribution in the net assets; that S. 73, Civil Procedure Code, did not bar the suit; and that the decree which was attacked could only be avoided if there had been a fraud: (a) either upon the Court; or (b) upon the

defendants in that case in the conduct of the proceedings as an extrinsic collateral act; or (c) unless there had been fraudulent collusion directed against the alleged injured creditor.

On the issues of the merits he held that the fraud alleged in the pleadings was that no land was in reality hypothecated with the Bank and that the defendants other than Baldeo Das who was absent colluded with the Bank to charge the land in order to extricate themselves from liability. He further held that there was no fraudulent collusion of this nature and that, in any case, if Baldeo Das's brothers did agree to the charge on the land in consideration of the claim being given up against them, this would not give the plaintiff Syndicate a cause of action, as it was necessary for them to show that the fraud was directed against them. He also held that there was no allegation in the pleadings that any fraud was directed against the plaintiff Syndicate and that if there had been, there was no evidence to support it. Lastly he held that it was not alleged in the plaint that there was any fraud on the Court, and that, in any case, no fraud upon the Court had been made out.

The grounds of appeal are somewhat diffuse. Grounds 1, 5 8, 9, 10, 11 and 12 are of a general nature and require no discussion. In Ground 13 it was prayed that the distribution of the proceeds of the sale of the land should be stayed pending the decision of the appeal. This was not done so that the money must have been paid to the Bank. The other grounds taken amount to this: (1) that there was a fraud upon the Court [ground No. 2 (a)]; and (2) that there was a fraud directed against the plaintiff-appellants [ground 2 (b)], in that the compromise was designed with intent to defeat their claim [ground 2 (c)], their suit being then pending [ground 7]; while grounds (3), (4) and (6) go on to state that none of the land in suit was mortgaged by Baldeo Das with the Bank and that paragraph (4) of the Bank's plaint showed that in any case the hypothecation was only as regards the promissory note of Rs. 3,700. and that the decree was (therefore) obtained by fraud by the Bank in collusion with Baldeo Das's brothers.

It has been held by their Lordships of the Privy Council in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1) that when fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Now in the present case, if the pleadings are looked at, the only fraud alleged is that Baldeo Das's brothers and the Bank colluded together to obtain for the Bank a charge upon the disputed land which in reality was not mortgaged with them, this having been done in order that the brothers should escape liability. This is the best possible statement of the appellants' case. There is no allegation that there was a fraud upon the Court or directed towards the Syndicate though it is noted in the pleadings that the Syndicate was adversely affected by the decree in question but nothing more, and that they for this reason had a cause of action. We would, therefore, hold that the appellants cannot be allowed to go beyond their own statement of their case, though, as we have heard appellants' counsel on all the grounds of appeal, we think it will be the best course to record our findings on all the points raised.

The case for the appellants, therefore, was that the Bank obtained their ex parte decree with a charge on the disputed land against Baldeo Das by fraud in that, in reality, the land was not mortgaged with the Bank, but Baldeo Das's brothers admitted that it was mortgaged and that it was their brother's self-acquired property in return for the Bank's releasing them from liability as members of a joint Hindu family with him. In order to establish their case, the appellants relied on the record of the previous case and examined two witnesses. The first witness was Lajput Rai, one of Baldeo Das's brothers. He denied that there was any talk at the time of the compromise to the effect that the decree should be made a charge on the disputed land in case other creditors should step in. It was not even mentioned at that time that there were other creditors. Though he and his two brothers, who contested the suit with him, disputed the hypothecation in their written statement, they admitted it later, he explained, when the sale deeds were produced by the Bank and Thakar

(1) [1888] 15 Cal. 533=15 I. A. 119=5 Sar. 168 (P. C.).

Das made his statement as a witness. The second witness knew nothing about the transaction. No further attempt was made to prove that the land in question was not hypothecated with the Bank or what the fraud was. The appellants' oral evidence was thus in favour of the Bank and against the appellants, whatever the fraud alleged be considered to be. This leaves to be considered only the circumstances. In connexion with them appellants' counsel laid great stress on para. 4 of the Bank's plaint, and the fact that the Syndicate's suit was then pending. He also commented at great length on the statement of Thakar Das, P. W. 3, in the Bank's suit, and stated that it was not sufficient to enable the Court to pass an ex parte decree in favour of the Bank against Baldeo Das. All this, however, amounts to little or nothing. At the time the Bank's suit was filed, it was in liquidation and its officials were dispersed. This might easily account for the statement in para. 4 of its plaint, which was contradicted by para. 10. The compromise in question might well have been entered into by the Bank and Baldeo Das's brothers, even if there had been no other creditor. There was a presumption against the brothers that they were joint with Baldeo Das. At the same time the contest was delaying the Bank from realizing its debt. The brothers had seen that the title-deeds were produced by the Bank and they had heard the statement of Thakar Das, who used to be its manager, to the effect that the title-deeds were deposited as a cover for the whole loan in 1908. It was thus quite reasonable on their part to admit that the land in dispute was the self-acquired property of Baldeo Das and was mortgaged with the Bank and that they had no concern with it, in return for the Bank giving up its claim against them. The Bank gained even more than that, for the brothers also admitted that Baldeo Das had a one-fourth share in the joint ancestral property and that the shares of the Bank held by him were his self-acquired property and not family property. In this way the brothers were estopping themselves from denying these facts in the subsequent execution proceedings. From these circumstances, combined with the fact that the appellants have not even tried to establish that there was not an equitable mortgage with the Bank, it is impossible to draw the deduction that the Bank and the brothers of Baldeo Das colluded together to defraud Baldeo Das or to obtain a fraudulent charge on the disputed land for the Bank. There was an eminently reasonable compromise entered into between them, and thereafter the Court, with the record and the evidence before it, passed the ex parte decree in question against Baldeo Das and, on the basis of the compromise, dismissed the suit against his brothers. The mere fact that the appellants' suit was pending, does not make such a fair compromise appear even suspicious. As the alleged fraud was not established the suit was properly dismissed on this ground alone.

We would go further and hold that the present suit did not lie on the allegation of fraud made. It has been held in *Maharani Janki Kuer* v. *Mahabir Singh* (2) that an ex parte decree cannot be re-opened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained and it is not sufficient to allege that it was obtained on a false claim. Even if an ex parte decree is obtained on perjured evidence, it cannot be set aside on that ground: *Kripasindhu Panigrahi* v. *Nandu Charan Panigrahi* (3). The following passage from *Venkatarama Aiyar* v. *The South Indian Bank Limited* (4) may be quoted in extenso:

"The passages relied upon in the books referred to lay stress on the fact that a fraud practised on the debtor is not itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment debtor and which is conclusive as to the amount of the debt as between the parties (and in the present case, as to there being a charge on the land). . . . . The plaintiffs have failed to establish fraud or collusion against themselves. In these circumstances I think the principle of the decision above referred to applies and the plaintiffs are not entitled to

(2) [1920] 58 I. C. 317.
(3) [1919] 1 P. L. T. 206.
(4) [1919] 43 Mad. 381=38 M. L. J. 108=27 M. L. T. 66=(1920) M. W. N. 92=11 L. W. 81.

attack the decree by showing that it is not based on a real debt."

It follows from this that it was necessary for the appellants to allege that there was collusion directed against themselves and this they did not do. Their suit failed on this ground also.

Even if it be taken that the allegations in the pleadings amount to an averment of fraud directed against the appellants, it is obvious from the above discussion that there is no evidence of any such fraud or collusion. It is unnecessary to go over the same ground again as it has been shown that the compromise complained of would have been a fair and reasonable compromise as between the Bank and Baldeo Das's brothers, even if the appellants' suit had not then been pending. The burden was therefore heavy upon the appellants to establish that it was the result of collusion to injure them. The evidence led by the appellants did not help them. It has not been shown that the land was in fact not hypothecated with the Bank. It does not affect the case that the result was detrimental to the present appellants, though it must be noted that there is no evidence on the record to show that it was detrimental to their interests and that they could not execute their decree in full otherwise. Fraud and collusion against the appellants were not alleged nor have they been made out.

Obviously there was no fraud on the Court. That also was not alleged in the pleadings. The ex-parte decree against Baldeo Das was passed on evidence. It would not matter if that evidence was insufficient, or if the decree was obtained on perjured evidence. Before the decree could be vacated, it would have to be established that it was the result of collusion and fraud directed against the appellants. As to this there is neither direct nor indirect evidence.

We dismiss the appeal with costs.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

✻ A. I. R. 1926 Lahore 100

HARRISON AND ZAFAR ALI, JJ.

(*Mahant*) *Basant Das*—Defendant—Appellant.

v.

Hem Singh and *others*—Plaintiffs—Defendants—Respondents.

First Appeal No. 559 of 1923, Decided on 23rd December 1925, from decree of the Senior Sub.-J., Lahore, D/- 7th March 1923.

(*a*) *Words—Sikh and Singh—Terms are not interchangeable.*

"Sikh" and "Singh" are not interchangeable terms, though the word "Sikh" is now-a-days commonly used for Singh. [P 102 C 1]

✻ (*b*) *Civil P. C., S. 92—Followers of Guru Gobind Singh, i. e., Sikhs, have no right to sue, in respect of Udasi Dera.*

Udasis constitute a separate sect of schismatics from the religion founded by Nanak. They are Hindus as well as Sikhs. Their mode of life, ritual and religious observances are materially different from those of the followers of Guru Gobind Singh; and therefore, such followers of Guru Gobind Singh, as do not profess to be Hindus, have no such interest in an Udasi shrine as is contemplated by S. 92, and are therefore not competent to maintain a suit under that section in respect of an Udasi shrine. [P 106 C 1]

✻ (*c*) *Civil P. C., S. 92—Suit for change of management of a religious endowment—Not the views of majority of persons entitled to sue but the original purposes of trust must be looked to.*

The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. The bond of union of a religious association may contain a power in some recognized body to control, alter or modify the tenets or principles at one time professed by the association, but existence of such power must be proved. Although any man having a right to worship can bring a suit under S. 92, the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practices, retains the control and possession of the place of worship and its endowments. No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. *A. I. R.* 1925 *Lah.* 189 (2). *Ref.* [P 107 C 2, P 108 C 1]

Gokul Chand Narang and *Durga Dass*—for Appellants.

Moti Sagar, R. B. Shoukat Rai and *Dyal Das*—for Respondents.

Zafar Ali, J.—This first appeal arises out of a suit instituted with the sanction

of the Collector of Lahore for the removal of the defendant Basant Das from the office of the mahant of shrine of Bhai Pirthi situate in the village Manak, and for the appointment of a committee to take possession of the shrine and its property and to manage its affairs. Basant Das is a sadhu of the well known Udasi order founded by Sri Chand son of Guru Nanak while the plaintiffs, eight in number, are all Singhs, i. e., followers of Guru Gobind Singh. These eight plaintiffs do not come from one place; one belongs to the village Bhai Ket, one to Lahore, five to village Araian, and only one to the village Manak. The origin and genesis of the litigation lies in the recent extensive quickening amongst Sikhs of this Province which engendered a well-organized movement for taking possession of all temples or shrines to which the term "Gurdwara" in addition to or as an alternative for "Udasi Dera" had been applied. This movement was directed by a representative body called the Shromani Gurdwara Prabandhak Committee which had under its control a number of Jathas or bands of Akali Sikhs and these Jathas under the guidance of the committee began to take forcible possession of Udasi temples and to oust their Udasi mahants. To oppose this aggressive movement the Udasi mahants also formed a committee which they designated the Udasi Maha Mandal, and Basant Das defendant who was presumably an influential mahant was appointed Secretary of the said Maha Mandal. He thus drew the attention of the Akalis towards himself and a Jatha took possession of his temple on the 6th March 1921 and turned him out. For this act of lawlessness twenty members of the Jatha were tried and convicted of dacoity and house-breaking and sentenced under Ss. 395 and 452 of the Indian Penal Code to various terms of imprisonment in September 1921. The present suit was filed on the 1st December 1921, and it appears that some of the plaintiffs are near relations of the men involved in the criminal case. For instance, Kahan Singh, Plaintiff No. 4 of the village Araian, is a brother of one of the convicts, namely, Wadhawa Singh of the same village, and Puran Singh, Plaintiff No. 7, is a son of the said Wadhawa Singh. Lal Singh, Plaintiff No. 5, was Accused No. 24 in that case.

The grounds on which the plaintiffs seek dismissal of the defendant from this office are given in paragraph 3 of their plaint and are briefly as below:

"Before the defendant was appointed mahant in Sambat 1964 (corresponding to May 1907) he had executed an agreement that he will give up his wife and children and will revert to single life; but in contravention of that agreement he is keeping his wife with him and begetting children. According to the custom of the institution, the mahant is bound to observe celibacy. Further the defendant has been making use of the wakf property as if it was his own and has willed it to his son Ram Parshad who is a minor. He misappropriates the income and omits to apply it to the legitimate customary purposes, as for example, keeping a free kitchen and feeding sadhus; moveover, he is a bad character and drunkard."

The defendant denied the charges against his character, etc., and pleaded that subsequent to his appointment he was allowed by the Bhek (council of Udasi mahants) which had appointed him to keep with him his wife and children, that it was not absolutely necessary for a mahant to remain single, and that it was with the approval of the Bhek that he appointed his son his successor. He also pleaded that the property was not wakf but withdrew this plea at the end of the trial. His main contention, however, was that the shrine of Bhai Prithi being an Udasi Dera and not a Sikh Gurdwara, the plaintiffs, who were Singhs, had no interest in it and no right to interfere with its management and they had therefore no locus standi to sue for his removal and for the appointment of a committee of management. It is not denied that according to custom the mahant of an Udasi shrine is appointed by the Bhek, that Basant Das was appointed by that body and that the office had always devolved on a chela of the late mahant.

The trial Court (Senior Subordinate Judge of Lahore) found that the plaintiffs were entitled to worship in the shrine and so had such interest therein as is contemplated by S. 92 of the Civil Procedure Code. But with regard to the character of the shrine he came to the conclusion that it was an Udasi institution and that its management could not be entrusted to a committee of Sikhs. He

held further that the defendant had not been discharging his duties properly and was not a fit person to continue in his office, and after taking the opinion of some Udasi mahants, he appointed one Dyal Dass to that office and dismissed the defendant.

In the light of evidence that is before us almost every important conclusion arrived at by the Court below appears to us to be untenable.

The two vital questions in the case which were put in issue were :

(1) Are the plaintiffs so interested in the institution as to have a locus standi to sue ?

(2) What is the origin and nature of the institution ?

It is unreservedly stated that the plaintiffs are not Hindus and in contradistinction to Hindus are Singhs or Sikhs. But Mr. Moti Sagar, who appears for the new mahant appointed by the Court below, maintains that Udasis are also Sikhs. Even if they are, they are not Singhs or followers of Guru Gobind Singh. "Sikh" and "Singh" are not interchangeable terms, though the word "Sikh" is now-a-days commonly used for "Singh," and Sikh means "disciple," and the followers of all the Gurus were called "Sikhs." Gobind Singh initiated or according to Trumpp, renovated the rite called Pahul (baptism by the dagger and sweetened water) and he gave the epithet of "Singh" to every person to whom he administered the Pahul. He received the Pahul himself also and changed his name from Gobind Rai to Gobind Singh. He thus converted Sikhs into Singhs, and he enjoined every Singh to keep five kakkas, i. e., to have always on his person the following five things which commence with the letter *kakka* (k), viz., *kes* (long hair), a comb, a *kara* (bangle), a kirpan (sword) and a (*kachh*) shorts. Nanak condemned the exaggerated observance of caste and received all men as his disciples without any regard to caste, but he did not attempt to abolish it and married his own children within his Khatri caste. Gobind Singh, on the other hand, abolished caste altogether and admitted untouchables also into the pale of Singhis. Further he abolished Kiria Shradh and all other rites and ceremonies of Hindu origin and strictly prohibited the adoration of *samadhs* (tombs of saints) and rejected the authority of Vedas, Purans and Shastras. In the hymn that he composed on his funeral pyre he said : "The Smriti, the Shastras and the Vedas all teach many modifications. I did not recognize one (of them)." Such being the innovations introduced by Govind Singh in the religion of Nanak, the plaintiffs, who are his followers say that they are not Hindus and it follows that they cannot claim a direct interest in or power of control over a temple or shrine which is in inception a Hindu institution and where Hindu idols and deities are worshipped, Samadhs are adored and Hindu scriptures are held in respect as revealed or inspired books and are recited as such. But before adjudging the character of the shrine in suit we pass on to the question whether Udasis are Sikhs or "Singhs" as alleged by the plaintiffs or Sanatan Dharmi (orthodox) Hindu as pleaded by the defendant. The plaintiffs' theory is that Sri Chand, the founder of the Udasi order was himself a Sikh or disciple of his father Nanak and that Udasis are neither Hindus nor constitute a separate sect but are Sikhs of an ascetic order which sprang from among the followers of Nanak. In this connexion we observe that all the Gurus, with the exception of the last, remained within the pale of Hinduism so much so that each employed a Brahman as a family priest. Trumpp in his sketch of the religion of Sikhs says: "The dignity of the Brahmans as family priests etc, was likewise left untouched and of nearly all the Gurus it is reported that they had their family priests though the teaching of the Brahmans as well as the authority of the Vedas and Purans is often reproved. It was the last Guru Gobind Singh who positively prohibited the employment of Brahmans in any capacity and introduced a new ritual party taken from the Granth and partly from his own compositions" (Trumpp's Introduction to his translation of the Adi Granth, page cxii).

Where a Brahman was employed as a family priest, it is natural that all rites and ceremonies at birth, death, or marriage were performed in accordance with Hindu religion. Nanak himself performed the Sharadh of his deceased father (Trumpp, page lxvv), and "he remained a thorough Hindu according to all his views." (Trumpp page ci). Gobind Singh had in his youth a special votary of the Hindu goddess Durga and at the instance of Brahmans he in his early life cut off

the head of a disciple and offered it to the goddess (Trumpp, page xc). All this very clearly indicates that Nanak as well as the Gurus that succeeded him, except the last, were Hindus. Sri Chand and his followers also though Sikhs could not be anything but Hindus. Gobind Singh renounced Hinduism and rejected everything that smacked of it.

Further it is clear that Sri Chand founded the Udasi order in opposition to the second Guru Angad. Nanak disowned his sons as they were disobedient. He said to his wife : "Sri Chand and Lakhmi Dass are thy sons. Lahina (Angad), who obeys me, is my son." The Guru's wife duly admonished her sons, giving them hope at the same time "that if they obeyed their father's order, one of them might be found fit to succeed him. The mother's words were addressed to deaf ears, for the sons in no wise showed filial affection or obedience". (The Sikh religion by Macauliffe, Volume 11, page 11). In the Introduction to his book (page lxxix, bottom) Macauliffe says: "There were three great schism of the Sikh religion. *** The Schismatics were known as the Udasis, the Minas, and the Handalis. The first schism of the Sikhs began immediately after the demise of Guru Nanak. Some of his followers adopted Sri Chand, his elder son, as his successor and repudiated the nomination of Guru Angad. The followers of Sri Chand were termed Udasi or solitary and they now constitute a large body of devout and earnest men."

Thus the Udasis formed a rival sect and Sri Chand kept aloof from Guru Angad and his successor Amar Das and did not recognize and follow them as Gurus. Guru Amar Das excommunicated Udasis because they refused to submit to his authority. The Udasis were thus cut off from the Sikhs.

Sri Chand lived to a very advanced age and no less than five Gurus succeeded Nanak and passed away one after the other during Sri Chand's lifetime. By the lapse of time the bitterness that originally existed between the heads of the two sects disappeared and friendly relations were established when the later Gurus showed respect and regard for the old son of Nanak. Sri Chand and his disciples, however, remained quite separate from the Gurus and their followers, the ritual and tenets of the former being different from those of the latter. We will state here briefly the points which discriminate the two sects.

Udasis are ascetics, Sikhs are not. The Gurus were *Ghristies*, (house holders) and discouraged retirement from the world. Sri Chand renounced the world and remained single all his life. The general rule among his followers is to observe celibacy. Udasis wear ocre coloured clothes. Sikhs do not. An Udasi may or may not keep kes (long hair). He is not enjoined to keep the five kakkas, nor do Udasis receive the Pahul. Cap and cord are their peculiar badges, but to wear a cap is for a Singh to seal his perdition. Udasis observe Hindu rites and ceremonies ; the present day Singhs do not. Udasis make a ball of the ashes of their Udasi Guru and that is the chief object of their worship. A ball of ashes is kept in the shrine in question also. Further they adore Samadhs and hold Hindu scriptures in respect ; the followers of Guru Gobind Singh condemn all this. Udasis and Sikhs are therefore poles asunder in their respective creeds and observances. Udasis are within the pale of Hinduism ; Singhs are not.

Macauliffe says : " There are two great divisions of Sikhs-Sahij Dharis and Singhs. The latter are they who accept the baptism inaugurated by Guru Govind Singh. All other Sikhs are called Sahij Dharis. The Sahij Dharis include the Udasis founded by Sri Chand. (Macauliffe's Sikh Religion, Volume I page 111). Thus according to Macauliffe also Udasis are not Singhs.

It is true that Udasis hold the Gurus in the highest respect and like all other Sikhs believe the Granth to be an inspired book, but by so doing they do not lose the distinctive characteristics of their order.

It may be observed here that there was no Granth in writing when the Udasi sect came into existence. The Granth was compiled for the first time by Arjan, the 5th Guru and it contains hymns composed by Gurus and others including two Mussalmans, viz. Kabir and Sheikh Farid. The pantheistic tenets propounded in the book are not altogether alien to the Hindu mind and religion. As the first nine Gurus and their followers did not cease to be Hindus

so Udasis did not merge into Sikhs by accepting the Granth as a divine book.

It was argued that Udasis became Sikhs when a reconciliation took place between Sri Chand and Har Gobind the 6th Guru, and the former adopted a son of the latter and made him his chela and successor. But the result of this adoption was that the Guru's son became an Udasi and not that Sri Chand became a Sikh or disciple of the Guru. If relations between the heads of two sects became friendly it does not follow that the two sects became one. We therefore come to the conclusion that Udasis constitute a sect of their own quite distinct from the orthodox Sikh of the previous generations as well as from the modern Singhs.

Having cleared the ground so far we proceed to determine the question whether any of the former mahants of the shrine were followers of Guru Gobind Singh. The Saint of the shrine, Bhai Prithi Sahib by name, is the spiritual ancestor of the defendant in the 11th degree, succession being from Guru to Chels. Bhai Prithi was a Brahman and it was admitted before the learned Subordinate Judge that he was a Sanatan Dharmi Hindu. This is denied before us, but there is nothing to indicate that he was not an Udasi. He died in Sambat 1789 (corresponding to 1744 A. D.) and was succeeded by his nephew Bhai Jagat Bhagat. The plaintiffs' story is that Bhai Jagat Bhagat was a chela of Bhai Pheru and that the latter was a disciple of Guru Govind Singh. But even if it be conceded that Jagat Bhagat was a chela of Bhai Pheru and not Bhai Prithi, the plaintiffs fail to establish that Bhai Pheru was a disciple of Gobind Singh. Bhai Pheru was employed as a tithe collector of masand by Har Rai, the 7th Guru, and continued to serve in that capacity, all his successors one after the other. Gobind Singh was so much pleased with his good work that he seated him by his side, gave him half his turban and conferred on him the title of Sangat Sahib Sachi Darhi. From this the learned Subordinate Judge drew the inference that "Bhai Pheru must be regarded as a follower of Guru Gobind Singh." But in the absence of any direct evidence and in the light of the circumstances that neither Bhai Pheru nor Jagat Bhagat nor any one of his successors added the epithet of "Singh" to his name, it is impossible to conclude from the fact than Bhai Pheru was honoured by Gobind Singh in the way stated above that he received the Pahul and became a Singh of Gobind Singh. As some other masands were punished by Gobind Singh for bad work, Bhai Pheru was rewarded for his meritorious services. Beyond this nothing is known and we find that it was not established that Jagat Bhagat was a follower of Gobind Singh. On the other hand an historic incident, which may be briefly related here, shows that there was no love lost between the followers of Bhai Prithi and those of Gobind Singh.

Among the followers of Bhai Prithi there were the two Khatri brothers Jaspat Rai and Lakhpat Rai who held high posts under the Mughal Governors of Lahore. An armed band of Singhs having made its appearance in Eminabad near Gujranwala with intent to plunder, the Governor sent a small detachment of troops under Diwan Jaspat Rai to disperse them, but the Singhs overpowered the Mughal troops and killed Jaspat Rai. When Lakhpat Rai heard of his brother's fate he vowed vengeance saying: "The founder of Sikhism was undoubtedly a Khatri, but I shall not call myself a Khatri if I do not blot out its name from the page of existence." He came out with a large army, defeated the Singhs and took 1000 of them as prisoners to Lahore where they were beheaded one by one. One of them was Tara Singh, an old companion of Guru Gobind Singh. This occurred in 1746, i. e., about 39 years subsequently to the death of Gobind Singh (see Mohammad Latif's History of the Punjab, page 213, and Dr. Gokal Chand Narang's transformation of Sikhism page 134). It is not conceivable that Lakhpat Rai would have treated the followers of Govind Singh so mercilessly if there had been any spiritual relationship between his Guru and Gobind Singh.

The next question is whether the shrine is an Udasi institution or Gurdwara. From what the learned Subordinate Judge saw in it, it clearly appears to be the former. There are pictures of Hindu gods and goddesses on its walls and there were thakars lying on a wooden stool besides the Granth Sahib. The Samadhs (tombs) of all the mahants from Bhai Pheru downwards are also in the shrine. The learned Subordinate Judge says: "It may also be true that some Hindu modes of worship like the ringing of bells and waving of lights

are adopted by Hindu visitors to the shrine." With all these indications of the purposes for which the shrine is used it is impossible to hold that it is a Gurdwara.

Further we find that in all old Government documents the shrine was described as the Samadh or Dera of Bhai Prithi and not as Gurdwara. In the statement of wills prepared in the settlement of 1868 the then Mahant is described as Gadi Nashin of the Samadh of Bhai Prithi Sahib. (See paper book, page 35). In the settlement Extra Tehsildar's report dated the 13th May 1892 the shrine is mentioned as Dera Bhai Prithi : (see paper-book page 37.) In the register of Jagirs, prepared at the settlement of 1915-16 it is mentioned as Dera : (see paper-book pages 58 to 60, column 6). One of its former Mahants viz., Sobha Ram, executed and registered a will to nominate his successor. This is printed at pages 10 and 11 of the paper book and is dated the 21st June 1905. In this will also the shrine is referred to as Dera. But in an entry in the mutation register dated the 7th December 1887 the shrine is spoken of as the Gurdwara of Bhai Prithi : (see paper book page 9). Latterly the defendant himself began to style it as Gurdwara, but there can be no manner of doubt that it was generally known as an Udasi Dera or Smadh of Bhai Prithi. It may be noted here that Guru Gobind Singh was opposed to the erection of Samadhs and his last words were : " If any one erect a shrine in my honour, his off-spring shall perish. (Macauliffe, Volume V, page 244).

It is, therefore, natural that Guru Gobind Singh's followers have no respect for Samadhs, and it will be highly objectionable to place under their control a shrine which contains Samadhs.

The plaintiffs claim an interest in the shrine on the further grounds :

(1) That their ancestors had made gifts of land to the shrine ;

(2) that they and other Sikhs have been making offerings to the shrine and have been worshipping therein ; and

(3) that Sikhs have a voice in the appointment of the mahant of the shrine and give saropas and presents to the mahant appointed.

It was, however, not established that any of the donors were ancestors of the plaintiffs and it is obvious that mere making of offerings confers no rights. Further it is clear from the lists of saropas and presents that are on the record that presents to a Mahant at the time of his installation are made by mahants of other shrines and Sikhs as well as by Hindus and Mussalmans (see pages 38 to 47 of the paper book). It cannot therefore be said that people who make these presents have a voice in the appointment of the Mahant.

Sikhs no doubt worship the Granth Sahib that is kept in the Dera and is recited therein, but the shrine was evidently erected for the worshippers of the Samadh of Bhai Prithi and the samadh occupies the most prominent position in the building. But it appears that as sikhs and Hindus also visit the shrine a copy of the Granth Sahib and some thakars are also kept therein for Sikhs and Hindus respectively for their worship. Udasi Sadhus are probably not idol-worshippers themselves ; but it is matter of common knowledge that Hindus, men and women, consider it a virtue to pay respect to Sadhus, to feed them and to make offerings to them, and thakars are kept in Udasi shrines for the sake of Hindu visitors. The plaintiffs' witnesses gave evidence to the effect that the thakars were introduced by the defendant about one year before suit but the Patwari produced a photograph taken in the shrine some four years back showing therein thakars also. One of the plaintiffs' own witnesses, viz., Kala Singh (P. W. 3) deposed that thakars were introduced 7 or 8 years ago. The defendant examined several respectable witnesses including two Tahsildars to prove that thakars have been in the shrine from old times. The observation of the learned Subordinate Judge that thakar worship appears to have been recent innovation was therefore not well founded. Equally baseless is his remark that in the agreement that the defendant executed before his appointment as Mahant, he bound himself to abstain from Thakar Puja because there is not a word about Thakar Puja in the agreement.

The lower Court also found that the shrine is an Udasi temple and that " the plaintiffs certainly desire that the orthodox Hindu practice should be discontinued." As they could not retain what they had seized by force the plaintiffs now seek to recover it through Court and the relief that they seek is not the appoint-

ment of a new Udasi Mahant but the removal of the institution from the control of Udasis. They are therefore dissatisfied with the decision of the lower Court and have appealed against the order appointing an Udasi Mahant.

From all the facts reviewed above the conclusions that follow are :

(1) That Udasis constitute a separate sect of schismatics from the religion founded by Nanak ;

(2) that they are Hindus as well as Sikhs ;

(3) that their mode of life, ritual and religious observances are materially different from those of the followers of Guru Gobind Singh ; and,

(4) that such followers of Guru Gobind Singh, as do not profess to be Hindus, have no such interest in an Udasi shrine as is contemplated by S. 92, Civil Procedure Code, and are therefore not competent to maintain a suit under that section in respect of an Udasi shrine.

That being our decision we need not enter into a detailed discussion of the remaining issue concerning the defendant's conduct and character. The lower Court found that the charges against his character were not established and it further found that the rule of celibacy was not stringently in force ; but in face of the fact that a previous Mahant of the shrine, namely Mehr Das, was also a married man, the lower Court held that " in this shrine celibacy has always been emphatically insisted on," and that the defendant was guilty of breaking his agreement to remain aloof from his wife and children. But many Mahants, some of whom appear to be members of the Bhek, filed an application in the Court below stating that they considered the defendant to be a capable Mahant and were opposed to his removal and that according to the custom of the shrine its Mahant could marry. It appears that, as stated by the defendant, he was allowed by the Bhek subsequent to his appointment to keep his wife with him. The appointment of his son as his successor was also made by him with the approval of the Bhek. Further no misappropriation of the wakf income was proved. It has been urged before us that the fact that the defendant is highly thought of by many Government officials and has received the honour of being made a Kursi Nashin unfit him for the performance of his duties. We do not agree. We are of opinion that there was no good ground for removing the defendant from his office. Further, we are of opinion that the Court could not appoint an Udasi Mahant, it being by custom the function of the Bhek to do so. A custom of a religious institution should be respected and the Court should not usurp the authority of the Bhek.

We accept the appeal and reversing the judgment and decree of the Court below we dismiss the plaintiffs' suit with costs throughout and set aside the order appointing Dyal Das as Mahant. The plaintiffs' cross-objections are also dismissed with costs.

Harrison, J.—I agree with the views expressed by my learned brother in the preceding judgment. It appears to me to be established as an historical fact that at the end of the fifteenth century a great religious teacher known as Guru Nanak undertook the task of simplifying, purifying and popularizing the Hindu religion, which in his opinion, had become overgrown by elaborate rituals and ceremonials. He preached, as many other great teachers have done, that God is one, that he is a spirit and those who worship him must worship him in spirit and in truth ; that He dwelleth not in temples made with hands ; and, above all things, that the latter killeth while the spirit gives life. He attacked, as all such teachers must attack, the vested interests of the priestly caste and their exaggerated pretensions. He sought to distract his disciples from the worship of the unessential and to draw them upwards to a higher, a simpler, and a purer faith. While doing so he never sought to undermine the foundations of the Hindu religion such as transmigration of souls and Karma ; and not only did he not do so but, as pointed out by my learned brother, he maintained a Brahmin as a family priest, respected the observances of the Khathri caste, to which he belonged, and shortly before his death performed the Shradh of his father. The sayings and commandments of this great teacher were not recorded in writing during his lifetime, but were handed down by word of mouth until more than a hundred years later the Fifth Guru compiled the sacred wor known as the Granth Sahib, which is the Bible of the Sikhs. This contains not only

the sayings of Guru Nanak, as handed down, but hymns composed by other holy men including those of some of his successors and disciples, among whom there was one Muhammadan. Even if the actual words were in all cases accurately preserved, which would be little short of miraculous, it stands to reason that in a vast anthology of this sort texts and passages can be found which, if divorced from their context, do not give a correct impression of the original teaching. I do not propose therefore to produce the elaborate arguments based on such selected texts but merely to give the general conclusions arrived at by us. This wonderful book, the Granth Sahib, has achieved the position which it enjoys, not only because of its intrinsic merit, its religious fervour, and literary beauty, but also because it is written in the vulgar tongue and can be read by all literate Punjabis in contradistinction to the old Hindu scriptures, which are written in Sanskrit and can only be read and interpreted by scholars. The case as presented by counsel for the respondents, has been briefly as follows :— The plaintiffs are not Hindus but Sikhs from the beginning, and from the days of Guru Nanak were not Hindus but the followers of a new religion, which has varied in essentials from the date of its birth. The Udasis are a sect of Sikhs. The plaintiffs are entitled to worship at the Udasi shrine at Manak and are therefore entitled to bring this suit. The main proposition that Sikhs are not Hindus is said to be proved in the following way : The essentials of Hinduism without which Hinduism cannot exist, are, so says Mr. Moti Sagar, caste, idol-worship, the worship of the Vedas and Purans. Guru Nanak denounced all these.

Now this premise, on which the whole argument is built, appears to me to be radically unsound ; for a man can discard caste as understood by an orthodox Hindu, or idol-worship, or both, and remain a Hindu and for this proposition I have what, to my mind, amounts to the authority of all the eminent counsel, who appeared in this case. The great teacher Swami Daya Nanad, who founded the Arya Samaj denounced the doctrine of predetermined caste and the practice of idol-worship as clearly and as emphatically as any Sikh, and his followers most assuredly claim to be, and are, universally accepted as Hindus, and to this latter proposition all counsel appearing have agreed. If I may presume to dogmatize as to the main essentials of the Hindu religion, they are ; a belief in transmigration of souls, "Karmas" and the sanctity of the cow ; and none of these was questioned by Guru Nanak, nor do I believe, by any of his successors. The Granth Sahib tells us at page 1476 that full Hindu ceremonies were observed at the Kiria of the third Guru Amar Das. The other faulty premise, from which the argument was developed, is that "Sikh" has always meant the same thing from the days of Guru Nanak till to-day. At first it meant a disciple, as the word implies, and a disciple of Guru Nanak." Now it is used generally to include those, who hold the same views as those disciples, and those who profess a very much more advanced and, in some cases, an antagonistic creed, a fact which has been fully dealt with by my learned brother. The most advanced are those, who, like the present plaintiffs, declare that they are not Hindus. The fact that these plaintiffs have done so simplifies our task in the present case. Had they claimed to be Hindus, and had the claim been denied, the question raised would have been far from easy to decide ; but here we have a body of plaintiffs, who, on their own showing, are not Hindus, claiming to interfere with the management of an institution which in its inception was Hindu. True, it was founded by a son of the reformer Nanak but it was none the less Hindu. The order of ascetics which he founded was a Hindu order and nonetheless so because it gave a place of honour to the Granth Sahib, when this great book came to be written. As stated by Mr. Macauliffe in the Encyclopædia Britannica the Udasis were Sikhs dissenting from the main body of Sikhs of the time in certain unessentials just as the Sikhs were a sect of Hindus dissenting from the orthodox main body of their co-religionists. Now it has been established by no less an authority than that of the House of Lords that the identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies, and texts. The bond of union of a Christian association (and I take it of any other religious association) may contain a power in some recognized body to control, alter or modify the tenets or principles

at one time professed by the association, but existence of such power must be proved : *Free Church of Scotland* v. *Lord Overtoun* (1).

Here we have not a case of a Hindu plaintiff contending that a Hindu foundation is not observing the tenets and principles existing at the time of the foundation or subsequently modified but of non-Hindus claiming to interfere with the management of a Hindu foundation.

It is a common place that any worshipper has a right to bring such a suit as this. It has further been held by this Court in *Narinjan Singh* v. *Kirpal Singh* (2), following the decision of a dissenting Judge in the Full Bench decision of the Madras High Court in *Ramachandra Aiyar* v. *Parameswaran* (3) that any man having a right to worship can do so, but the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practice retains the control and possession of the place of worship and its endowments. In the words of Halsbury, L. C., "No question of the majority of persons can affect the question, but the original purposes of the trust must be the guide."

I agree in accepting the appeal and restoring the appellant to his benefice. I further agree that under no circumstances could the Court usurp the function of the Bhek in appointing an Udasi Mahant.

Appeal allowed.

(1) [1904] A.C. 515=91 L.T. 394.
(2) A.I.R. 1925 Lah. 189 (2).
(3) [1918] 42 Mad. 360—36 M.L.J. 396=25 M.L.T. 304=(1919) M.W.N. 370=9 L.W. 492.

A. I. R. 1926 Lahore 108

MARTINEAU AND FFORDE, JJ.

Lal Chand and *others* — Defendants—Appellants.

v.

Hans Kumar and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 95 of 1921, Decided on 25th November 1925, from the decree of the Senior Sub.-J., Jhelum, D/- 25th October 1920.

Custom (Punjab)—Pre-emption—To prove custom in a particular mohalla of a town it is not sufficient to prove instances in the adjacent mohallas.

In order to prove a custom in a particular mohalla of a town it is not sufficient to prove instances of the custom in adjacent mohallas, but that the custom prevails generally throughout the town should be proved. [P 109, C 1]

Nand Lal, A. R. Kapur and *Hemi J. Rustomji*—for Appellants.

Mukand Lal Puri and *Amar Nath Chona*—for Respondents.

Martineau, J.—The plaintiffs in this case sued for possession, by right of pre-emption, of a house in the town of Jhelum which was sold in 1919 by Defendant No. 1 and the husband of Defendant No. 2 to Defendant No. 3 and the predecessor-in-title of Defendants Nos. 4 to 7. They claim pre-emption by virtue of their ownership of serai called Serai Mangal Sain, which is contiguous to the house sold, and allege that the custom of pre-emption prevails throughout the town. The defendants contend that there is a subdivision of the town called Mohalla Serai Mangal Sain, in which the house in suit is situate, and they deny that the custom of pre-emption exists therein or in any part of the town. The Subordinate Judge has found that the town is not subdivided and that the custom of pre-emption exists generally in the town, including the locality in which the house is situate, and he has accordingly given the plaintiffs a decree. The vendees have appealed and there are cross-objections by the plaintiffs in regard to the amount of the pleader's fee awarded to them.

There is no force in an argument which has been put forward as to the plaint not having been properly presented. The important question is whether the custom of pre-emption has been proved to exist

in the locality in which the house is situate.

We cannot accept the statements of some of the plaintiffs' witnesses as to the house in suit, being in the Bagh Mohalla. This house, the plaintiff's serai, and a few other houses and shops, form a block which is bounded on all sides by roads. There is a road between this block and the Bagh Mohalla on the north, and we think that the learned Subordinate Judge is right in regarding the serai block as a portion separate from the Bagh Mohalla. The evidence of the special Kanugo shows that it is a part, not of the Bagh Mohalla, but of an area which was known in 1860 as the Chakla Mohalla. That area is no longer known as a separate mohalla, but now comprises, in addition to Serai Mangal Sain, several bazars with distinctive names, and, according to the defendant's witnesses, the serai block alone is now called the Chakla Mohalla. The serai block appears to be too small an area to constitute a sub-division of the town, although it is not really material for the decision of the case whether it is a sub-division or not. Jhelum is, as the learned Subordinate Judge has observed, a town of recent growth. There has not been a single instance of the exercise of the right of pre-emption in the particular block in which the house is situate, nor is there even any evidence to show that the custom existed in any part of the old Chakla Mohalla in which this block was included. The plaintiffs must, therefore, in order to succeed, prove that the custom prevails generally throughout the town, for instances which have been adduced of the exercise of the right of pre-emption in the neighbouring Bagh Mohalla and Naya Bazar are not sufficient to prove that the custom exists in the locality in which the house in suit is situate. (The judgment then proceeded to examine the judicial decisions relied upon as proof of the generality of the custom and continued.)

Our conclusion is that the plaintiffs have failed to prove that the custom of pre-emption exists either throughout the town of Jhelum or in the particular locality in which the house in suit is situate. We accordingly accept the appeal, reverse the decree of the lower Court and dismiss the suit with costs throughout.

The cross-objections are dismissed.

Appeal accepted.

A. I. R. 1926 Lahore 109

LE ROSSIGNOL, J.

Kaura Lal—Defendant—Appellant.

v.

Panjab National Bank, Ltd. Multan—Plaintiff—Respondent.

Misc. First Appeal No. 2134 of 1923, Decided on 31st January 1924, from an order of the Senior Sub-J., Multan, D/- 16th July 1923.

(a) *Civil P. C., O. 21, R. 90—Order refusing restoration of objection under R. 90 is not appealable.*

Order of the executing Court refusing to restore objections by the judgment-debtor under O. 21, R. 90, Civil P. C., is not appealable.[P. 199, C. 2]

(b) *Civil P. C., S. 141—Applicability.*

S. 141 does not apply to proceedings in execution: 19 *C. W. N.* 758, *Not foll.* [P. 109, C. 2]

Durga Das—for Appellant.

Hargopal—for Respondent.

Judgment.—This is an appeal from the order of the executing Court refusing to restore objections by the judgment-debtor under O. 21, P. 90, Civil P. C. When the objection to the auction sale was called for hearing, the objector was absent and the objections were dismissed for default. On the same day the objector put in an application for restoration of his objections on the ground that he had been busy, engaging another pleader, but the Court below refused to restore the objections on the ground that the objector was intentionally causing delay.

A preliminary objection is raised that no appeal from such an order lies. For the appellant it is contended that O. 9, R. 9 does apply by virtue of S. 141 of the Code, and refers to *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (1). There is, however, a long series of authorities in support of the proposition that S. 141 does not apply to proceedings in execution; and that is my own view. Another argument advanced on behalf of the appellant is that the order is appealable as a decree, but no order of dismissal comes within the definition of a decree. For these reasons I hold that the order complained of is not subject to appeal, and I dismiss this appeal with costs.

Appeal dismissed.

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(1) (1915) 19 C. W. N. 758.

A. I. R. 1926 Lahore 110

SHADI LAL, C. J., AND LE ROSSIGNOL, J.

Hargobind-Kishan Chand—Plaintiffs —Petitioners.

v.

Hakim Singh and *Co.*—Defendants —Respondents.

Civil Misc. No. 292 of 1925, and Civil Appeal No. 662 of 1925, Decided on 17th November 1925, being application for stay of execution proceedings pending.

Civil P. C., O. 21, R. 30—Judgment-creditor is to decide whether execution should be taken against the person or property of judgment-debtor—Court, though it has discretion for refusing simultaneous execution against both, cannot decline to order execution against person in the first instance.

The statutory law leaves no doubt whatsoever that it is for the judgment-creditor to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of his property, or both; and that while the Court has discretion to refuse execution against the person and property simultaneously, it has no authority to decline to make an order of committal to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor: 7 *Bom.* 301 and 14 *M. I. A.* 605, *Applied*; 73 *P. L. R.* 1915, *Dissented from.*

Per LeRossignol, J.—Except in cases where the judgment-debtor has no property the decree-holder should be encouraged to proceed against both the property and the person simultaneously, and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule. [P 111 C 1, 2]

Jai Gopal Sethi—for Petitioner.

Shadi Lal, C. J.—The respondent, Hakam Singh, has obtained a money decree against the applicant, Kishan Chand, and seeks to execute that decree by the arrest and detention in the civil jail of the judgment-debtor. The latter has applied to this Court for an order directing the proceedings relating to the arrest to be stayed pending the decision of the appeal in which he impeaches the validity of the decree.

Now, the law as enacted in the Civil Procedure Code recognises the arrest and detention in prison of the judgment-debtor as one of the ordinary modes of executing a decree for the recovery of money, vide S. 51, Civil Procedure Code, and gives an option to the creditor of enforcing the decree either against the person or the property of the debtor; and it is nowhere laid down that execution against the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property. Indeed, O. 21, R. 11 (1), authorizes the Court to direct, on the oral application of the decree-holder at the time of the passing of the decree, immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the Court. If the decree-holder subsequently applies for the execution of his decree, he must make an application in writing and state therein, inter alia, the mode in which the assistance of the Court is required. vide Cl. (j). sub-R. (2) of R. 11, and one of the modes specified in that clause is the arrest and detention in prison of the judgment debtor. R. 17 of O. 21 prescribes that if the application is not in any way defective, the Court shall order execution of the decree according to the nature of the application. In other words, if the decree-holder states in his application that he desires to execute the decree against the person of the judgment-debtor, his request cannot be refused on the ground that he must, in the first instance, proceed against the property of the judgment-debtor. The decree-holder is also allowed to execute his decree at the same time against the person and property of the judgment-debtor, but the Court has discretion to refuse simultaneous execution and to ask the creditor to avail himself of only one mode at one time: vide O. 21, R. 21. The discretion must, however, be exercised in a judicial manner; and as held by the Bombay High Court in *Chena Pemaji* v. *Ghela Bhai Naraindas* (1), the creditor has a right to all the assistance which the law can give him and the Court is not justified in refusing a warrant of arrest simply because a warrant for the attachment of property has already issued if the Court is satisfied that the judgment-debtor is determined to evade, if possible, the payment of his debt.

That the decree-holder can seek the assistance of the Court in either or both of the modes of execution mentioned above is expressly laid down in O. 21,

(1) [1883] 7 Bom. 301.

R. 30, which provides that every decree for the payment of money may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both. There are no doubt observations in a Single Bench judgment of the Punjab Chief Court in *Bahadur Khan* v. *Veroo Mal* (2), to the effect that the decree-holder "was not justified in applying for the arrest of the appellant (judgment-debtor) in the first instance without trying to obtain execution of the decree by other means available to him, i. e., by the attachment and sale of the appellant's property other than land." No authority was, however, cited by the learned Judge in support of his view which runs counter to the express provisions of the Code.

The statutory law referred to above leaves no doubt whatsoever that it is for the judgment-creditor to decide whether he should execute the decree for the payment of money by the judgment-debtor or by the attachment and sale of his property, or by both; and that while the Court has discretion to refuse execution against the person and property simultaneously, it has no authority to decline to make an order of committal to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor. As pointed out by their Lordships of the Privy Council in *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (3), "the difficulties of a litigant in India begin when he has obtained a decree;" and it is a matter of common knowledge that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. The Legislature has consequently provided for the execution of a decree for money by the arrest of the judgment-debtor, and there is neither justice nor equity in forcing the judgment-creditor to proceed against the property, a remedy which is not only dilatory but often proves infructuous, when he has the right of availing himself of an efficacious mode of recovering his lawful due.

(2) [1915] 73 P. L. R. 1915=93 P. W. R. 1915.

(3) [1872] 14 M. I. A. 605=10 B. L. R. 294=17 W. R. 459=2 Suther 575=3 Sar. 117 (P. C.).

For the foregoing reasons, I hold that the order of the lower Court directing the execution of the decree against the person of Kishan Chand is not open to any objection and must be maintained. I accordingly dismiss the application.

Le Rossignol J.—I entirely concur in the conclusion of the learned Chief Justice and in his reasons for his conclusion.

Experience amply proves that the epigram of their Lordships of the Privy Council in *General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* (3), reposes upon a wide foundation of fact. The judgment-debtor in this country as a rule is either frankly recalcitrant or averse from suffering the inconvenience of finding the decretal sum, and execution against his estate is almost invariably opposed by means of objections, generally without foundation, and more often than not, brought at his instigation in order to secure delay in the execution of the decree. The result is that the proverbial law's delay is more frequently and strikingly exemplified in execution proceedings than even in the initial dispute. In these circumstances any tenderness towards the judgment-debtor on the part of the executing Court is not only entirely misplaced but is entirely opposed to the law. Except in cases where the judgment-debtor has no property, I would go so far as to say that far from being discouraged the decree-holder should be encouraged to proceed against both the property and the person simultaneously, and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule. The judgment-creditor, except in a few cases, is inspired not by revenge but by the desire to recover his lawful due and he will not apply for execution against the person of his debtor, except in those cases when he has good reason to believe that that form of execution will result in the payment of the debt.

I accordingly concur in the dismissal of the application.

Application dismissed.

A. I. R. 1926 Lahore 112

CAMPBELL, J.

Behari Lal—Plaintiff—Appellant.

v.

Balmokand and *others*—Defendants—Respondents.

Second Appeal No. 1212 of 1923, Decided on 28th January 1924, from a decree of the Dist. J., Amritsar, D/- 26th February 1923.

Bengal Regulation (17 *of* 1803)—*Foreclosure notice is not presumed to be regular—Person relying upon foreclosure proceedings must prove fulfilment of every condition.*

There can be no presumption in law that a foreclosure notice under the regulation is regular and that the party who relies upon foreclosure proceedings, having effected forfeiture of the estate of a mortgagor, has to prove affirmatively the due performance of every condition necessary to be established under the regulation. Unless the party who sets up due service of a notice under Regulation 17 proves affirmatively that actual demand of payment was made from the mortgagor before application was made for the foreclosure the notice must be held to be a nullity: 46 *P. R.* 1907, *Rel. on.* [P 112, C 2]

Badri Das—for Appellant.

Balwant Rai—for Respondents.

Judgment.—The plaintiff on the 13th of March 1919 sued to redeem a mortgage of a house effected on the 9th of March 1901 by the father of his assignors, Defendants Nos. 3 and 4, in favour of Defendant No. 2, and was met, among other pleas, with the assertion that the mortgagee had served the plaintiff's predecessors-in-interest with notice under Regulation 17 of 1806 on the 9th of February 1918 and that the plaintiff, not having brought his suit within one year from that date, had lost his right to redeem.

The plaintiff denied that notice had been served or that the notice was valid. The trial Court struck the general issue "Whether the plaintiff's suit is within time" with onus on the plaintiff, and refused to listen to objections by the plaintiff's counsel that the alleged notice was invalid, saying that these should be put forward in a separate proceeding of objections before the Court which issued the notice. The suit was dismissed and the order of dismissal was upheld by the District Judge.

The plaintiff has come to this Court on second appeal. The learned counsel for the respondents admits that the trial Court took a wrong view of the law in ruling out objections to the validity of the notice in the suit before him. He contends, firstly, that the plaintiff did not, as he should have done, specify exactly in what respects the notice was invalid; and, secondly, that in his appeal to the District Judge the plaintiff did not raise the question of irregularity or invalidity of the notice.

In regard to the first point, the plaintiff rejoined the defendants' written statement that the alleged notice was not regular or legal and added that he had made objections to that effect in the Court which issued the notice. This plea was sufficiently explicit and, as pointed out in *Sochet Singh* v. *Dial Singh* (1), where several other authorities were discussed, the law is that there can be no presumption in law that a foreclosure notice under the regulation is regular and that the party who relies upon foreclosure proceedings having effected forfeiture of the estate of a mortgagor has to prove affirmatively the due performance of every condition necessary to be established under the regulation. For instance, it has been laid down repeatedly that, unless the party who sets up due service of a notice under Regulation 17 proves affirmatively that actual demand of payment was made from the mortgagor before application was made for the foreclosure, the notice must be held to be a nullity.

As for the second point, it appears to me that the learned District Judge fell into the same error of law as did the trial Court and in any case his judgment states that the plaintiff had urged that service of the notice had not been proved to have been duly effected.

The plaintiff-appellant asks for no more than that the suit should be sent back for re-trial, and this must be done. I accept the appeal, set aside the orders of the Courts below and direct that the defendant Balmokand be required to prove that every requisite formality was fulfilled in connexion with the foreclosure notice alleged to have been served on the plaintiff as well as that the notice was actually served and that after decision of this and of any other issues that may arise a fresh decision be ordered by the trial Court.

Costs in this Court will be costs in the suit.

Appeal accepted.

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(1) [1907] 46 P. R. 1907.

* A. I. R. 1926 Lahore 113

SHADI LAL, C. J., AND HARRISON, J.

Hira Lal Anant Ram—Decree-holders —Appellants.

v.

Sherumal-Chaina Mal — Judgment-debtors—Respondents.

Letters Patent Appeal No. 200 of 1923,. Decided on 9th May 1925, against the judgment of Campbell, J., D/- 25th May 1923, in Civil Appeal No. 2036 of 1922 and published in A. I. R. 1925 Lah. 233.

(a) *Legal Practitioner—Letters patent appeal—Counsel are not confined to arguments in lower Court.*

Counsel in a Letters Patent appeal are not confined to the arguments addressed to the Single Judge. [P 113 C 2]

* (b) *Civil P. C., S. 42—Vesting of powers in Court to which case is transferred does not divest parent Court of its powers of re-transferring a case—Application for second transfer lies to the parent Court.*

The fact that in S. 42 the transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not divest the parent Court of the jurisdiction which it alone enjoys of making an order of transfer. An application, therefore, for the issue of a certificate to a Second Court lies to the Court which passed the decree, and once a certificate is given by the transferee Court the Original Court is competent to re-transfer to the same transferee Court on proper application being made. If at the time of application the certificate of non-satisfaction had not been granted by the transferee Court the defect is cured by the certificate being received subsequently. 39 *Mad.* 640, *Dist. A. I. R.* 1922 *Bom.* 359, *Diss.* 14 *M. I. A.* 529, *Foll.* [P. 114 C. 1, 2]

Dalip Singh and *Madan Gopal*—for Appellants.

Jagan Nath Agarwal and *Amar Nath Chona*—for Respondents.

Judgment.—The Senior Subordinate Judge of Ambala held in this case that an application for execution of a decree presented on the 1st October 1921 was within time. On appeal to this Court Judge in Chambers held that it was not, as no application to the proper Court had been made within the three years preceding the 1st October 1921. He, therefore, accepted the appeal and dismissed the application. From that order the present appeal is before us.

The decree in question was passed at Karnal on the 9th December 1915. On the 11th May 1916 a certificate of non-satisfaction was issued to the Court of the Senior Subordinate Judge of Simla, and on that certificate proceedings were taken which continued until the 27th July 1917 On the 3rd May 1919, the decree-holders applied to the Karnal Court asking for a fresh certificate addressed to the Simla Court, and it was on this application that the decree-holders previously relied for the purpose of saving limitation.

It is unnecessary for us to go into the question of the effect of such an application addressed to the parent Court under these circumstances, for there is a later application of the 12th July 1919 made to the Karnal Court on which Counsel now rests his case. This was apparently not brought to the notice of the learned Judge who decided the appeal. In consequence of the application of the 3rd May the Karnal Court addressed the Simla Court, and on the 11th July 1919 the Simla Court noted that certain payments had been made and ordered that a certificate of part satisfaction should be issued to the Karnal Court. This was actually done on the 14th July. On the 12th July an application was made in Karnal asking for a fresh certificate of non-satisfaction and on the 28th August 1919 that certificate was issued, the necessary information having been received from Simla in the interval. The question therefore, is whether that application of the 12th July was made to the proper Court.

Counsel for the respondents raises an objection that this is a new point which was not raised before the learned Judge in Chambers. A new argument it certainly is but the point in our opinion has been one and the same throughout, namely, whether the application of the 1st October 1921 was within time. To hold that Counsel in a Letters Patent appeal are confined to the arguments addressed to the Single Judge would, in our opinion wholly stultify the privilege of appeal, which is granted by the Letters Patent.

It is contended that as the Simla Court was not functus officio until the certificate was actually granted and counsel indeed contends that it continued to be the proper Court until the certificate reached its actual destination, the application of 12th July was not competent, and even if the Karnal Court had jurisdiction at the moment the certificate was granted or received, it had no such jurisdiction on the 12th July. The defect is, in our opinion, cured by the subsequent granting of

the certificate. We hold that the date of the receipt is immaterial and that once the certificate was actually granted the Karnal Court had jurisdiction in virtue of the pending application combined with the certificate, and on this point we follow the view taken in *Manorath Dass* v. *Ambica Kanta Bose* (1). But it is urged, the interpretation of the Privy Council ruling in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (2) which is contained in *Rangaswami Shetti* v. *Seshappa Manjappa* (3) lays down that once a decree has been transferred any further application for transfer lies to the transferee Court and not to the parent Court With all respect to the learned Judges who gave that decision, we are of opinion hat it goes beyond the ruling of their Lordships of the Privy Council. In *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (2) it was decided on the facts of that case that the parent Court could not order the sale of property which had been attached by the transferee Court. This was decided and nothing more. In *Saroda Prosaud Mullick* v. *Luchmeeput Singh Doogur* (4) it was laid down that a decree might be executed concurrently in several Courts. Before such a decree can reach a transferee Court the parent Court must act, for under S. 39 it is the Court, which passed the decree. and no other which can send it for execution elsewhere. The fact that in S. 42 the transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not, in our opinion divest the parent Court of the jurisdiction which it alone enjoys of making an order of transfer. An application, therefore, for the issue of a certificate to a Second Court lies to the Court which passed the decree, and once a certificate is given by the transferee Court the original Court is competent to re-transfer to the same transferee Court on proper application being made. The defect in the application of the 12th July due to the facts that at the time the certificate had not been granted by the Simla Court is cured, in our opinion, by the subsequent events.

We hold, therefore, that the application of the 12th July was a sufficient application to save limitation. We accept the appeal and restore the order of the Trial Court. The costs incurred by the decree-holders in the High Court will be paid by the judgment-debtors.

Appeal accepted.

(1) [1909] 13 C. W. N. 533=9 C.L. J. 443.
(2) [1916] 39 Mad. 640=43 I. A. 238=31 M.L.J. 300=18 Bom. L. R. 909=14 A. L. J. 1129 =20 M. L. T. 472=24 C. L. J. 478=4 L.W. 558=(1916) 1 M. W. N. 541=21 C. W. N. 162=1 P. L. W. 26 (P. C.).
(3) A. I. R. 1922 Bom. 359.
(4) [1871-72] 14 M. I. A. 529=17 W. R. 289=10 B. L. R. 214=2 Suther 560=3 Sar. 77 (P.C).

A. I. R. 1926 Lahore 114

FFORDE, J.

Buta Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 909 of 1923, Decided on 23rd January 1924, from an order of the Mag., 1st Class, Lahore.

Penal Code, Ss. 365 and 376—Separate sentences.

Where the real offence is rape and the abduction is an aggravating circumstance separate sentences under both the sections should not be given. [P 114 C 2]

D. R. Sawhney—for the Crown.

Judgment.—Buta Singh has appealed against his conviction and the sentence passed upon him by the Sub-Divisional Magistrate with S. 30 powers. Mr. Gobind Ram, who filed the appeal, informs me that he is no longer retained for the appellant and, accordingly, the latter is now unrepresented. Mr. D. R. Sawhney appears for the Crown.

Having been through the entire evidence I am satisfied beyond a shadow of doubt that the charge against this appellant has been substantiated. I find, however, that he has been sentenced under S. 365, Indian Penal Code, to three years' rigorous imprisonment, and under S. 376, Indian Penal Code, to five years' rigorous imprisonment, including three months' solitary confinement, the two sentences to run consecutively. I do not consider that two separate sentences should be given in a case of this kind. The real offence is rape and the abduction is an aggravating circumstance; but I think that the one sentence of five years' rigorous imprisonment with three months' solitary confinement is adequate, and I accept the appeal to the extent of reducing the sentence accordingly.

Sentence reduced.

A. I. R. 1926 Lahore 115

SCOTT-SMITH, J.

Kirpal Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1736 of 1924, Decided on 25th February 1925, against an order of the S. J., Rawalpindi, D/- 11th November 1924.

Penal Code, S. 117—Exhorting Sikhs to form jathas under the S. G. P. Committe and to collect funds for the committee is not an offence under Criminal Law Amendment Act, S. 17 but is one under S. 117, Penal Code—Criminal Law Amendment Act (1908), *S.* 17.

Exhorting the Sikhs in a meeting to enlist themselves for shahidi jathas for the purpose of going to a certain place and collecting funds for a committee which was declared as unlawful by the Government, is not an offence under S. 17 (1) and S. 17 (2) of the Criminal Law Amendment Act, but is an offence under S. 117, Penal Code, as the accused instigated people to become members of a jatha under the orders of the said committee which jatha would be an unlawful association within the meaning of S. 16 : *A. I. R* 1924 *Lah.* 440 *Ref.* [P 116 C 1]

C. H. Oertal—for Petitioner.

Dalip Singh—for The Crown.

Judgment.—This is an application for revision of an order of the Sessions Judge of Rawalpindi dismissing an appeal from the petitioner's conviction for an offence under S. 17, sub-S. (2), Criminal Law Amendment Act, XIV, 1908.

The facts found against the petitioner are that (1) at a meeting of the Singh Sabha in Rawalpindi on the 6th of July 1924 he delivered a speech calling upon the Sikhs assembled to organize jathas of either 500 or 250 each for the purpose of going to Amritsar and proceeding to Jaito under the orders of the Shromani Gurdwara Parbandhak Committee ; and (2) that at a subsequent meeting of the same Singh Sabha on the 9th of July he exhorted the Sikhs to enlist themselves for shahidi jathas for the purpose of going to Jaito. It is also found that in the Diwan held on the 5th of March he read a communique from the Shromani Gurdwara Parbandhak Committee to the effect that every Sikh should contribute his share of five pice Panj Paisa Fund and that he actually collected money for that fund.

The Magistrate found that he had committed offences both under S. 17 (1) and S. 17 (2) of the Criminal Law Amendment Act, but sentenced him for the latter offence only to two years' rigorous imprisonment.

The learned Sessions Judge dismissed the appeal. In the course of his judgment he stated that there was no evidence to show that any meeting or unlawful association was held in consequence of petitioner's speech, but he was of opinion that he had promoted such a meeting or association because he instigated persons to join such an association within the meaning of sub-S. (2). In this connexion he referred to *Jaswant Rai* v. *Emperor* (1). Counsel for the petitioner relies upon *Emperor* v. *Mihan Singh* (2), in which it was held that the accused's act in that case did not come within the purview of either of Cl. (1) or (2) of S. 17 of the Criminal Law Amendment Act, as he did not contribute to the fund or assist in the management of an existing association. On the strength of this ruling it is contended that as there was no existing jatha which the petitioner incited persons to join, he did not commit any offence under S. 17 (2). The learned Government Advocate concedes this point, but contends that the petitioner urged the people to form themselves into jathas under the orders of the Shromani Gurdwara Parbandhak Committee, i. e., to form themselves into an unlawful association, and, therefore, committed an offence under S. 117, Indian Penal Code ; and he suggests that the conviction be altered into one under that section. The Punjab Government Notification No. 23772 of the 12th October 1923 is as follows :

" Whereas the Governor of the Punjab in Council is of opinion that the association known as the " Shromani Gurdwara Parbandhak Committee and all jathas organized by or affiliated to this body interfere with the maintenance of law and order, and that they jointly and severally constitute a danger to the public peace :

" Now, therefore, the Governor of the Punjab in Council, by virtue of the powers conferred upon him by S. 16 of the Criminal Law Amendment Act, 1908, as amended by the Devolution Act, 1920 is pleased hereby to declare the said

(1) [1907] 10 P. R. 1907 Cr.=14 P. W. R. 1907 Cr.=5 Cr. L J. 439=2 M. L T.272
(2) A. I. R. 1924 Lah. 440.

Shromani Gurdwara Parbandhak Committee and the said jathas to be unlawful associations." This notification shows that not only the Shromani Gurdwara Parbhandak Committee was declared to be an unlawful association under S. 16 of the Criminal Law Amendment Act, but also all jathas organized by or affiliated to that body were so declared.

It is, therefore, urged by the learned Government Advocate that the petitioner instigated people to become members of a jatha under the orders of the said committee which jatha would be an unlawful association within the meaning of S. 16. In my opinion there is force in this contention and I do not see that the petitioner will be in any wise prejudiced by the alteration of his conviction even though he was not charged with an offence under S. 117, Indian Penal Code. In the case reported as *Crown* v. *Mihan Singh* (2) the accused was convicted of an offence under that section, though he was not charged thereunder. In that case the accused though a gentleman of influence, was punished only with a fine, and I, therefore, do not think that the petitioner in this case deserves so severe a sentence as one of two years' rigorous imprisonment. He has already been more than six months in jail and that is, in my opinion, a sufficient sentence.

I, therefore, allow the revision so far as to alter the conviction to one under S. 117, Indian Penal Code, and reduce the sentence to the term of imprisonment already undergone.

Sentence reduced.

A. I. R. 1926 Lahore 116

ABDUL RAOOF AND ADDISON, JJ.

Darbari Mal-Ram Sahai—Plaintiff—Appellant.

v.

The Secretary of State—Defendant—Respondent.

Second Appeal No. 691 of 1924, Decided on 21st July 1925, from the decree of the Dist. J., Amritsar, D/- 17th January 1924.

Railways Act, S. 80—Goods to be carried by two railways delivered to one—Other is liable if loss is caused on its railway.

When goods are delivered to one railway administration to be carried by it and beyond its limits by another, the other railway administration can only be sued if the "loss" occurred on its railway. 2 *Lah.* 133, *Dist.* [P. 117, C. 1]

Durga Das—for Appellant.

Govt. Advocate—for Respondent.

Addison, J.—The plaintiff sued the Secretary of State for India for Rs. 1,505-9-6 on the ground that half of a consignment of 820 tins of molasses, namely 410 tins, had not been delivered to him by the North-Western Railway. The goods were delivered to the B. N. W. Railway by Dana Mal-Babu Ram of Naukhar, District Gorakhpur, on Risk Notes A and B. The plaintiff refused to make the B. N. W. Railway a party to the suit. The N. W. Railway pleaded that no suit lay against them under the provisions of S. 80 of the Railways Act, and that they were protected by the risk notes. The trial Court decreed the claim to the extent of Rs. 1,328-0-6, but on appeal, the learned District Judge allowed the plaintiff only the sum of Rs. 268-14-0 being the freight paid for the undelivered half of the consignment. He held that the N. W. Railway was not liable by reason of the provisions of S. 80 of the Railways Act, as it had not been proved that the loss occurred on that railway, and that further the risk notes on which the goods were booked protected the railway. Against this decision the plaintiff has filed this second appeal.

There is a finding of fact that it has not been proved that the loss occurred on the N. W. Railway, and it seems to us that on this finding the decision of the lower appellate Court must be upheld, as in order to make the N. W. Railway liable it is necessary under S. 80 of the Railways Act that the loss should have occurred on that railway. There may have been loss to the owner by the fact that the goods in question were not delivered, as laid down in *Hill Sawyers and Company* v. *Secretary of State* (1); but in that case it was clearly established that the "loss" to the owner was caused by the N. W. Railway, and, therefore, it was not protected by S. 80 of the Railways Act. In the present

(1) [1921] 2 Lah. 133=3 L. L. J 297 (F. B.).

case, however, the N. W. Railway is clearly not liable as the concluding portion of S. 80 is to the effect that, when goods are delivered to one railway administration, another railway administration can only be sued if the "loss" occurred on its railway. This appeal must therefore fail and we dismiss it with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 117

SCOTT-SMITH, J.

Mt. Zainab Bibi—Second Party—Appellant.

v.

Abdul Karim—First Party—Respondent.

Misc. First Appeal No. 339 of 1924, Decided on 30th May 1924, from an order of the D. J. Gurdaspur, D/- 12th November 1923.

(a) *Guardians and Wards Act* (8 *of* 1890), *S.* 13—*Sections does not contemplate summary procedure.*

The procedure under S. 13 is not intended to be summary. 17 *Bom.* 560, *Ref.* [P 117, C 2]

(b) *Guardians and Wards Act* (8 *of* 1890), S. 17—*Welfare of minor has to be considered—Who is entitled to be guardian under minor's personal law is not the only consideration.*

Court passing an order appointing a guardian of a minor should not solely base his order upon who is entitled to be guardian under personal law of the minor but the Court has also to consider the welfare of the minor. [P 117, C 2]

(c) *Muhammadan Law—Guardianship—Mother can be guardian of her minor children even after divorce provided she is of good character.*

Divorce is not always a disqualification to the appointment of a mother to be a guardian of her minor children. If she is of good character she retains her right after separation from her husband, even although she may have been divorced from him. [P 117, C 2]

Gulam Rasul—for Appellant.

Asghar Beg—for Respondent.

Judgment.—This is an appeal by Zainab Bibi under S. 47 of the Guardians and Wards Act from the order of the District Judge of Guardaspur appointing Abdul Karim grandfather to be the guardian of the property of her minor children, and as regards the appointment of a guardian of their persons, referring the parties to a regular suit for the purpose of a decision as to which of the parties should be appointed such guardian. The minors are said to have been living with their mother's husband's father during the absence of their father Abdul Aziz on service in Basra where he died in 1921. It is stated that before his death Abdul Karim took the girl, who was aged about 8, and the elder boy aged 7, away to Guardaspur and that he refused to give them up to the mother. Mt. Zainab Bibi, in her pleas said that she herself was a fit person to be appointed guardian of the minors. Mr. Anderson, District Judge, in his order of the 14th May 1923 pointed out that the mother was entitled to the guardianship of her minor daughter until puberty and minor sons until the age of 7 years. It was alleged that she has been divorced by her husband before his death, and in Mr. Anderson's opinion if this were established, it was a disqualification to her appointment. He accordingly called upon Abdul Karim to prove the factum of divorce.

When the case came up for evidence Mr. Anderson had been succeeded by Lieutenant-Colonel J. Frizelle, who passed the order appealed from. He stated that guardianship proceedings were summary and that it was not for him to hold a lengthy trial in order to be able to decide the question of divorce. He said that petitioner or Mt. Zainab Bibi should bring a regular suit before the question of minors' guardianship could be decided. It was pointed out in *Sayed Shahu* v. *Hapija Begum* (1), that the procedure under S. 13 of Act VIII of 1890 is not intended to be summary. This was followed in a decision of the Chief Court reported as *Jivan* v. *Zabo* (2). The learned District Judge passed his order as to the appointment of Abdul Karim to be the guardian of the minors' property solely upon the fact that he was entitled thereto under Muhammadan Law. Under Act VIII of 1890, however, the Court has also to consider the welfare of the minors. Moreover divorce is not always a disqualification to the appointment of mother to be guardian of her minor children: (see Trevelyan's Law relating to Minors, 1912 Edition, page 55 bottom). It is stated there that if the

(1) [1893] 17 Bom. 560.
(2) [1917] 63 P. L. R. 1917=134 P. W. R. 1917.

mother is of good character she retains her right after separation from her husband, even although she may have been divorced from him. It is stated that even before the order appealed against was passed Abdul Karim withdrew Rs. 763 belonging to the minors from the Post Office Savings Bank, and it is urged that he is not a suitable person to be appointed guardian. The minor daughter of Abdul Aziz is said to be still living with her grandfather.

I think it is necessary that there should be a proper enquiry as to whether Mt. Zainab Bibi is or is not fit to be appointed her guardian as well as the guardian of her minor sons. Evidence also should be recorded as to the fitness of Abdul Karim to be appointed guardian of the minor's property and the Court should also consider whether it is for the welfare of the minors, that he or their mother should be so appointed. I, therefore, accept the appeal and setting aside the order of the lower Court remand the case to the lower Court for re-decision in accordance with the law. Costs to follow the event.

Appeal accepted.

A. I. R. 1926 Lahore 118

MARTINEAU, J.

Mehtab Bibi—Plaintiff—Appellant.

v.

Din Mohammad—Defendant—Respondent.

Second Appeal No. 952 of 1920, Decided on 9th January 1924, from the decree of the Addl. Dist. J., Lahore, D/- 2nd March 1920.

Custom (Punjab)—Succession by daughter as heir—Property reverts on failure of male issue—Half sister is a preferential heir to mother's father's brother.

The principle that when the succession of a daughter is allowed she acts merely as a conduit to pass on the property to her sons and their descendants, and that when her male issue fail the land will revert to her father's agnates, applies to a case in which the daughter has succeeded for some special reason, but does not apply to a case among tribes like Arains where the daughter's right of inheritance is recognized as being superior to that of collaterals : 32 *P. R.* 1895 (*F. B.*), *applied.*

A half-sister is entitled to succeed among Arains of Lahore District by custom in preference to mother's father's brother, notwithstanding that the property has come to the last male owner through his mother. [P 119 C 1]

M. Obedulla—for Appellant.

Shaukat Rai—for Respondent.

Judgment.—The dispute in this case is as to the right of succession to the estate left by Muhammad Din, an Arain of Mauza Nawankote in the Lahore District. His land was mutated in favour of Amir, his mother's father's brother. Amir has died and the present defendant is his son. The plaintiff, who lays claim to the estate, is the deceased Muhammad Din's half-sister', their father having had two wives, one of whom, Talia Bibi, was the mother of Muhammad Din, and the other the mother of the plaintiff. The First Court found for the plaintiff, but the District Judge on appeal has dismissed the suit. The plaintiff has obtained a certificate from the District Judge on the question of custom and has filed a second appeal.

I heard the appeal ex parte and decided it in favour of the appellant, but on the respondent's application set aside the ex-parte decree and have heard the arguments of counsel on his behalf. That a sister has a right of succession by the custom of Arains of the Lahore District is established by the entry in the rewaji-am, which is supported by several instances and also by several judicial decisions which are mentioned in the first Court's judgment. It was in fact not disputed in the lower appellate Court that the plaintiff would have been entitled to succeed to the estate if she had been Muhammad Din's full sister. The learned District Judge has held that the plaintiff is not entitled to succeed because the land has not descended from an ancestor common to the plaintiff and Muhammad Din, that is to say, did not descend to Muhammad Din, from his father, but was inherited by him from his mother who was only a step-mother of the plaintiff. It appears to me, however, that the fact that the land descended to Muhammad Din from his mother and not from his father, is immaterial. Counsel for the respondents has referred to page 61 of Roe and Rattigan's Tribal Law in the Punjab and to *Lehna* v. *Thakri* (1) and other rulings

(1) [1895] 32 P.R. 1895 (F.B.).

in which the principle has been laid down that when the succession of a daughter is allowed she acts merely as a conduit to pass on the property to her sons and their descendants, and that when her male issue fail the land will revert to her father's agnates. But in the first place the very fact that it was 'conceded in the lower appellate Court that the plaintiff would have been entitled to succeed if she had been Muhammad Din's full sister shows that the general principle mentioned above is not fully applicable in the present case. In the second place it appears to me that that principle, while it may apply to a case in which a daughter has succeeded for some special reason, such as on account of her husband being a khana damad, is not applicable to a case among tribes like Arains where the daughter's right of inheritance is recognized as being superior to that of collaterals. There is no question that Talia Bibi was the rightful heir of her father; for a suit brought against her by Amir for possession of the property, after her father's death, was dismissed. The learned District Judge admits that Talia Bibi had a more or less complete power of alienation and might have gifted the property to her husband, and his view on this point is in accordance with the answer to Question No. 64 in Bolster's Customary Law of Lahore District, in which it is stated that where daughters exclude agnates they have full rights of alienation. I hold, therefore, that the rule of reversion, for which counsel for the respondent contends, does not apply in the present case. The only question is: Which of the parties is the heir to Muhammad Din, his half-sister or his mother's father's brother. The defendant has produced no evidence to show that a mother's father's brother has any right of succession. The plaintiff, on the other hand, has given evidence of four instances in which a half-sister has inherited. Three of these are mentioned by the witnesses Nizam Din, Chanan Din and Mehr Din, two of them being supported by mutation entries (Exs. P-4 and P-9), and the fourth instance is furnished by a mutation of 1894 (Ex. P-13). These instances, which are unrebutted, are sufficient proof that a half-sister is entitled to succeed.

I, therefore, accept the appeal, reverse the decree of the District Judge, and restore that of the first Court. The respondent will pay the appellant's costs in all Courts.

Appeal allowed.

A. I. R. 1926 Lahore 119

ZAFAR ALI, J.

Ram Sahai—Accused—Petitioner.

v.

Krishna Lal—Complainant—Respondent.

Miscellaneous Criminal Case No. 140 of 1925, Decided on 24th October 1925, for transfer of the case.

Criminal P. C., S. 181 (2)—*Liability to render accounts at a particular place—Accounts not rendered due to criminal breach of trust—Court at place where accounts should have been rendered can try offence.*

Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the Court, within the local limits of whose jurisdiction that place is situated, may enquire into and try the offence under the provisions of S. 181 (2) : *A. I. R.* 1925 *Cal.* 613, *Foll.*

[P 120 C 1]

Nanak Chand—for Petitioner.

Nand Lal—for Respondent.

Zafar Ali, J.—This application under S. 526, Criminal P. C., for the transfer of a case from a Court in Jhelum to the Court in Rawalpindi is made by the accused petitioner on two grounds, namely : (1) that the offence of criminal breach of trust with which he is charged is not triable at Jhelum but at Rawalpindi ; and (2) that the complainant being a man of great influence and being on friendly terms with the local Magistrate, a fair and impartial trial cannot be had at Jhelum.

The question of jurisdiction was raised before the Magistrate also, and it was contended before him that though no evidence had yet been recorded it appeared from the facts stated in the complaint itself that the case could not be tried at Jhelum. But it was stated in the written complaint that the accused had to render accounts to his employer, the complainant, at Jhelum for the business which was carried on by him at Rawalpindi, and the Magistrate, on the authority of *Gunanand* v. *Santi Prakash* (1)

(1) A. I. R. 1925 Cal. 613.

came to the conclusion that the case was triable at Jhelum. In the said Calcutta case it was held that: " Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him the Court, within the local limits of whose jurisdiction that place is situate, may enquire into and try the offence under the provisions of S. 181 (2) Criminal P. C."

I am of opinion that the above view of the Calcutta High Court is correct and that, therefore, the case is triable at Jhelum.

As regards the second ground: the petitioner made no allegation against the Magistrate and there is nothing to show that the Magistrate is in any way biased against the accused or has any friendly relations with the complainant. I, therefore, see no reason for transferring the case and dismiss the application.

Application dismissed.

A. I. R. 1926 Lahore 120

LE ROSSIGNOL, J.

Ruldu Ram—Defendant—Appellant.

v.

Surain Singh and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 404 of 1925, Decided on 3rd November 1925, from the decree of the Addl. Dist. J., Amritsar, D/- 18th November 1924.

Mortgage—Suit for redemption — Foreclosure proceedings taken previously but no record thereof available—Mortgagee entered as full proprietor in revenue records—If plaintiff proves mortgage to be within 60 years presumption of correctness of revenue records would be rebutted.

The plaintiff sued to redeem a mortgage which was with possession and comprised a stipulation by way of conditional sale. Though there had been previously foreclosure proceedings no record of those proceedings, with the exception of a mere entry in a register that notice was served on the mortgagor, was forthcoming. After foreclosure proceedings, a mutation was written up to convert the mortgagee right into a full proprietary right.

Held: the only onus thrown upon the plaintiff was to show that there was a mortgage and that it was granted within sixty years of suit. This would rebut the prima facie presumption of correctness of the revenue record entry and the defendants would then be fixed with the liability for showing that the revenue entry was in fact correct and that there was a proper and legal foreclosure. [P.120 C 2, P 121 C 1]

Moti Sagar and *Amar Nath Chona*—for Appellant.

Fakir Chand—for Respondents.

Judgment.—This second appeal arises out of a suit to redeem a mortgage of land granted in the year 1882. The mortgage was with possession and comprised a stipulation by way of conditional-sale. The suit has been decreed by the Court below on the ground that, though foreclosure proceedings in the suit were had in 1885, no record of those proceedings with the exception of a mere entry in a register that notice was served on the mortgagor, is forthcoming, and the oral evidence to the effect that the notices were in accordance with law and that all the formalities required by the regulation were observed has been rejected. In other words, the Courts below have held that there were no valid foreclosure proceedings and the mortgage consequently is still subsisting.

In 1888, after foreclosure proceedings; a mutation was written up to convert the mortgagee right into a full proprietary right. Bagu, the mortgagor, appeared before the attesting officer and denied receipt of consideration for the mortgage. He did not assert that the foreclosure proceedings were not in order, and since that date the quondam mortgagee has been in possession and regarded as proprietor. In 1902 Ruldu Ram, the quondam mortgagee, sold 37 kanals 8 marlas out of the land mortgaged to an uncle of one of the present plaintiffs who are reversioners of the mortgagor Bagu who died childless. The vendee is not one of the plaintiffs. Consequently it is not contended for the appellant with any vigour that there is any question of estoppel; but it is urged that, in as much as the entry in the revenue record is a prima facie evidence of the full proprietary right of the defendant, the burden of proving that there was no valid foreclosure lay upon the plaintiffs.

The plaintiffs-respondents referred to *Norender Narain* v. *Dwarka Lal* (1) and *Madho Pershad* v. *Gujudhar* (2) which lay

(1) [1877] 3 Cal. 397=5 I. A. 18=1 C. L. R. 369=3 Sar. 771 (P. C.).
(2) [1885] 11 Cal. 111=11 I. A. 186=4 Sar. 574 (P. C.).

down that the quondam mortgagee is fixed with the onus of proving the validity of the foreclosure proceedings, but it is noteworthy that in both those cases the plaintiff was the quondam mortgagee who was out of possession and who came into Court seeking possession within a short time of the foreclosure proceedings. Reference is also made to *Indar* v. *Asa Singh* (3) where the rule is cited that neither mortgagor nor mortgagee, by adverse act, can bar the right of the other. None of these rulings is of any direct help in the present case. Admittedly it lies upon the mortgagee to prove that his mortgage right has been converted by foreclosure proceedings in accordance with law into a full proprietary right, and the finding in this case is that such valid foreclosure proceedings have not been established. But the question for this Court's decision is whether in this case, in which the mortgagor's representatives are the plaintiffs, the burden of proving that the foreclosure proceedings were invalid does not lie upon them by reason of the mutation proceedings of 1888 and the presumption of correctness that attaches to the entry in the revenue record.

In my opinion the only onus thrown upon the plaintiffs is to show that there was a mortgage and that it was granted within sixty years of suit. This rebuts the prima facie presumption of correctness of the revenue record entry, and the defendants are then fixed with the liability for showing that the revenue entry is in fact correct and that there was a proper and legal foreclosure. The Courts below on the evidence might have held that the foreclosure proceedings were good, but they have come to the opposite conclusion and the finding is one of fact.

For the foregoing reasons it must be taken that there were no legal foreclosure proceedings and the mortgage is still subsisting. I accordingly dismiss the appeal with costs.

Appeal dismissed.

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(3) [1909] 65 P. R. 1908=90 P. L. R. 1908=113 P. W. R. 1908.

A. I. R. 1926 Lahore 121

MOTI SAGAR, J.

Naman and *others* — Defendants—Appellants.

v.

Gurditta and *others*—Plaintiffs—Respondents.

Second Appeal No. 1324 of 1923 Decided on 22nd January 1924, from a decree of the Dist. J., Jullunder, D/-10th May 1923.

(a) *Limitation Act, Ss.* 12 *and* 4—*Copying agent is not an agent of litigant—Expiry of time on the closing day of Court—Application for copies made on re-opening day—Limitation does not expire for the suit.*

Copying agent, who receives his salary from the Government, is not the agent of the litigant for the purpose of receiving applications for grant of copies. If the period prescribed for the presentation of an appeal expires on a date on which the Court is closed, and if the appellant has not obtained copies of the decrees and judgment before closing the Court, and applies for such copies on the date of re-opening of the Court whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation. 19 *All.* 342, *Foll.* [P. 122. C. 1]

Badri Dass—for Appellants.

Fakir Chand—for Respondents.

Judgment.—The sole question to be determined in this second appeal is whether the plaintiff's appeal preferred to the lower appellate Court was or was not barred by the Law of Limitation. The judgment and decree of the Court of first instance are dated the 28th November 1922. Copies were applied for on the 22nd of December 1922, but the application, which was handed over to the copying agent, was not entered in the register till the 2nd of January 1923, when the Court first re-opened after the Christmas vacation. On that date the application was entered in the register as the first application for the year 1923. The copies were delivered to the applicant on the 5th of January 1923 and the appeal was presented to the District Judge on the same date. It is admitted that the application for copies was handed over to the copying agent on the 22nd of December, the last working day before the Christmas vacations; but it is argued that the copying Agent was the agent of the applicant, and that as the application

was not entered in the register by the latter till the 2nd of January 1923, it must be considered to have been made on that date and not before. No authority has been cited in support of this contention and I am unable to agree that the copying agent, who receives his salary from the Government, is the agent of a litigant for the purpose of receiving applications for grant of copies. In my opinion the application must be deemed to have been presented on the 22nd of December 1922 and the plaintiffs-respondents were entitled to exclude the time spent in obtaining copies from the 22nd of December 1922 to the 5th of January 1923, both days inclusive, under S. 12 of the Indian Limitation Act. I am further of opinion that, even if the application is considered to have been made on the 2nd of January 1923, the appeal preferred to the learned District Judge was not barred by limitation. It has been held in *Siyadat-un-nissa* v. *Muhammad Mahmud* (1) that if the period prescribed for the presentation of an appeal expires on a date on which the Court is closed, and if the appellant has not obtained copies of the decrees and judgment before closing of the Court, and applies for such copies on the date of re-opening of the Court, whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation. The ruling is exactly on all fours with the present case and I must hold that the appeal presented by respondents in the Court below on the 5th of January 1923 was not beyond time and that there is no force in the contention that the appeal was time-barred.

On the merits, the judgment of the lower appellate Court appears to be perfectly correct and there are no grounds for interference. Section 23 of the Indian Easements Act provides that a dominant owner may from time to time alter the place and mode of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. In the present case the old well having fallen into disuse a new well has been constructed and the plaintiffs only wish to employ the previously existing water course to carry the water of this well for the purpose of irrigating his lands. The test to be applied is to see whether any additional burden has been imposed on the servient heritage of the defendants by use sought to be made of the watercourse by the plaintiffs. The learned District Judge has found that no additional burden has been imposed and this finding being clearly one of fact cannot be impugned in second appeal.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1897] 19 All. 342=(1897) A. W. N. 76.

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* A. I. R. 1926 Lahore 122

HARRISON AND JAI LAL, JJ.

Hari Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 169 of 1925, Decided on 4th June 1925, from an order of the Sessions Judge, Ferozepore, D/- 2nd January 1925.

(a) *Evidence Act, S. 80—Confession recorded according to law is presumed to be genuine.*

A statement made by a dead person recorded in accordance with the law by an officer uathorized to record it and signed by him must under S. 80 be presumed to be genuine and as having been made by the person by whom it purports to have been made. [P. 123, C. 2]

* (b) *Criminal P. C., S. 162 Proviso—Statement admitted under S. 32, Evidence Act can be contradicted by another statement made by the same person to Police— Evidence Act, S. 158.*

S. 158 places a person whose statement has been used as evidence under S. 32 in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him. Therefore a statement which has been admitted in evidence under S. 32 may be contradicted by another statement of the same person made to police during investigation. [P 124, C. 2]

(c) *Criminal P. C., S. 164—Statement cannot be used for contradicting other witnesses.*

Statements of witnesses recorded under S. 164, Criminal P. C., cannot be used for the purpose of contradicting the statements of other witnesses made at the trial. [P 124, C. 2]

Moti Sagar and *Jagan Nath Bhandari*—for Appellant.

Dalip Singh—for Opposite Party.

Ghulam Mohi-ud-din—for Complainant.

Judgment.—Hari Ram has been found guilty of murdering Gaman alias Ghulam Muhammad and has been sentenced to death, and his appeal is before us.

Gaman or Ghulam Muhammad an elderly man was married to a young wife Mt. Amiran, who was notoriously ill-behaved. She had an intrigue with one Rana and gave him up for the sake of the present convict Hari Ram. On the night of the 22nd-23rd February 1924 Gaman was seen for the last time, and on enquiries being made Mt. Amiran stated that he had gone to Peshawar. About a month later on the 26th of March, a letter was received by her father, Rahim Bakhsh, purporting to have been written by one Haji Abdulla of Bombay to inform Rahim Bakhsh of the death of Gaman at Bombay. This was admittedly written by Hari Ram and was posted at some point between Ferozepore and Bombay by one of the postal staff. Inquiries by Rahim Bakhsh in Bombay showed that Gaman never went there. In the middle of April, or about two months after the disappearance of Gaman, one Jani noticed a bad smell coming from a well, and on a search being made a corpse was found and this corpse was fully identified as that of Ghulam Mohammad. At the trial of this case the accused questioned the correctness of the identification of the corpse. But before us Mr. Moti Sagar has admitted that it is established beyond doubt that this was corpse of Ghulam Muhammad. Suspicion naturally attached to Mt. Amiran and she was named by Fateh Din, brother of the deceased, together with Hari Ram and one Anait and his mother as suspected persons, the latter two being included as having provided a meeting place for Mt. Amiran to meet her lover. She was arrested and eventually died in jail, In the course of the investigation one Rahmat Ali was also arrested and was given a pardon. Eventually Hari Ram was sent up for trial and the evidence on which he was convicted consists, in the first place, of the statement of this approver and in the second, of the corroboration afforded of that statement, the statement of Mt. Amiran recorded by a Magistrate during the investigation, the letter admittedly written by Hari Ram, and the formal evidence, such as the post-mortem evidenoe etc., etc.

It will be convenient, at this stage. to dispose of some objections which were taken to the admissibility of certain documents on the record. The learned Government Advocate who appeared for the Crown objected to the use by counsel for the convict of Ex. D for the purpose of contradicting the statement of Mt. Amiran Ex. PFF. The latter is her confession recorded by a Magistrate under S. 164, Cr. P. C. in which she implicated Hari Ram as one of the murderers of the deceased. Exhibit DD is the record of a statement which she made on the 21st April 1924 during the investigation before the police. In this she implicated one Rana as one of the murderers and made no mention of Hari Ram. Exhibit PFF has been admitted in evidence under S. 32 Cl. (3) of the Indian Evidence Act, as a statement made by a dead person (Mt. Amiran), which if true, would have exposed her to a suit for damages for causing the death of the deceased Gaman. The learned counsel for the appellant objected to this statement being used as, evidence on the ground that the prosecution had not proved the indentity of Mt. Amiran. This statement having been recorded in accordance with the law by an officer authorised to record it and being signed by him must under S. 80 of the Indian Evidence Act, be presumed to be genuine and as having been made by Mt. Amiran, widow of Ghulam Muhammad alias Gaman deceased as expressly mentioned in the record of the statement. Moreover the identity of the maker of the statement as Mt. Amiran is sufficiently proved by the evidence of Babu Mani Ram, Circle Inspector (P. W. No. 50). On this point we overrule the objection of the Counsel for the appellant.

As regards the objection by the learned Government Advocate regarding the admissibility of Exhibit DD we are of opinion that this also must be overruled. The contention of the Government Advocate is that under S. 162, Criminal P. C., the use of any statement made to a police officer in the course of an investigation is prohibited for any purpose except as expressly provided in the Code : the main proviso to the section is that when a witness is called for the prosecution, subject to the observance of certain formalities, such a statement may be used to contradict that witness in the manner provided in S. 145, Indian Evidence Act. The learned Government Advocate argued that the

statement made by Mt. Amiran to the police officer on the 21st April 1924 could be used for the purpose of contradicting her confession only if Mt. Amiran had been actually called in Court as a witness for the prosecution; and as she was not called the proviso to S. 162 did not come into operation. Mr. Moti Sagar relied on S. 158, Indian Evidence Act, which provides that whenever any statement relevant under S. 32 is proved all matters may be proved in order, inter alia, to contradict it which might have been proved if the person by whom it was made had been called as a witness and had denied upon cross-examination the truth of the matter suggested. This section, in our opinion, places a person whose statement has been used as evidence under S. 32 in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him. We hold that for the purpose of contradicting Mt. Amiran by her statement made before the police officer during the investigation Mt. Amiran must be treated as a witness actually produced in Court and that it must further be assumed that her previous statement made before the police was put to her in cross-examination as required by S. 145, Indian Evidence Act, and that she denied its correctness. Exhibit DD has been proved to be a statement made by Mt. Amiran by independent evidence on the record and we hold, therefore, that it has been rightly admitted by the Sessions Judge for the purpose of contradicting the statement by her before the Magistrate.

Mr. Moti Sagar wished to use the statement of certain witnesses recorded by the Magistrate under S. 164, Criminal P. C., for the purpose of contradicting the statements of other witnesses made at the trial. The witnesses, whose statements had been recorded under S. 164, were produced at the trial and their previous statements had been proved and used by the Crown under S. 157, Indian Evidence Act, for the purpose of corroborating the evidence given by them in Court. Such statements could not be and were not used as substantive evidence but had been brought on the record merely for the limited purpose specified above, and could not, therefore, be used for any other purpose whether by the Crown or on behalf of the accused. We, therefore, uphold the objection of the Government Advocate to the use of the statements for the purpose of contradicting the evidence of other witnesses.

The story told by the approver is that he was approached through one Bhagat Ram, a friend of his, by Hari Ram and Mt. Amiran with a view to deciding how to get rid of Ghulam Muhammad, that unsuccessful efforts were made to enlist another assistant, and that on the night in question, the 22nd-23rd Feuruary, after meeting them at a liquor shop Mt. Amiran opened the house and let them in, in the middle of the night. From the room in which they were placed they could hear her quarrelling with her husband. They were in a room with two doors. The approver went through one door and on seeing him the deceased tried to get out of the other but was met by Hari Ram and they both fell upon him and strangled him. After waiting for a short time they tied up the corpse in a sack and carried it for a distance of about half a mile, and he, the approver, then went and fetched a hand-cart. When fetching the cart he was challenged by a man Chiranji Lal, but succeeded in securing it. The corpse was then taken on the hand-cart towards the river, but when it began to get light it was thrown into the well. Another sack was thrown in loaded with bricks and tied to it to keep it down.

The story of the negotiations with Rahmat Ali and the subsequent details are corroborated on many small points in such a way as to prove beyond all doubt that Rahmat Ali certainly did take part in the murder, and the question is whether there is sufficient corroboration connecting the accused directly with the murder as apart from the general corroboration of the correctness of the story supplied by small incidents and the evidence of various witnesses.

Discrepancies have been pointed out by counsel such as that Mt. Amiran allots a different part in the actual murder to Hari Ram from what Rahmat Ali the approver does, and that the dates given by Bhagat Ram and the approver of the actual death of Gaman do not agree. It is far more probable that Bhagat Ram is right about this date than that the approver is for he has reason to know on what date his leave terminated, and calculates from that point. At the same time the undoubted discrepancy is not, in our

opinion, of any material importance and does not discredit in any way the story of the approver. What has to be seen in the first place is how far the story of Mt. Amiran corroborates the story of the approver and whether there is sufficient reason for accepting her later version in which she implicates Hari Ram, as against the earlier story in which she states that Rana, her earlier lover, was the actual murderer. Counsel urges that the statement of Bhagat Ram and those of Mt. Amiran are themselves tainted evidence. So far as Bhagat Ram's evidence is concerned this is true. We do consider, however, that the statements of Mt. Amiran are valuable and that the learned Sessions Judge has rightly accepted the latter version and rejected the earlier story. We believe that she was shielding her lover Hari Ram in implicating Rana, and taking everything into account we find her later story to be true.

The case, therefore, against Hari Ram amounts to this. There is very strong evidence of motive, his attachment to Mt. Amiran being fully and conclusively proved and the subsequent conduct of both corroborates their previous intimacy. Not only before her husband's death but after this woman went and lived openly with Hari Ram. In addition to the motive we have the story of the approver, which we believe to be true and which we find corroborated by the statements of Mt. Amiran as to the actual participation of Hari Ram and by the many witnesses and incidents recorded in the judgment of the learned Sessions Judge as to the general correctness of the details. Finally, we have the all important letter signed with the name of Haji Abdulla. It is admitted that this was written by Hari Ram in order to divert suspicion. Reading all the evidence together we have no hesitation in finding that Hari Ram took part in this murder. There is no question as to the sentence and we dismiss the appeal and confirm the sentence of death.

Appeal dismissed.

A. I. R. 1926 Lahore 125

ZAFAR ALI AND ADDISON, JJ.

Raghunath Das Ram Sarup—Defendant—Appellant.

v.

Sulzer Bruderer and *Co.*—Plaintiff—Respondent.

First Appeal No. 2586 of 1922, Decided on 2nd December 1925, from the decree of the Senior Sub-J., Delhi, D/- 18th July 1922.

(a) *Arbitration — Award—Suit to enforce—Absence of arbitrator's jurisdiction pleaded—Evidence on issues involving question of jurisdiction should not be excluded—Civil P. C., O. 15, R. 3 (1).*

When in the suit on an award objection is raised as to the jurisdiction of the arbitrators it would be illegal for the Court to shut out evidence on the issues involving the question of arbitrator's jurisdiction and to decide the case on other issues as preliminary issues. [P. 128, C. 2]

(b) *Practice—Trial—Piecemeal trial of a case should be avoided.*

The practice of trying an important case piecemeal should be deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal. [P. 128, C. 1]

Tek Chand and *Kahan Chand*—for Appellant.

PremLal and *Ram Kishore*—for Respondent.

Addison, J.—The plaintiff sued the defendant on the allegations that the defendant on the 8th January 1920 placed an indent with him for five cases of grey merino on certain terms: that the indent was duly accepted by the plaintiff within the prescribed period of sixty days; that the goods were shipped by the plaintiff; but that the defendants raised frivolous objections which were referred by the two parties to arbitrators who disagreed and that thereupon they were duly referred to an umpire who gave an ex-parte award in the plaintiff's favour. This award was to the effect that the defendant should take up and pay for the goods. It was alleged that the sum payble on this award, though it was not actually fixed, was Rs. 36,925-15-9 and this with future interest was claimed on its basis. In the alternative it was claimed that this sum was due for the price of the goods apart from the award.

The defendant admitted the indent but denied that it had been accepted within the period prescribed. There was thus

no completed contract. The submission to the two arbitrators was admitted, but the appointment and proceedings of the umpire were alleged to be illegal, so that the award was invalid. The other pleas do not require mention at present except that plaintiff's counsel replied that the indent had been accepted within the prescribed period and that in any case the defendant had accepted his client's acceptance as due acceptance. These allegations were denied by defendent's counsel and the Court proceeded to frame the following issues :

(1) Was an umpire validly appointed and did he give an award ?

(2) If so, is it invalid and not binding on the defendants ?

(3) To what amount is plaintiff entitled under the award ?

(4) Was there a completed contract between the parties ?

(5) Is defendant estopped from impugning the contract ?

(6) Was plaintiff ready and willing to perform his part of the contract ? Did defendant break it ? If so, how and when ?

(7) Was defendant excused from accepting the goods under the circumstances of the case.

(8) Had the property in the goods passed to the defendant ?

(9) If so, does not a suit lie for the price of the goods as framed ?

Later it added the following two issues.

(10) What goods and under what circumstances have been parted with ? What is the effect thereof on plaintiff's claim ?

(11) To what amount for price, charges and interest are plaintiffs entitled and at what rate of exchange ?

When the first nine issues were struck the Court ordered the parties to produce their evidence on the first three issues only, though later evidence was also allowed on Issues (10) and (11) as being supplementary to the first three issues. It would seem that this order was verbally objected to when it was made ; while before evidence was commenced, defendant's counsel again tried to get the order changed to allow of evidence being given on all the issues. He was overruled and he then put in a written application to the same effect. This also was refused. The Court then proceeded to judgment on the issues mentioned and holding that the award was valid, found that Rs. 32,683-2-6 were due on it. A decree for that sum with future interest at 9 per cent. per annum was given to the plaintiff with a lien on the goods. Against this decision the defendant has filed this appeal.

It was argued by the learned counsel for the appellant that Issues (4) and (5) went to the very root of the matter as they involved the question of the jurisdiction of the arbitrators and that it was therefore illegal to shut out all evidence on these two issues and to decide the suit only on Issues (1) to (3). The trial Court itself seems to have felt this difficulty for, though it confined the case to Issues (1) and (3), it entered into a discussion of Issues (4) and (5) in its judgment at pages 73 and 74 of the paper-book. It said there that the indent, which contained an agreement to refer disputes to arbitration, was admitted. It did not add that the acceptance of that indent by the plaintiff-respondent which was necessary to make it a complete contract was denied. It then went on to say that in the correspondence not a word was said as to the contract not having been completed, although both sides appointed arbitrators. This was a discussion of Issues (4) and (3), evidence as to which had been excluded.

In *E. D. Sasoon and Co.* v. *Ramdutt Ram Kissen Dass* (1) their Lordships of the Privy Council held that a suit was maintainable to contest an award when the objection was the want of jurisdiction in the arbitrator. In *Jai Narain Babu Lal* v. *Narain Das Janu Mal* (2) it was held, at pages 305, 306, that the question of the factum or the validity of the contract was not within the cognizance of the arbitrators, and that the arbitration clause assumed that there was a valid and binding contract between the parties, that is that the arbitration clause, which is part of the contract, falls if the contract falls. It was sought to distinguish these authorities on the ground that in them the arbitration had been ex parte throughout. But in the present case the effect of their having been a submission to arbitration is clearly included in Issue (5), which should, therefore, have been decided after

(1) A. I. R. 1922 P. C. 374.
(2) A. I. R. 1922 Lah. 369.

recording evidence and after Issue (4) had been decided.

In *Tayabally Abdul Hussain* v. *James Findlay and Co.* (3) the Sind Judicial Commissioners also held that a party dissatisfied with a private award could contest it, when it was sought to enforce it, under the Indian Arbitration Act, by taking such objections as that Act allowed but that that remedy was not his sole remedy. He could also bring a suit, thereafter, to set 'aside the award on the ground that no contract, providing for a reference to arbitration was made or that it, if made, was not enforceable by reason of fraud or misrepresentation. *Radha Kishen Khetry* v. *Lakhmi Chand Jhawar* (4) is also in point.

In the case of the above authorities the suit was brought by the party objecting to the award ; but that clearly makes no difference. In the present case, the umpire's ex-parte award was simply to the effect that the buyers should take up and pay for the goods. It was useless to file such an award in Court under the Indian Arbitration Act as no sum was fixed in it as due and certain calculations had therefore to be made and rates of exchange ascertained. The plaintiff therefore came into the regular Courts on the umpire's award. In these circumstances it was within the defendant's rights to attack the award on all possible grounds.

It was urged, however, by the learned counsel for the plaintiff-respondent that his plaint proceeded on two causes of action, paras. (4) to (7) disclosing the cause of action on the award, and the other paras. dealing with the claim independently of the award ; that defendant's plea as to there being no completed contract referred to the second part of the claim which arose only if the award was set aside ; and that the initial submission to arbitration was admitted and that all that was pleaded as regards the claim on the award was that the arbitration proceedings were invalid on various grounds. This argument, though ingenious, cannot be accepted. It was in para. (2) of the plaint that it was stated that the indent had been accepted by the plaintiff within the prescribed period of 60 days. This was prior to any mention of an award. Similarly in para (2) of the pleas the defendant at once denied that there was a completed contract as the indent had not been accepted within 60 days. The order of the pleas had to follow the plaint. Later, in replying to the paras. of the plaint dealing with the award it was admitted that two arbitrators, who disagreed, were appointed while it was added that the appointment of the umpire was invalid. Then in the further pleas, it was again denied that there was a completed contract. It is true that it might have been added for the sake of clearness that there could be no valid submission to arbitration as there was no completed contract; but the meaning was clear enough, namely, that, as there was no completed contract, the whole suit went.

This becomes even clearer when the statements of counsel before issues are examined. Plaintiff's counsel stated that the indent was accepted two days before the prescribed period ended and that in any case the defendant accepted plaintiff's acceptance as due acceptance. Both these allegations were denied by the opposing counsel. Issues (4) and (5) embody this part of the case and the whole suit depends on the findings on these issues and the legal effect thereof. The fact that there was a submission to arbitration may be evidence on this part of the case, but in the absence of other evidence it is impossible to decide these issues. No question arises as to the defendant having accepted the order of the trial Court confining the trial to the three first issues. It is clear from the Court's order, dated the 20th April 1922, that this objection was probably taken at the very time the order was passed and that defendant certainly objected before any evidence was recorded, and finally put in a regular petition when his objections were not heeded.

It follows that the trial Court has erroneously decided the first three issues as being preliminary issues, the decisions of which were sufficient for the disposal of the case, whereas Issues (4) and (5) may go to the root of the case. We, therefore, accept the appeal, and setting aside the decree of the trial Court, remand the suit under O. 41, R. 23, Code of Civil Procedure, for decision according to law. The Court-fee on appeal will be refunded. Other costs will be costs in the cause.

In conclusion we would refer to *Yatendra Nath Chaudhary* v. *Hari Charan*

(3) A.I.R. 1924 Sind 105.
(4) [1920] 31 C.L.J. 283=24 C. W. N. 454.

Chaudhary (5) where the practice of trying an important case piecemeal was deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal.

Appeal accepted.

(5) [1915] 20 C.L.J. 426.

A. I. R. 1926 Lahore 128

CAMPBELL, J.

(*Chaudri*) *Nand Ram* and *another*—Defendants—Appellants.

v.

Ishar and *others* — Plaintiffs—Defendants—Respondents.

Second Appeal No. 2647 of 1924, Decided on 1st December 1925, from the decree of the Dist. J., Hissar, D/- 30th June 1924.

(*a*) *Punjab Tenancy Act, Ss. 50 and 77 (3) (g) —Occupancy tenant wrongfully dispossessed—Suit for possession lies in revenue Court even after one year from dispossession.*

A suit for possession by an occupancy tenant who has been wrongfully dispossessed from his holding by the landlord lies in a revenue Court only, even though one year from the date of dispossession has expired : *A. I. R.* 1924 *Lahore* 539, *Foll.* [P. 128, C. 2.]

(*b*) *Limitation Act, S. 18—Fraud by which plaintiff is kept from knowledge of his right has to be proved.*

For purposes of S. 18 it is not the alleged fraud by which dispossession was carried out which is pertinent, but the fraud by which the plaintiffs have been kept from the knowledge of their right to institute a suit. [P. 129, C. 1.]

Shamair Chand—for Appellants.

Nanak Chand—for Respondents.

Campbell, J.—The plaintiffs in this suit alleged themselves to be occupancy tenants of certain land and the defendants to be the landlords. They sued for possession on the ground that in 1917, at a time when the plaintiffs had arranged for the cultivation of the occupancy tenancy by sub-tenants, the defendants landlords got a mutation sanctioned removing the plaintiffs' names from the record as occupancy tenants and thereby dispossessed them. The suit was for possession of the land comprised in the tenancy.

The defendants pleaded that the plaintiffs had lost their rights of occupancy by abandonment.

Both Courts below have concurred in decreeing the plaintiffs' claim. In second appeal the objection is raised for the first time that the suit was cognizable by a revenue Court and not by a civil Court. It is obvious that this is so.

The alleged dispossession took place on the 15th December 1917 and the suit was instituted on the 11th January 1921. In a precisely similar case, *Mahindra Singh* v. *Alla Ditta*, printed as *All India Reporter*, 1924 *Lahore* 539, it was held that cases of this nature are fully covered by the decision in the Full Bench case, *Akbar Hussain* v. *Karam* (1). In the judgment of Mr. Justice Shah Din in the latter case it is laid down that if a tenant, who has been wrongfully dispossessed of his tenancy in the circumstances mentioned in S. 50 of the Punjab Tenancy Act, allows the period of one year prescribed by that section to expire without bringing a suit in the revenue Court, he loses his remedy altogether, and by the combined operations of Ss. 50 and 77 (3) (g) is debarred from bringing a suit for recovery of possession or for compensation or for both in a civil Court. This pronouncement was made after considering the observations of Sir Meredith Plowden in the referring order in P. R. 1891, *Kesar* v. *Singh Nihal Singh* (2); and it appears to me to be conclusive in respect of the present suit. In the same case, *Akbar Hussain* v. *Karam* (1), it was rightly pointed out by Rossignol, J., that S. 77 (3) (g) and (i) appear to cover all conceivable causes of litigation between a landlord and his tenant qua tenant, and that an ex-tenant, in that capacity, can look for no relief outside the revenue Courts.

In the present instance the plaintiffs allege themselves to be tenants who have never abandoned their tenancy and the suit is not cognizable by a civil Court.

I have been asked to consider the facts that no previous objection to jurisdiction was raised and that fraud was alleged in the plaint in deciding whether an order should be passed under S.100 (3) of the Punjab Tenancy Act and the decree of the first Court ordered to be registered as that of an Assistant Collector. No

(1) [1918] 90 P. R. 1918 (F. B.).
(2) [1891] 45 P. R. 1891 (F. B.).

specific allegation, however, is made in the plaint of the particular fraud by which dispossession was concealed from the plaintiffs by the defendants, and for purposes of S. 18 of the Limitation Act it is not the alleged fraud by which dispossession was carried out which is pertinent, but the fraud by which the plaintiffs have been kept from the knowledge of their right to institute a suit. As for the failure of the defendants to raise the question of jurisdiction before, it is not contended that this precludes me from going into this question in second appeal, and in view of the rulings of this Court, cited above, to which I adhere, it would be vexatious to order otherwise than that the suit should be dismissed. I accept the appeal and dismiss the suit with costs throughout as being a suit which the lower Courts had no jurisdiction to hear.

Appeal accepted.

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* A. I. R. 1926 Lahore 129

CAMPBELL, J.

Kaka—Defendant—Appellant.

v.

Ram Saran—Plaintiff—Respondent.

Second Appeal No. 2787 of 1923, Decided on 8th April 1924, from a decree of the Dist. J., Jullundur, D/- 27th October 1923.

* *Landlord and Tenant—Notice to quit—Tenancy-at-will admitted by defendant tenant—Defendant in possession long after suit—Notice to quit is not necessary where it is not so required by a statute.*

Where in an ejectment suit the defendant was found unable to prove anything more than a tenancy-at-will in his favour and retained possession of the property for a considerable period after the institution of the suit and where no statute required notice.

Held : that the suit cannot be dismissed on the ground that there was no previous notice to quit : 18 *Bom.* 107, *Dist.* [P. 130, C. 1.]

Jagan Nath—for Appellant.

Faqir Chand—for Respondent.

Judgment.—The plaintiff is a Jat and the defendant is an Arain of Mauza Lorai in the Jullundur District. The plaintiff sued on the 23rd of January 1922, alleging that 2¼ years previously the defendant had become his tenant-at-will of a certain house on certain conditions ; that the defendant had been guilty of breach of those conditions and that, therefore, he was liable to ejectment. He asked for a decree for ejectment and admitted that no notice to vacate had been given to the defendant before suit.

The defendant pleaded that five or six years before suit he was permitted by the plaintiff to occupy the premises which were then in ruins ; that subsequently he roofed the house and built a portion ; and that then the plaintiff made him a permanent tenant for life.

The defendant endeavoured to prove a written lease, dated the 25th of October, in support of his plea, but, since the document was unregistered, he was unable to do so and he was held to be shut out from proving by other evidence the terms of the alleged permanent lease. It is, however, a point made before me for the defendant that a document of some kind was executed on the 25th of October 1919 which date corresponds roughly with the plaintiff's allegation that defendant's tenancy commenced 2¼ years before the 23rd January 1922. The trial Court held that the plaintiff had failed to prove the forfeiture of any condition, but that since the terms of the defendant's alleged lease could not be proved, and since he had admitted that he had been a tenant-at-will for six years before suit, he must be taken to be a tenant-at-will still and could be ejected at the plaintiff's pleasure. The plaintiff was given a decree for possession of the premises.

This decree was modified by the lower appellate Court to this extent that the plaintiff was ordered to pay the defendant Rs. 100 as the cost of the structures erected by the latter.

The defendant has come to this Court on second appeal and his principal ground is that the suit must fail for want of notice to quit given before suit. It has been pointed out on his behalf that the plaintiff relied in the first instance upon forfeiture which he failed to prove and that then he was allowed to fall back on the defendant s admission that the original entry by the defendant had been as a tenant-at-will. It is contended that, if the plaintiff was permitted to fall back upon this admission, the defendant was entitled to rely upon the failure to give notice before suit, and that, as laid down in *Abu Bakar Saiba* v. *Venkataramana Vishvesh var* (1), the District Judge could

(1) [1894] 18 Bom. 107.

not in his judgment give the notice which he thought the plaintiff was bound to give. What the learned Judge actually said on this point was that the original tenancy must be held to be a tenancy-at-will terminable by either party on reasonable notice and that "defendant by this time has had ample notice that the plaintiff wishes to terminate the tenancy, and he cannot complain if he has to vacate" For the respondent it is argued that any notice now given by the plaintiff would be disobeyed since the defendant, as is shown by his memorandum of appeal to this Court, still persists in his claim to be a tenant for life.

There is this difference between the present case and that reported as *Abu Bakar Saiba* v. *Venkatramana Vishveshvar* (1) that the decision of the latter was based upon *Vithu* v. *Dhondi* (2) which was a case where there was a statutory obligation on the landlord to give notice to quit, whereas in the present case there was no such statutory provision. The situation here is that the defendant is unable to prove that he is anything more than a tenant-at-will. He has been given a compensation for his buildings and he has retained possession for a considerable period since the institution of the suit. In all the circumstances, I am not prepared to interfere for the reason that no formal notice to quit was given before suit.

I dismiss the appeal, but leave the parties to bear their own costs.

Appeal dismissed.

(2) [1891] 15 Bom. 407.

A. I. R. 1926 Lahore 130

BROADWAY, J.

Harnam Singh and *another*—Accused —Petitioners.

v.

King-Emperor—Complainant — Opposite Party.

Criminal Revision No. 1289 of 1925, Decided on 15th January 1926, for revision of the order of the Dist. Magistrate Ferozepur, D/- 26th May 1925.

Criminal P. C., S. 437—Further inquiry should not be directed unless the order of discharge is manifestly foolish or perverse.

Further enquiry should not be ordered unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which was obviously incomplete : 1 *Lah.* 216, *Ref.* [P 130 C 2]

Anant Ram—for Petitioners.

Judgment.—In this case a Magistrate had discharged a complaint brought by Sucha Singh against Harnam Singh and Mangal Singh under S. 342, Indian Penal Code. The complainant moved the learned District Magistrate who, in the exercise of his revisional powers, directed a further enquiry. Harnam Singh and Mangal Singh have come up to this Court in reivision through Mr. Anant Ram.

The learned District Magistrate says as follows :—

"There is a good deal of evidence in support of this story. The Magistrate had discharged the accused on the ground that the evidence is discrepant, and that certain additional witnesses were produced before the Court though it was stated by one of the earlier witnesses that only he and Arjan Singh were present. I consider that the Magistrate has given insufficient ground for rejecting a considerable volume of evidence recorded againt Mangal Singh and Harnam Singh." He then goes on to say: "I consider that the evidence produced by Sucha Singh requires more careful consideration than it has yet received."

Now, it had been held more than once by this Court that further enquiry in cases of this nature should not be ordered unless the order of discharge was manifestly perverse or foolish, or was based upon a record of evidence which was obviously incomplete. It has not been suggested that the record of evidence in the present case is incomplete nor had the District Magistrate found that the order of discharge was manifestly perverse or foolish. In this connexion reference may be made to *Nabi Bakshi* v. *Crown* (1). In the circumstances, in my opinion, the order of the learned District Magistrate is erroneous and accepting the petition, I restore the order of discharge passed by the Magistrate and quash the further proceedings ordered.

Application accepted.

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(1) [1920] 1 Lah. 216=21 Cr. L. J. 521=109 P. L. R. 1920.

A. I. R. 1926 Lahore 131

HARRISON, J.

Emperor

v.

Akbar Ali Shah

Criminal Revision No. 963 of 1925, Decided on 21st November 1925, against the order of the S. J., Gurdaspur, D/- 24th March 1925.

* (a) *Criminal P. C., (as amended in 1923), S. 195—Sanction obtained and case instituted under old section—Fresh complaint under amended section is not necessary.*

When the sanction has been given and the case has been instituted before the amendment comes into force the case can proceed to its logical conclusion and a fresh complaint under the amended section is not necessary. *A. I. R.* 1925 *Lah.* 330, *Approved*; *A. I. R.* 1924 *Mad.* 615 (2), *Diss.* [P 132 C 2]

(b) *Criminal P. C., S. 195—Sanction obtained by private individual—Crown can take up the case at a later stage as Crown is technically complainant in all criminal cases.*

When the sanction has been obtained by a private individual and the earlier proceedings have been taken by Public Prosecutor, the Crown can take over the case at a later stage as the Crown is technically the complainant or the prosecutor in all criminal cases. [P 132 C 1]

Jagan Nath Bhandari for *Govt. Advocate*—for the Crown.

Mehr Chand Mahajan—for the Accused.

Judgment.—On the 6th May 1922 the Sessions Judge of Gurdaspur acquitted nine accused persons, including one Gobind Singh, who had been sent up for trial on a charge of murder. On the 4th of December 1922 the successor of that Sessions Judge gave sanction under S. 195, Criminal Procedure Code, to the prosecution of six of the witnesses, who had appeared for the Crown. On the 4th of June 1923 or on the last day of the six months the present complaints were instituted in the Court of a Magistrate in Gurdaspur. At this time the amendment in the Criminal Procedure Code had been passed but had not come into force and did not do so until September 1923. After a considerable delay which was due to irregular proceedings in the Magistrate's Court and to the return of the case after it had been committed, Mr. Skemp, Sessions Judge, by his order of the 24th of March 1925 discharged the accused holding that the case was governed by the new section and that in the absence of a complaint by the Court he had no jurisdiction. His judgment shows that he understood that he was following the view taken by the Chief Justice of this Court in *Jawahar Lal* v. *Jaggu Mal* (1), and dissenting from *Muthiah Goundan* v. *Chinna Nallappa Goundan* (2), a decision of a Division Bench of the Madras High Court. The question, is whether when the sanction has been given and the case has been instituted before the amendment comes into force the case can proceed to its logical conclusion, or whether further proceedings must be stayed and a fresh c omplaint presented under the present section.

Counsel for the Crown contends that the view taken in *Jawahar Lal* v. *Jaggu Mal* (1), so far from being opposed to the case proceeding when once instituted is directly in favour of it and this on the principle of *unius inclusio, alterius exclusio*, or, in other words, that if a complaint subsequently instituted does not lie, it follows by implication that if instituted before the amendment came into force, it does. He also contends that the view taken in *Muthia Goundan* v. *C. Nallappa Goundan* (2) is correct. As against this all that counsel for the respondents has been able to urge is that in Webster's Dictionary the word "cognizance" in its legal sense is defined as meaning "hearing and deciding." This is not the exclusive sense in which the word is used in the Criminal Procedure Code nor indeed as far as I am aware in any legal enactment and is at once too wide and too narrow. In S. 190, Criminal Procedure Code, we find that "a Magistrate may take cognizance of any offence: (a) upon receiving complaint, etc., etc.;" so in S. 4, sub-S.(5) offence cognizable by the police, i. e., regarding which the police can take action without a warrant. The present S. 195, as I understand it, and in my opinion this is also the view taken in *Jawahar Lal* v. *Jaggu Mal* (1), lays down the conditions on which the Court may take cognizance; that is to say, the conditions precedent must be fulfilled and then the Court will function. So where the Court has taken cognizance before the present section was in force, these restrictions do not apply and the old Code governs the case. I hold, therefore, that the Sessions Judge had jurisdiction to try these cases.

Counsel contends that even so the or ler passed was tantamount to an order of

(1) A.I.R. 1925 Lah. 330.
(2) A.I.R. 1924 Mad. 615 (2).

acquittal and as the Crown has not appealed, it had no right to apply for revision in the present form. The order was in terms one of discharge. I think the present application is in order. Further, counsel contends that the sanction having been obtained by a private individual and the earlier proceedings having been taken by him, it was not for the Crown to take over the case at a later stage. I do not think there is any force in this contention as the Crown is technically the complainant or the prosecutor in all criminal cases.

Finally it is contended, and I think with great force, that whatever view be taken of the law, this is not a case in which proceedings should now be re-started. I have gone through the original judgment in the murder case, which gave rise to the original application and taking everything into account, the great delay in instituting the proceedings, the subsequent delay caused by various reasons, the great difficulty of proving a negative of rather proving affirmatively that the men have committed perjury when all of them told only one story, I do not think it advisable to re-start the case. The judgment of the Sessions Judge after dealing at unnecessary length with the shortcomings of the police, gives a definite finding that a man Gobind Singh has established his alibi. Regarding this alibi the Judge's successor, who gave sanction, writes as follows: "So far as Gobind Singh is concerned, there is some evidence which appears to be reliable to prove that he could not have been present, etc. etc.," This is not very positive, and taking everything into account, I do not order further proceedings to be taken in spite of the grave nature of the case in which the perjury is said to have been committed.

Order accordingly.

A. I. R. 1926 Lahore 132

SCOTT-SMITH AND FFORDE, JJ.

Achpal—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Case No. 656 of 1923, Decided on 6th November 1923, against the order of S. J., Ambala, D/- 24th April 1923.

(*a*) *Evidence—Indian women can identify their own jewellery even if of common pattern.*

Indian women can identify their own articles of jewellery even if they are of a common pattern. [P 133 C 2]

(*b*) *Criminal P. C., S. 239—A person charged under S. 412 cannot be jointly tried with others charged under S. 396.*

A person cannot be tried upon a charge under S. 412, jointly with others who are being tried for the offence of dacoity under S. 396. [P 133 C 2]

(*c*) *Criminal P. C., S. 238—Offence under I. P. C., S. 412 is not a minor offence compared with S. 396.*

The offence of receiving stolen property cannot be considered a minor one as compared with that of dacoity or of house breaking by night. [P 134 C 1]

B. A. Cooper—for Appellant.

Des Raj Sawhney—for Opposite Party.

Judgment—This is an appeal from the order of the Sessions Judge of Ambala convicting Achpal of the offence of dacoity with murder under S. 396, Indian Penal Code, and sentencing him to transportation for life. At the same trial Idu also was convicted under the same section and sentenced to ten years' rigorous imprisonment, while Kapura who was charged under Ss. 396/109, Indian Penal Code, and tried along with others was convicted and sentenced under S. 412, Indian Penal Code, to five years' rigorous imprisonment. Idu and Kapura were also sentenced to a fine of Rs. 200/- each. Other persons who were jointly tried with these three were acquitted by the learned Sessions Judge on the ground that the evidence of the two approvers was not corroborated in material particulars as regards them. Achpal's appeal has been argued by Mr. Cooper, Advocate and Kapura's by Mr. Gulla Ram. Idu's appeal was filed by counsel but he was unrepresented at the hearing.

The facts of the case including the evidence of the two approvers have been fully set forth in the judgment of the Court below and we need not repeat them. It is not denied that the dacoity in which two murders were committed took place in the house of Asa Ram in village Sabepur on the night between 30th June and 1st July 1922. It has also not been denied before us that the two approvers, P. Ws. 5 and 9, Nawab and Saini, themselves took part in the dacoity, but it has been urged by Mr. Cooper that their evidence so far as his client is concerned has not been sufficiently corroborated to warrant a conviction. In our

opinion there is ample corroboration of the evidence of the approvers as against Achpal. It is in evidence that one of the dacoits was wounded by a spear-thrust delivered by Asa Ram at the time of the dacoity. Seven days afterwards Achpal was medically examined and was found to have a wound in the shoulder which could have been caused by a spear. His explanation that it was caused by a bullock's horn has been disproved by the medical evidence. The presence of this injury on his person is in itself, in our opinion, a sufficient corroboration of the evidence of the approvers. But in addition to this three articles of jewelery and a chuni (Ex. P. 4) were produced by him during the police investigation. They have been fully identified by Asa Ram and his female relations as belonging to them and as part of the property stolen by the dacoits. The witnesses who identified these articles were not cross-examined as to the question of identity and there is no evidence of rebuttal. Achpal did not claim them to be his own property. We see no reason to doubt the guilt of Achpal and dismiss his appeal.

As regards Idu, five articles of jewellery (Exs. P. 9 (1), P. 9 (2), P. 10, P. 11 and P. 13) are said to have been produced by him or at his instance. Exs. P. 9 (1) and P. 9 (2) were found in the possession of Mt. Santi, P. W. 24, who states that the wife of Idu pawned them to her but did so some six months prior to the dacoity. There is no evidence to show that these articles came into the possession of Idu's wife subsequent to the dacoity. Mt. Santi may have falsely stated that they were pawned to her prior to the dacoity but there is no rebuttal of her statement and we cannot read into her evidence what she has not said. As regards the ear-rings Ex. P. 10, they also are said to have been produced by Mt. Santi; but she pleaded ignorance in regard to them and there is no evidence that they were ever in her possession or that of Idu's wife. As regards P. 11 and P. 13, it is admitted that they were produced from the house of Idu and at his instance, but Idu and his wife claimed them as their own property. Lal Singh, lambardar, stated that when the *pariband*, Ex. P. 11, was first produced during the investigation Asa Ram failed to identify it, but his statement is contradicted by other evidence which we see no reason to reject. Asa Ram and his female relations have given clear evidence of identification of these articles. It is an undoubted fact that Indian women can identify their own articles of jewellery even if they are of a common pattern, and we see no reason to reject the evidence of identification which has been produced in the present case. Moreover the two approvers have given clear evidence against Idu and there is nothing on record to show that they had any reason to name him falsely. We consider that his conviction is justified by evidence and dismiss his appeal.

Kapura, as already stated, was tried along with his co-accused for abetment of dacoity. He could so be tried along with them but, in our opinion, it was illegal to convict him of an affence under S. 412, I. P. C., which is a totally different offence from that of dacoity, committed at a different time and not in the course of the same transaction within the meaning of S. 239, Criminal P. C. It is quite clear that Kapura could not have been tried upon a charge under S. 412, I. P. C., jointly with others who were being tried for the offence of dacoity under S. 396, his offence being quite distinct and committed on a different occasion. But the learned Sessions Judge was of opinion that he was justified in convicting him under S. 412 having regard to S. 238, Criminal P. C. This latter section lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, although he is not charged with it. The learned Sessions Judge says "dacoity is a composite offence and the dishonest retention of property stolen in the commission of a dacoity would, I hold, be included in the more comprehensive charge of dacoity or abetment of dacoity." Here we are unable to agree with the learned Sessions Judge. None of the particulars which go to make up the offence of dacoity constitute by themselves the offence of dishonestly receiving stolen property. Some instances of what is a minor offence within the meaning of this section are as follows: The offence under S. 365, Indian Penal Code, is a minor offence as compared with that under S. 366, the offence of causing

grievout hurt or of causing hurt under S. 325 or 323, Indian Penal Code, is a minor offence as compared with the offence of murder or culpable homicide. But we are quite unable to see how the offence of receiving stolen property can be considered a minor one as compared with that of dacoity or of house-breaking by night. We, therefore, accept the appeal of Kapura and set aside his conviction and sentence.

It remains to consider whether Kapura should be re-tried for an offence under S. 412, Indian Penal Code. The approvers have stated that he was not one of the dacoits but that Sharfu, who is said to have been absconding and the leader of the gang, said that he should have a share of the stolen property because he had organized the gang. This statement of Sharfu made to the approvers has been admitted as evidence against Kapura by the Court below, but it was obviously inadmissible in evidence. The only evidence against him is that of Joti P.W. 33, a boy of 20 and a shopkeeper of Jagadhri who produced two ornaments, a *menkdi* and a *Kanda* (Exs. P. 15 and 16) valued at Rs. 20/- and Rs. 2/8/- respectively, which he said Kapura had sold to him about a month after the dacoity. Joti's evidence is not corroborated by any entry in any book or by any other evidence whatsoever. It is simply his word against Kapura; even if it be assumed that the property be stolen property, it was found in the possession of Joti and it is quite possible that he accused Kapura in order to save his own skin. The case is therefore a very weak one against Kapura and considering the long time he has been in custody and in jail, we do not think that he should be re-tried. We therefore direct that he be released from custody.

Appeals partly allowed.

A. I. R. 1926 Lahore 134

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Ishar Das and *another*—Objectors—Appellants.

v.

Parma Nand and *another*—Decree-holder and Judgment-debtor—Respondents.

Letters Patent Appeal No. 253 of 1923, Decided on 12th November 1925, from the judgment of Martineau, J., D/- 25th October 1923.

Civil P. C., S. 47—Purchaser of judgment-debtor's attached property is representative within S. 47—Order disallowing his claim is appealable.

Purchasers of the attached property of the judgment-debtor are representatives of the judgment-debtor as contemplated by S. 47 and an order disallowing their claim is appealable and regular suit is not necessary for setting it aside: 16 *All.* 286 and 64 *P. R.* 1912, *Dist.* 21 *All.* 20; 28 *Cal.* 492; 20 *Mad.* 378 and 34 *Mad.* 450, *Foll.*

[P. 135, C. 1]

M. S. Bhagat—for Appellants.

Badri Das—for Respondents.

Shadi Lal, C. J.—The facts, which are relevant to the question of law involved in this appeal, lie within a narrow compass. The first respondent, Parma Nand, obtained a simple money decree against the second respondent Panna Lal and in execution of that decree he seeks to have certain land sold which he had attached before judgment. This land was under mortgage to the appellants whose rights as mortgagees are not disputed, but the appellants maintain that they have purchased the equity of redemption, and contend that, although the purchase was made after the attachment of the property by the decree-holder, the attachment was invalid and the land cannot be sold in execution.

The Subordinate Judge has pronounced his opinion in favour of the validity of the attachment and he has accordingly disallowed the claim preferred by the appellants. The question for determination is whether the order rejecting the claim can be held to be one passed under S. 47 of the Civil Procedure Code and can form the subject of an appeal, or whether it can be set aside only by a regular suit.

Now, a perusal of S. 47 makes it absolutely clear that two conditions must be satisfied before a Court executing the decree can adjudicate upon a dispute under that section. In the first place, the matter in dispute must relate to the execution, discharge or satisfaction of the decree, and this condition is admittedly satisfied in the present case. The second condition is that the question to be determined must arise between the decree-holder or his representative on the one side and the judgment-debtor or his representative on the other. The learned Judge, against whose judgment this appeal under Cl. 10 of the Letters Patent has been preferred, holds that the appellants are not the representatives of the judgment-debtor within the meaning of S. 47,

and they cannot consequently prefer an appeal against the order of the Court executing the decree.

Now, it has been repeatedly held that the expression "representative" in S 47 has a more extended meaning than a "legal representative" and includes also a representative-in-interest. An assignee from a judgment-debtor of property belonging to him and affected by the decree is a representaative of the judgment-debtor within the meaning of the section. Such an assignee stands in the shoes of the judgment-debtor and is bound by the decree so far as the property assigned to him is concerned. He is subject to the same liabilities and is entitld to exercise the same rights as his assignor, the judgment-debtor. This principle has been affirmed in several judgments, vide inter alia, *Gur Prasad* v. *Ram Lal* (1); *Mathewson* v. *Gobardhan* (2); *Parmananda Das* v. *Mahabeer Dossji* (3); and *Kuppana Kavundan* v. *Kumara Kavundan* (4). The learned counsel for the respondent invites our attention to the judgment in *Madho Das* v. *Ramji Patak* (5), which was followed by the Punjab Chief Court in *Mt. Bhamphul Devi* v. *Rai Sahib Bahadur Harbakhsh Singh and others* (6), but the learned Judges of the Allahabad High Court who decided the case of *Gur Prasad* (1) point out that in the course o the delivery of the judgment in the case of *Madho Das* (5) the fact of the property being under attachment at the time of the purchase was not present to the mind of the Court.

There can be no doubt that a purchaser from the judgment-debtor of his property which is neither under attachment nor otherwise affected by the terms of the decree cannot be held to be a representative of the judgment-debtor, and the case reported as *Mt. Bhamphul Devi* v. *Harbakhsh Singh* (6), is one of that description.

In the case before us the appellants are purchasers of the attached property and we have no hesitation in holding that they are the representatives of the judgment-debtor as contemplated by S. 47 of the Civil Procedure Code. We accordingly accept the appeal and setting aside the judgment of the Single Bench, we remit the case for decision on the merits. The respondent decree-holder must pay the costs incurred by the appellants in this Court.

Appeal allowed.

(1) [1898] 21 All. 20=(1898) A.W.N. 160.
(2) [1900] 28 Cal. 492=5 C.W.N. 654.
(3) [1896] 20 Mad. 378=7 M.L.J. 195.
(4) [1909] 34 Mad. 450=(1910) M.W.N. 574=2 M.L.J. 961=8 M.L.T. 240.
(5) [1894] 16 All. 286=(1894) A.W.N. 84.
(6) [1912] 64 P.R. 1912=113 P.W.R. 1912.

A. I. R. 1926 Lahore 135

SHADI LAL, C. J.

(*Firm*) *Kundan Lal-Mukandi Lal*—Plaintiff—Petitioner.

v.

Kanshi Ram and *another*—Defendants—Respondents.

Civil Revision Petition No. 769 of 1923, Decided on 4th June 1924, against an order of the Sub.-J., Fourth Class, Jagadhri, Dist. Ambala, D/- 6th August 1923

Civil P. C., S. 151—Specific provision of limitation cannot be evaded.

Where a definite period of limitation has been prescribed by law within which action could be taken, a Court is not entitled to extend such period by invoking S. 151 : *A. I. R.* 1922 *Patna* 479, *Rel. on.* [P. 135, C. 2]

Shamair Chand—for Petitioner.

Judgment.—An ex-parte decree was granted to the plaintiff on 7th January 1920, and it was not until 21st February 1923 that the defendants made an application for an order to set aside the ex-parte decree. Now, summons were duly served upon the defendants and the terminus a qua under Art. 164 of the Limitation Act is the date of the decree. The application to have the decree set aside was consequently barred by time.

The learned Judge of the lower Court is, however, of opinion that he can evade the law of limitation by acting under S. 151, Civil P. C. This view is entirely erroneous. Where a definite period of limitation has been prescribed by law within which action could be taken, a Court is not entitled to extend such period by invoking S. 151, of the Civil P. C. If any authority were needed on the subject, I would refer to the judgment of the Patna High Court in, *Ajodhia Mahton* v. *Phul Kuer* (1).

(1) A.I R. 1922 Patna 479.

I accordingly accept the application for revision and dismiss the application made by the defendants for setting aside the ex-parte decree. The defendants must pay the costs incurred by the plaintiff in this Court as well as in the Court of first instance.

Application accepted.

A. I. R. 1926 Lahore 136

ABDUL RAOOF AND HARRISON, JJ.

Imam Din—Plaintiff—Appellant.

v.

Muhammad Din and *another*—Defendants—Respondents.

First Appeal No. 534 of 1921, Decided on 10th March 1924, from a decree of the Senior Sub-J., Jhang, D/- 22nd December 1920.

(a) *Specific Relief Act, Ss. 15 and 27 (b)—Agreement by major to sell his own and minor nephew's property—Suit for specific performance by vendee—Decree for major's share on payment of whole purchase money may be granted.*

Where a major agrees to sell property belonging to himself and his minor nephew whose property he has no right to sell, and consequently the agreement with regard to which is void, the purchaser is entitled, in a suit for specific performance, on offering to pay the whole purchase money, to a decree directing the adult party to convey all his interest in the property : 33 *Mad.* 359 and 13 *A. L. J.* 739, *Rel. on.* [P 137, C 1 and 2]

(b) *Contract Act, S. 40—Purchase of property subject to prior contract to sell—Purchaser pleading absence of notice must so prove.*

A vendee claiming to have purchased immovable property for value without notice of a previous contract to sell, must prove want of notice of the previous contract. [P 137 C 1]

Niaz Muhammad and *Ram Chand Manchanda*—for Appellant.

Muhammad Iqbal—for Respondents.

Judgment.—This is an appeal against a decree dismissing a suit for the specific performance of a contract for sale. The following facts will disclose the nature of the question that arises for decision in this appeal.

Defendants Nos. 1 and 2 agreed to sell the land in dispute to the plaintiff for Rs. 5,600 by a deed dated the 19th of September 1919. Defendants Nos. 1 and 2 were originally occupancy tenants of the land. They agreed to sell the land to plaintiff on acquiring proprietary rights therein. The proprietary rights were conferred upon them on the 8th October 1919. Instead of selling the land to the plaintiff they sold it to Abdul Wahab, Defendant No. 3, by a registered sale-deed dated the 16th of October 1919. Defendant No. 3 took possession under the deed.

Defendant No. 1 is the uncle of original Defendant No. 2, the latter being a minor at the date of the agreement in favour of the plaintiff as well as at the date of the sale in favour of the defendant.

The plaintiff brought the suit for the specific performance of the above agreement. The Defendant No. 1 did not put an appearance and the suit proceeded ex parte against him. On behalf of the minor defendant it was pleaded that he being a minor, his uncle, Defendant No. 1, had no right to sell his share in the land in dispute. Defendant No. 3, the vendee, under the sale-deed, dated the 16th October 1919, pleaded that he had no knowledge of the alleged agreement in favour of the plaintiff, and that, therefore, he had a preferential and indefeasible title under his sale-deed.

The principal questions that arose for decision in the Court below upon these pleadings were :

(1) Whether Defendant No. 1 had any right to sell the share of Defendant No. 2 who was a minor ; and

(2) Whether it lay upon Defendant No. 3 to prove that he had no knowledge of the agreement of sale in favour of the plaintiff; or whether it was the duty of the plaintiff to prove that the vendee, Defendant No. 3, had knowledge of the agreement in his favour.

The trial Court found that Defendant No. 1 had power to sell the share of the minor also and that the burden of proof lay upon the plaintiff to prove positively that Defendant No. 3 had notice of the agreement in his favour. It further held that, even if Defendant No. 1 had no power to convey the interests of the minor, the plaintiff cannot succeed, as a partial decree for the specific performance cannot be made. Upon these findings the Court below dismissed the suit.

The plaintiff has come up in appeal to this Court, and it has been contended that the decision of the lower Court on the question of the burden of proof is opposed to the current of authorities. There is no doubt that there used to be some

controversy as to the burden of proof in such cases, but the matter appears to have been set at rest by later authorities, for example, see the case of *Naubat Rai* v. *Dhunkal Singh* (1) and the case of *Ganga Prasad* v. *Khushal Chand* (2).

In our opinion the burden of proof lay upon Defendant No. 3 to prove that he had no knowledge of the agreement of sale in favour of the plaintiff. He has given some evidence to prove that he had not this knowledge ; but this evidence is inconclusive, and even if accepted, proves nothing more than that the existence of previous agreement was not discussed at the time of the sale. Defendant No. 3 did not put himself in witness-box nor did he state on oath that he had no knowledge. We should have been prepared to accept light evidence in proof of this issue in negative form, but as, in our opinion, there is no evidence at all worthy of the name, we are constrained to hold that Defendant No. 3 has failed to discharge the burden of this issue.

The other question that requires decision is whether Defendant No. 1 had any right to agree to sell the interests of the minor defendant. It has not been seriously contended before us that he had such a right. It is, however, urged that it does not lie in the mouth of Defendant No. 3, who has derived his own title from an equally vitiated source, to question the title of the plaintiff. Whatever might be the position in an ordinary suit where it is a question of ordering specific performance it is for the Court to decide whether any relief should be given ; and if so, what, and in circumstances like the present, where the plaintiff bases one-half of his title on a wholly void agreement, we find that he is entitled to no relief so far as the share of the minor is concerned.

The next question that arises is whether a decree for specific performance should be granted in respect of the share of Defendant No. 1. The plaintiff has offered to purchase the share of defendant No. 1 alone on payment of the entire consideration, i. e., Rs. 5,600. There is authority for such a proposition for example, see *Mahmud Ali* v. *Yawar Beg* (3) and *Pano a Subba Rani Reddy* v. *Vadamadi Seshachellam Chetty* (4). In the latter case it was held that the purchaser in such a case will be entitled, on offering to pay the whole purchase-money, to a decree directing the adult party to convey all his interest in the properties.

We accordingly accept the appeal in part and direct that Defendant No. 1 should execute a sale-deed in favour of the plaintiff conveying all his interests in the property in dispute in consideration of the entire amount of Rs. 5,600 minus Rs. 500 (earnest money already paid). Having regard to the special features of this case we make no order as to costs.

Appeal partly accepted.

(1) [1916] 38 All. 184=14 A. L. J. 111.
(2) [1918] 14 N. L. R. 27.
(3) [1915] 13 A. L. J. 739.
(4) [1910] 33 Mad. 359=7 M. L. T. 137=20 M. L. J. 328.

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* A. I. R. 1926 Lahore 137

ABDUL RAOOF AND MARTINEAU, JJ.

Haji and *another*—Defendants—Appellants.

v.

Janum and *others*—Plaintiffs—Respondents.

Second Appeal No. 1040 of 1920, Decided on 6th March 1924, from a decree of the Dist. J., Jhelum, D/- 24th January 1920.

* *Civil P. C., O. 22, Rr. 4 and 9—Joint decree—Appeal—Abatement—Ignorance of death of respondent was held not sufficient cause for setting aside abatement.*

The fact that the appellant did not come to know of the respondent's death, which occurred at a place about 14 kos from the appellants' village, till 10 days before he applied to have the deceased's representatives impleaded was held not to be a sufficient reason for setting aside the abatement of an appeal : 23 *P. R.* 1917, *Dist* ; 60 *P. R.* 1911 and 67 *P. R.* 1919, *Rel. on.*

[P 138 C 1]

Nanak Chand—for Appellants.

Zafrulla Khan—for Respondents.

Judgment.—The parties are proprietors of the village of Mianwal in the Gujrat District. There is a tract of high lying land in the village known as Utar, while the low lying portion is called Hithar. In 1892 the Utar land was recorded by the order of the Collector as shamilat deh, although it had previously since 1868 been shown as divided into separate proprietary holdings. When an application for partition of the Utar land

was made in 1915 a dispute arose as to the way in which the partition was to be made and plaintiffs have in consequence sued for a declaration that they are entitled to get a share in proportion to the area (826 kanals 8 marlas) which they owned before the mutation of 1892, and not, as contended by the defendants, in proportion to the revenue paid on the Hithar land. The Courts below have found in favour of the plaintiffs, who have been given a decree declaring that they are proprietors of 826 kanals 8 marlas, or according to present measurements 898 kanals, 1 marla and are entitled to get a share in the shamilat on the basis of that area. The defendants have filed a second appeal in this Court.

One of the plaintiffs-respondents, namely, Shahabal, was murdered in September 1922, and as the application for impleading his representatives was not made till July 1923, after the period of limitation had expired, the appeal has abated. It is contended for the appellants that the appeal abates only qua the deceased Shahabal and not against the other respondents, but we do not agree with this contention. *Zainab Bibi* v. *Rohila* (1), which is relied upon, was a case in which the respondents were defendants and is not in point. The decree in the present case was a joint decree in favour of all the respondents, and each respondent is entitled to the benefit of the whole decree. The appeal must consequently abate in toto.

It is also contended for the appellants that the abatement should be set aside on the ground that they did not come to know of Shahabal's death, which occurred at a place about 14 kos from their village, till before 10 days they applied to have his representative impleaded. Even if this allegation is correct, it would not be sufficient reason for setting aside the abatement: see on this point *S. Mir Nawab* v. *Hardev* (2) and *Jamna* v. *Sarjit* (3).

This appeal having abated, we direct that it be struck off the file of pending cases. The appellants will pay the respondents' costs in this Court.

Appeal abated.

(1) [1917] 23 P. R. 1917.
(2) [1911] 60 P. R. 1911=42 P. L. R. 1912=238 P. W. R. 1911.
(3) [1919] 67 P. R. 1919.

A. I. R. 1926 Lahore 138

SCOTT-SMITH AND ZAFAR ALI, JJ.

Sulakhan Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 163 of 1924, Decided on 14th May 1924, from an order of the S. J., Amritsar, D/- 29th January 1924.

(a) *Evidence Act, S. 27—Information by accused that he buried the dead body is not provable under the section.*

In a case under S. 302, I. P. C., the information given by the accused that he buried the body does not distinctly relate to the discovery of the body and is not provable under S. 27: 125 *P. L. R.* 1920, *Appl.* [P. 139, C. 1]

(b) *Penal Code, S. 302—Knowledge of accused of the place where corpse of deceased is buried does not make him the murderer.*

The mere fact that an accused person appears to have known where the corpse was buried does not prove that he was the murderer: 18 *P. R.* 1917, *Foll.* [P. 139, C. 2]

Ram Chand Manchanda—for Appellant.

C. H. Carden Noad—for the Crown.

Sagar Chand—for Complainant.

Judgment.—This is an appeal by Sulakhan Singh through counsel from the order of the Sessions Judge of Amritsar convicting him of the murder of Udham Singh, son of Jawand Singh, on or about the 25th of October 1923, and sentencing him to death. The learned Sessions Judge in his judgment at page 20 of the paper-book, in summing up the case against Sulakhan Singh, says that there is no strong evidence of any motive for murder as against the appellant and that there is no independent corroboration of the fact that he was one of the men last seen with the deceased. He admits that the case against the appellant rests entirely on his alleged confession said to have led to the discovery of the corpse. This alleged confession was made when he was in police custody and is, therefore, inadmissible unless it falls within the purview of S. 27 of the Indian Evidence Act. The evidence given by the witnesses as to the confession is that he gave information to the effect that he would point out the place where the dead body was buried and that he also said: "I buried it." The learned Sessions Judge held that the whole of this was admissible in evidence; but in appeal it

is contended that the confession of Sulakhan Singh that he himself had buried the dead body was inadmissible in evidence as that part of his statement did not in any way relate distinctly to the fact discovered, namely, the dead body. Counsel has referred inter alia to the following authorities in support of his contention :

Queen-Empress v. *Nana* (1), *Ganu* v. *Empress* (2), *Tara Singh* v. *Emperor* (3), *Matu* v. *Emperor* (4) and *Emperor* v. *Turezi* (5). These authorities generally support the contention of the learned counsel. In *Ganu* v. *Crown* (2) it was held, following *Emperor* v. *Nana* (1), "that the fact discovered being the body of the boy lying buried in the spot indicated, and the information received from the accused which related distinctly to that fact being that the accused would show where the body was buried, the further information that he killed the boy did not distinctly relate to the discovery of the body and was not provable under S. 27 of the Evidence Act." Similarly, in the present case, the information said to have been given by the appellant that he had buried the body did not distinctly relate to the discovery of the body and is not provable under S. 27 Evidence Act. The case reported as *Emperor* v. *Turezi* (5) was very similar to the present. There in a prosecution for murder a witness stated that the accused offered to point out the place where the dead body was and that on being questioned as to who had buried the body he said that he had done so. It was held that the accused's statement that he had buried the body was not admissible in evidence. In *Tara Singh* v. *Emperor* (3), it was held that where the statement to the police was : " I will point out the spot where I committed the murder " the part relating to alleged confession by the accused that he had committed the murder was not receivable in evidence. We have, therefore, no hesitation in holding that so much of the appellant's statement as related to the burial of the body by him is not admissible in evidence.

There remains, therefore, merely the fact that the appellant pointed out the place where the body was found and all that this shows clearly is that he knew where it had been buried. But, as pointed out in *Matu* v. *Emperor* (4), the mere fact that an accused person appears to have known where the corpse was buried does not prove that he was the murderer. The learned Assistant Legal Remembrancer who appears for the Crown expresses himself as unable to support the conviction.

We, therefore, accept the appeal and setting aside the conviction and sentence we acquit the appellant and direct that he be forthwith released from custody.

Accused acquitted.

(1) [1890] 14 Bom. 260 (F. B.).
(2) [1894] 28 P. R. 1894 Cr.
(3) [1915] 11 P. R. 1915 Cr.=16 Cr. L. J. 545= 61 P. W. R. 1915 Cr.
(4) [1917] 18 P. R. 1917 Cr.=18 Cr. L. J. 6.
(5) [1920] 125 P. L. R. 1920=21 Cr. L. J. 349.

A. I. R. 1926 Lahore 139

LE ROSSIGNOL, J.

Shahdad Khan—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 913 of 1925, Decided on 24th November 1925 against the order of the S. J. Rawalpindi, D/- 9th May 1925.

Penal Code, S. 189—Injury—Mere threat to bring a complaint against a constable is not injury.

Injury in S. 189 implies an illegal harm ; but the mere threat to bring a legal complaint either before a Court or before a constable's superiors is not an injury. [P. 140, C. 1]

Aziz Ahmad—for Petitioner.

R. C. Soni—for Respondent.

Le Rossignol, J.—The petitioner in this case has been convicted under S. 189, Indian Penal Code, and sentenced to pay a fine of Rs. 30 on the following facts as found by the learned Sessions Judge :

On the evening of the 28th August 1924, constable Nadir Khan stopped a motor-car without lights on the Murree Road and asked the driver for his name and number. The driver refused this information at first, and during the altercation the petitioner came up and told the driver to bring a complaint against the constable in which he himself would be pleased to give evidence on behalf of the driver. The learned Sessions Judge's finding on the facts is justified by the evidence and in all probability represents what really did occur ; and the question

for decision is whether on these facts the petitioner was guilty of an offence under S. 189, Indian Penal Code, which runs as follows :

"Whoever holds out any threat of injury to any public servant for the purpose of inducing that public servant to forbear to do any act connected with the exercise of the public functions of such public servant, shall be punished, etc., etc.,

Now it appears that the constable was detaining the car because he wished the driver to proceed to the thana and sign an undertaking to appear before a Magistrate. There had no doubt been some altercation between the policeman and the driver of the car, and the action of the policeman appears to have been justified by S. 57, Criminal Procedure Code, and there can be no doubt that the remark of the petitioner was made with the intention of inducing the constable to forbear from further detention of the car and its occupants. Injury, however, implies an illegal harm, and unless the threat was to bring a false complaint—the word used was complaint or petition—I am unable to hold that the mere threat to bring a legal complaint either before a Court or before the constable's superiors was an injury. Police constables in the execution of their duty must be protected ; but when a member of the public considers that he is being harshly treated, or that a constable is exceeding the powers given to him by law, it would be absurd to hold that a protest or oral threat to report the matter either to the Courts or to the constable's superior officers amounts to an illegal harm. If the constable is acting within his powers, the complaint can do him no harm ; if he is acting beyond his powers, he has no cause for complaint and the public has every right to protest.

For the foregoing reasons I accept the petition, acquit the petitioner and direct that the fine, if already paid, shall be refunded.

Revision accepted.

A. I. R. 1926 Lahore 140

SHADI LAL, C. J., AND ZAFAR ALI, J.

Said Nur—Accused—appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 17 of 1925, Decided on 17th February 1925, from an order of the S. J., Attock, at Campbellpur, D/- 21st November 1924.

Penal Code, Ss. 34, 302 *and* 394—*Robbers armed with fire-arms-One causing death by shooting—All are guilty of murder.*

Where the culprits went armed with fire-arms to commit robbery, and death was caused by the shot of one of them in the commission thereof ;

Held : that they were all responsible for what was done by one of them in prosecution of the common intention of all : *A. I. R.* 1925 *P. C.* 1, *Foll* [P. 141, C. 1]

Khurshaid Zaman—for Appellant.

Abdul Rashid—for the crown

Judgment.—On the 8th of June 1924, shortly before sunset, four Pathans, of whom two had guns and one a pistol, approached the village Mahura to loot the houses of its Khatri inhabitants. From outside the village they seized Umra and Gulab (P. Ws. Nos. 7 and 8) and questioned them about the position of the Khatris' houses and took them along into the village so that they might show the same. They showed the house of Sain Ditta (P. W. No. 5) which the culprits entered. One of them, i. e. Hazrat Gul, approver, mounted on the roof and began firing therefrom. The rest seized Jowala (P. W. No. 6), son of Sain Ditta, and he handed over to them Rs. 1,350 in silver and notes and a handkerchief. Then the culprits moved on to the house of Nirmal, taking Jowala, Umra and Gulab with them. Nirmal was not in the house, but his wife and children were there. As Vilayat Khan (P. W. No. 9) came to his baitakh he found Nirmal there and at his suggestion Nirmal got to the roof of his mother and began to abuse in Pashto to the Pathan who was on the roof of Sain Ditta. The Pathan fired and Nirmal fell. From Nirmal's house, in which the culprits got nothing, they passed into the bazar and there broke open Hari Chand's shop and took some sugar therefrom. Vilayat Khan fired several shots with the result that one of the Pathans was hit in the head and was killed. The Pathans shot dead one more villager, i. e., Amanat Khan. On

the 14th June 1924, i. e., six days after the event, Said Nur, appellant, was arrested by the Police at his residence in the Mardan Tahsil of the Peshawar District. He had two shot wounds on the arm. In the identification parade held on the 18th June 1924 he was duly identified in the presence of Khan Ghulam Mohammad Khan, Extra Assistant Commissioner, Attock, by Jowala, Umra and Gulab.

Besides this evidence, there is the testimony of Hazrat Gul who was one of the four offenders, but who turned King's evidence on accepting a tender of pardon.

The appellant's explanation of the wounds on his arm was that he was fired at and wounded by an enemy in the foreign territory, but this was refuted by the testimony of Allu (P. W. No. 19). It appears that after the event the three Pathans, Miru, who has not been arrested Hazrat Gul, approver, and the appellant Said Nur, repaired to the farm of Jahanabad, and there Miru engaged Allu (P. W. No. 19) to carry Said Nur on his camel. Allu deposed that Said Nur's arm was wounded and that he carried him on his camel to Hasan Abdal. At Hasan Abdal Said Nur bought a lungi and a chadar and some twill from Uttam Chand (P. W. No. 17). A shirt was made of the twill by Hussain Bakhsh, Darzi (P. W. No. 18), at Uttam Chand's shop.

All this evidence fully establishes that the appellant was one of the four Pathans. The only question that remains for consideration is whether he can be held responsible for the murders which were committed not by him but by one of his comrades i. e., the approver. As the culprits went armed with firearms it follows that they intended to use the same to take life. They were therefore, all responsible for what was done by one of them in prosecution of the common intention of all and in accordance with the exposition, by their Lordships of the Privy Council in *Barendra Kumar Ghose* v. *Emperor* (1), of the principle underlying S. 34, Indian Penal Code, the appellant is clearly guilty of murder. We therefore, uphold the conviction under S. 302, Indian Penal Code, and confirm the sentence of death.

It may be noted here that we have already confirmed the sentence of death passed on the appellant in the case of robbery with murder which took place in the village Achhral two days previously, i. e., on the 6th June 1914. Therefore, the present sentence would merge in the former.

Appeal rejected.

(1) A. I. R. 1925 P. C. 1.

A. I. R. 1926 Lahore 141

MARTINEAU, J.

Hayat Ali Khan—Defendant—Appellant.

v.

Ishar Dass and *others* — Plaintiff and Defendants—Respondents.

Mis. Second Appeal No. 2312 of 1923, Decided on 10th April 1924, from an order of the D. J., Multan, D/- 12th June 1923.

Civil P. C., S. 104 (2)—*Scope.*

Section bars second appeal from an order returning plaint. [P. 141, C. 2]

(b) *Civil P. C., O.* 43, *R.* 1 (*u*)—*Remand not on appeal from decree—No appeal lies.*

A remand order not passed on appeal from a decree is not an order under O. 41, R. 23, and so is not appealable : 119 *P. R.* 1912, *Foll.* [P. 141, C. 2]

Niaz Ali—for the Appellant.

Fakir Chand for *Badri Das*—for the Respondents.

Judgment.—A preliminary objection is taken that a second appeal does not lie and this is correct. The appeal to the District Judge was from an order returning the plaint and not from a decree, and S. 104 (2) of the Civil P. C. bars a second appeal in such a case. The present appeal is also not one falling under O. 43 R. 1 (u) as the remand order passed by the District Judge not being one passed on appeal from a decree was not an order under O. 41, R. 23.

Chhubu Mian v. *Har Charan Dass* (1) is a case in point. The appeal does not lie, and I dismiss it with costs.

Appeal dismissed.

(1) [1913] 119 P. R. 1912=101 P. L. R. 1913 =48 P. W. R. 1913.

A. I. R. 1926 Lahore 142

SCOTT-SMITH AND FFORDE, JJ.

Mt. Naraini—Plaintiff--Appellant.

v.

Jowahir Singh and *others*—Defendants—Respondents.

Second Appeal No. 2194 of 1920, Decided on 20th December 1923, from a decree of the Dist.-J., Amritsar, D/- 5th July 1920.

(a) *Custom (Punjab)—Succession—Kambohs of Amritsar District—Daughters do not succeed in preference to collaterals.*

Amongst Kambohs of the Amritsar District daughters do not succeed in preference to collaterals to non-ancestral property. [P. 142, C. 2]

(b) *Riwaj-i-am — Entries are admissible in evidence and are a strong proof of custom.*

The riwaj-i-am is a public record prepared by a public officer in the discharge of his duties and is clearly admissible in evidence to prove the fact therein entered, and the statements contained in the riwaj-i-am form a strong piece of evidence in support of the custom: 44 *Cal.* 749 (*P. C.*), *Foll.* [P. 142, C. 2]

B. D. Qureshi for *Nand Lal*--for Appellant.

Tek Chand and *Kirpa Ram*—for Respondents.

Judgment.—This is a second appeal upon a certificate granted by the District Judge under S. 41 (3) of the Punjab Courts Act. The pedigree table of the parties will be found at page 18 of the paper-book. The property in dispute is that left by Jhanda Singh and the dispute is between his daughter the appellant, and his fourth degree collaterals, the defendants-respondents. A part of the property has been found by the lower appellate Court to be ancestral of the respondents, but a part of this is non-ancestral. It has held that amongst Kambohs of the Amritsar District daughters do not succeed in preference to collaterals to non-ancestral property. There is very little evidence in the case. The respondents rely on the answers to questions Nos. 60 and 61 of the riwaj-i-am of the Amritsar District prepared by Mr. Craik in 1914. According to these answers the daughters are not entitled to inherit in preference to collaterals whether the property be ancestral or acquired. Mr. Craik, in a note under the answer to question No. 60, shows how strict the exclusion of a daughter is even in those cases where there is no agnate at all; she is usually deprived of succession by the members of the village community. He says, however, that daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted. There are no instances on either side given by Mr. Craik.

In *Beg* v. *Allah Ditta* (1) their Lordships of the Privy Council held that the riwaj-i-am is a public record prepared by a public officer in the discharge of his duties and is clearly admissible in evidence to prove the fact therein entered, and that the statements contained in the riwaj-i-am form a strong piece of evidence in support of the custom. This case has been considered in *Wazira* v. *Maryan* (2), and in other cases of this Court. In *Wazira* v. *Maryan* (2), the Division Bench, following *Chhuttan* v. *Hazari Lal* (3), held that statements in a riwaj-i-am when "opposed to general custom can carry very little weight unless supported by instances", and that consequently the entries in the riwaj-i am of the Gujranwala District in favour of the special custom relied on by the plaintiffs unsupported by instances were insufficient to establish that custom, such riwaj-i-am having moreover been imperfectly compiled. We are not prepared to hold that the entries relied upon by the respondents in Mr. Craik's riwaj-i-am of the Amritsar District can carry very little weight. There is no suggestion that that riwaj i-am was carelessly or imperfectly compiled and Mr. Craik's own note shows that the exclusion of a daughter is very strict in the Amritsar District. There is not a single instance on the record of the present case of a daughter having succeeded to any property of her father in the presence of collaterals so near as the respondents in the present case. On the other hand there are instances in support of the respondents' contention. In another case the Judges of the lower appellate Court held that a gift by a Kamboh widow to

(1) [1917] 44 Cal. 749=44 I. A. 89=45 P. R. 1917=12 P. W. R. 1917=21 M. L. T. 310 =32 M. L. J. 615=19 Bom. L. R. 388=15 A. L. J. 525=21 C. W. N. 842=26 C. L. J. 175 (P. C.).

(2) [1917] 84 P. R. 1917=151 P. W. R. 1917= 3 P. L. R. 1918.

(3) [1916] 7 P. R. 1916=129 P. W. R. 1915= 46 P. L. R. 1916.

her daughter was invalid in a case brought by the deceased's husband's collaterals. A further appeal was lodged from that order in this Court, but we have been informed that that appeal has abated. There is also the case of one Amar Singh, a Kamboh of the Amritsar District, who had shifted to the Lyallpur District, and left self-acquired land which had been mutated in favour of his collaterals, the mutation being contested by his daughters. The remarks of the Collector, Mr. DeMontmorency, in his order, are certainly admissible as evidence and show that daughters, more particularly married daughters, are never preferred to male collaterals. The learned District Judge has also pointed out that Sobha Singh, son of Jassa, died sonless, leaving a daughter and that his collaterals obtained a share of his land without any objection being raised by the daughter.

We think that the above facts, coupled with the entries in the riwaj-i-am, are sufficient to shift the onus on to the daughter. As already remarked, she has not produced a single instance where a daughter has succeeded in the presence of collaterals to her father's property. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 143

LE ROSSIGNOL AND FFORDE JJ.

Lachhman Singh — Convict —Appellant.

v.

Emperor— Opposite Party.

Criminal Appeal No. 494 of 1925, Decided on 14th October 1925, from the order of the S. J., Amritsar, D/- 15th April 1925.

Penal Code, S. 302—Intention of the accused who ran off after causing injuries which resulted in the deceased's death, was held to be to cause such bodily injury as is likely to cause death.

Where, in continuation of an altercation which had taken place between the accused's mother and the deceased's wife the two men were struggling in front of their houses when the accused suddenly struck the deceased with a weapon who collapsed and died at once whilst the accused ran off to his house where he was shortly afterwards arrested with blood-stains on his clothes, and the medical evidence showed that the person of the deceased bore two wounds of a penetrating nature one of which completely perforated the heart; the other penetrating the abdomen on the left side had divided the intestines and death was due to shock and hoemorrhage and the accused himself bore no mark of injury upon his person.

Held; that intention of the accused was, if not to cause death, at least to cause such bodily injury as was likely to cause death. [P. 143, C. 2; P. 144 C. 1]

Nand Lal—for Appellant.

Des Raj Sawhney—for the Crown.

Le Rossignol, J.—The appellant Lachhman Singh has been sentenced to transportation for life for the murder of Sajjan Singh on the evening of the 25th September 1924.

In continuation of an altercation which had taken place earlier in the day between the mother of the appellant and the wife of the deceased, the two men were struggling in front of their houses, when Lachhman Singh suddenly struck deceased with a weapon which has not been recovered and which is variously described as a spear head and a sickle. Sajjan Singh collapsed and died at once, whilst Lachhman Singh ran off to his house where he was shortly afterwards arrested with blood-stains on his clothes and his person, by the village notables to whom he is said to have confessed his guilt.

The medical evidence shows that the person of the deceased bore two wounds of a penetrating nature; one of which completely perforated the heart: the other penetrating the abdomen on the left side had divided the intestines. Death was due to shock and hæmorrhage.

The eyewitnesses in the case are Mt. Basant Kaur, Mt. Naraini, Mt. Rukman and Mt. Tabo, who all were in the neighbourhood and were likely to have seen any fight that took place in the open space before their houses. We believe their statements implicitly.

The appellant pleaded not guilty, but produced no defence. He denied all knowledge of the occurrence and did not take the plea of self-defence. Even, therefore, if the deceased was the stronger man of the two he was unarmed and the appellant was under no apprehension of receiving grievous hurt in the course of the struggle. The fight was an ordinary one arising out of a very trivial dispute and the appellant stabbed to death an unarmed man. He himself bore no mark

of injury upon his person. Having regard to the nature of the wounds inflicted it is impossible for us to avoid the conclusion that his intention was, if not to cause death, at least to cause such bodily injury as was likely to cause death. We consider that offences of this type are becoming far too common and that the sentence passed upon the appellant is not excessive.

We dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Lahore 144

SCOTT-SMITH AND FFORDE, JJ.

Mt. Daulan—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 88 of 1925, Decided on 6th April 1925, from an order of the S. J., Lyallpur, D/- 20th December 1924.

Penal Code, S. 302—Woman causing death of her step-child by a stick blow in vengeance of her ill-treatment by her husband—Offence of murder is committed.

Where accused, a young woman of fifteen years of age being roused to frenzy by the ill-treatment of her husband who was 40 years of age and whom she did not like, seized a stick lying by and made a murderous attack on her step-son in order to avenge herself against her husband and caused the death of the infant son.

Held : that her intention was to cause death and she was therefore guilty of murder.

Nanwan Mal—for Appellant.

C. H. Carden Noad—for Opposite Party.

Judgment. — This is an appeal by Mt. Daulan, who has been convicted by the Sessions Judge of Layallpur for the murder of her step-son, Malla, by striking a blow on his head with a kahi. She has been sentenced to death and the case is also before us under S. 371 for confirmation of the sentence.

It is proved in the clearest possible manner by the evidence of Mt. Sattan (P. W. No. 2), an eyewitness, and by that of Umar Din (P. W. No. 3) and Nizam Din (P. W. No. 4), who came up immediately afterwards and seized the appellant, that she did give her step-son a blow on the head with a kahi, and would probably have given further blows had she not been seized. The first information report was made promptly by Baja, a cousin of Sajawal, Mt. Daulan's husband. The evidence shows that Sajawal, who is 40 years of age, married the appellant who is not, more than 15 years of age, about a month after the death of his first wife. The couple did not get on well together because the girl did not like to live with her husband and used to run away to her parents' house. On the day before the murder she had run away to the house of one Ismail and on the morning of the 1st August was brought back home and beaten, and when Sajawal went out to work in his fields he chained her feet together to prevent her running away again. Shortly after this he was informed that his infant son had been killed by the appellant, and returned home.

It seems obvious that Mt. Daulan being roused to frenzy by the way in which she was treated, seized the first weapon that came to her hand and made a murderous attack on her step-son in order to avenge herself against her husband. There is no reason for rejecting the prosecution evidence and having regard to the fact that the appellant used such a heavy weapon and struck a blow on the head there can be no doubt that her intention was to cause death. We think, therefore, that she has been rightly convicted of murder.

Considering her age, which she gives as 13, and which the Court puts at 15, and the other circumstances of the case, the capital sentence was quite uncalled for. In fact we think that a lesser sentence than one of transportation for life, which we are obliged to impose, would meet the ends of justice.

We, therefore, accept the appeal and reduce the sentence to one of transportation for life and direct the record to be forwarded to the Local Government in order that it may take action if it deems it suitable to do so under S. 401 of the Criminal P. C.

Appeal accepted.

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* A. I. R. 1926 Lahore 145

ABDUL RAOOF AND MARTINEAU, JJ.

Tulsi Ram—Defendant—Appellant.

v.

Dina Nath and *others*—Plaintiffs—Respondents.

Civil Appeal No. 3164 of 1918, Decided on 23rd January 1924, from a decree of the Sub-J., Kulu.

(a) *Partnership—Partnership for fixed term can be dissolved before the term if partners have lost confidence in each other.*

Even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners reposed in each other at the time when the partnership was entered into has ceased. [P. 146, C. 1]

(b) *Civil P. C., S. 99—Misjoinder of both of parties and of causes of action—S. 99 applies.*

The words "Misjoinder of parties or causes of action" in S. 99 do apply to a case in which there is a misjoinder both of parties and of causes of action. Rulings under the old Code are inapplicable on this point. [P. 146, C. 1]

(c) *Insolvency—Plaintiff declared insolvent during suit—Suit can be continued only at Receiver's instance.*

Where the plaintiff is adjudicated an insolvent during the pendency of a suit, the suit cannot be continued except at the instance of the Receiver. [P 146, C. 1]

(d) *Civil P. C., S. 75 and O. 26—Judge cannot make over whole case to commissioners.*

Judge has no power to make over the whole case to the commissioners and to delegate his functions in the matter of taking evidence and determining issues to them: *A. I. R.* 1922 *Lah.* 47, *Ref.* [P. 146, C. 2]

* (e) *Practice—Jurisdiction—Suit premature at institution—Cause of action maturing during pendency of suit—Suit should not be dismissed.*

Where a suit is premature at the date of the institution, but subsequently the cause of action matures, the suit should not be dismissed as the initial defect is removed. [P. 146, C. 1]

Mehr Chand Mahajan—for Appellant.

Jagan Nath, Madan Gopal for *Faqir Chand* and *J. N. Bhandari*—for Respondents.

Judgment.—This is an appeal from a decree passed by the Subordinate Judge at Kulu, a Sub-Division of the Kangra District, in a suit for dissolution of partnership and rendition of accounts. The partnership business consisted in extracting timber from forests in Kulu which had been leased by the Government to the plaintiff, floating it down the river Beas to Wazir Bullar, and there selling it. The plaintiff took into partnership the first defendant, Salig Ram, on the 12th August 1910 and the second defendant, Tulsi Ram, on the 10th January 1913. There was an agreement made by the plaintiff with Tulsi Ram in 1911, but it appears that that was not acted upon. On the 18th January 1914 Salig Ram entered into an agreement with Tulsi Ram in respect of trees purchased by the former in certain forests.

The plaintiff alleged that he had borne most of the expense incurred in the business and that the defendants had sold some of the timber without consulting him and misappropriated the price. The defendants denied these allegations and said that the plaintiff had not supplied money as he had agreed to do. Salig Ram pleaded that the plaintiff had sold the timber of the first and second ghals or floats and realized the price, and Tulsi Ram pleaded that all the timber which had been sold was sold in consultation with the plaintiff and his agent, and that as some of the timber had not yet been sold the suit was premature.

The Subordinate Judge, on the 24th December 1915, framed certain issues and appointed a commissioner to take accounts and report on all the issues. Afterwards various other persons were appointed commissioners at different times. The persons finally appointed were Brahma Nand and Ram Chand, who examined witnesses, and ultimately, in December 1917, made two divergent reports, the former finding that large sums of money were due from Tulsi Ram to the plaintiff and Salig Ram, and the latter that the plaintiff and Salig Ram were in debt to Tulsi Ram. In September 1918 the Subordinate Judge gave his judgment, which he divided into two parts. In the first part he determined the shares of the parties and passed a preliminary decree, directing that the partnership should stand dissolved from the 18th March 1915, the date on which the Court had attached the timber at Dehra; and in the second part he went into the matter of the accounts, and agreeing in the main with the report of Brahma Nand he passed a decree against Tulsi Ram in favour of Salig Ram for Rs. 9,129 and in favour of the plaintiff for Rs. 20,969, of which amount Salig Ram was to be entitled to recover Rs. 6,446, due to him in respect of the first two floats. The Subordinate Judge also allowed interest on the sums declared

at the rate of one per cent. per mensem. Tulsi Ram has appealed to this Court.

One contention advanced on behalf of the appellant is that the suit is premature, on the ground that the partnership was one for a fixed term as it was to continue until all the timber was sold, and that, therefore, the suit would not lie so long as some of the timber remained unsold. But even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners reposed in each other at the time when the partnership was entered into has ceased : see Lindley on Partnership, 8th Edition, page 657. Moreover, even if the suit was instituted prematurely, this would not be a sufficient ground for dismissing it at this stage, as the remaining timber was sold during the pendency of the suit, the initial defect being thus removed.

A second contention is that the suit is bad for multifariousness as it includes claim for accounts in respect of timber comprised in three ghals or floats in two of which the appellant was not a partner. Without going into the merits of this contention it is sufficient to say that it is too late for the appellant to raise it now, not having set up the plea in the lower Court. It is argued on his behalf that the words "misjoinder of parties or causes of action" in S. 99 of the Civil P. C. do not apply to a case in which there is a misjoinder both of parties and of causes of action, but we do not agree with the argument. Those words did not occur in the corresponding section of the old Code, and the rulings under that Code, which have been cited before us, are, therefore, inapplicable. We are also unable to agree that the misjoinder, if any, has affected the merits of the case.

It is next urged that the plaintiff was adjudicated an insolvent during the pendency of the suit, and that the suit could not be continued except at the instance of the Receiver. This contention is correct, and it will be necessary to ascertain whether the Receiver wishes to continue the suit. This will be done by the lower Court, to whom, we think, the case must be remanded in view of the fact, which has been strongly pressed before us, that the trial of the suit has been left in the hands of the commissioners appointed by the lower Court.

No evidence at all was taken by the Court, and the records consist of reports of various commissioners, evidence taken by them and objections of the parties to the reports. The lower Court was competent to issue a commission for the examination of the accounts, but the case is not one which can be decided solely on the result of such an examination. There are various points in controversy which have to be determined by the Court on evidence, and the Subordinate Judge had no power to make over the whole case to the commissioners and to delegate his functions in the matter of taking evidence and determining issues to them. In this connexion we may refer to a case recently decided by this Court, namely, *Sawan Mal* v. *Raunaq Mal* (1). There has been no trial of the case by the lower Court in the manner required by law, and there must, therefore, be a re-trial.

The parties do not live in Kulu, and we think that it would be more convenient if the case were tried at Dharmsala, the headquarters of the Kangra District, where assistance of counsel can be obtained, than in Kulu. We accept the appeal, set aside the decree of the lower Court, and direct that the suit be re-tried by the Senior Subordinate Judge of Dharmsala. The Court-fee paid on the memorandum of appeal will be refunded and other costs will be costs in the case.

Re-trial ordered.

(1) A. I. R. 1922 Lah. 47.

A. I. R. 1926 Lahore 146

SCOTT-SMITH AND MARTINEAU, JJ.

Hayat Muhammad — Vendee—Appellant.

v.

Bhawani Das and *others*—Creditors—Respondents.

Misc. First Appeal No. 1964 of 1922, Decided on 16th February 1925, from an order of the Dist. J., Lyallpur, D/- 31st May 1922.

Provincial Insolvency Act (1907), *S.* 36—*Section does not apply to transfers by insolvent subsequent to adjudication, nor to transfers by insolvents transferee.*

S. 36 does not apply to transfers made by an insolvent subsequent to his adjudication but only

to transfers made by him previous thereto. Nor does it apply to transfers made by an insolvent's transferee. [P 147 C 1]

Ram Chand Manchanda and *Jagan Nath Bhandari*—for Appellant.

Judgment. — Bakhu applied to be declared insolvent on the 12th February 1918 and was adjudicated insolvent on the 13th March 1918. On the 2nd October 1918 Bakhu sold part of his land to Massu. On the 31st March 1919, Massu sold this land and some of his own land to Hussain Bakhsh and Sardar Khan. On the 18th June 1919 the latter vendees sold the land to Hayat Muhammad. On the 10th December 1921 the Insolvency Court annulled the sales in favour of Massu and in favour of Hussain Bakhsh and Sardar Khan. On the 31st May 1922 the sale in favour of Hayat Muhammad was annulled. Hayat Muhammad has appealed to this Court.

It is contended that S. 36 of the Provincial Insolvency Act does not apply to transfers made by an insolvent subsequent to his adjudication but only to transfers made by him previous thereto. Moreover, it does not in terms apply to transfers made by an insolvent's transferee. The transfer to Hayat Muhammad was not made by the insolvent himself. The section, therefore, does not apply to the original transfer made by Bakhu, insolvent, much less to subsequent ones. Whether these transfers are binding on the Official Receiver is another question which we are not at present called upon to decide.

We, therefore, accept the appeal and set aside the order of the Court below annulling the transfer in favour of Hayat Muhammad. The appellant will receive his costs out of the insolvent's estate.

Appeal accepted.

A. I. R. 1926 Lahore 147

SHADI LAL, C. J.

Jaimal—Accused—Petitioner.

v.

Emperor—Respondent.

Criminal Revision No. 366 of 1924, Decided on 25th April 1924, from the order of the S. J., Lahore, D/- 10th December 1923.

(a) *Penal Code, Ss. 379 and 511—Attempt is an intentional preparatory action — Entering into cattle enclosure which is prevented by owner is attempt to commit theft.*

When a man does an intentional act with a view to attain a certain end and fails in his object through circumstances independent of his own will then that man has attempted to effect the object at which he aimed : 13 *P. L. R.* 1919 *Cr., Foll.*

Where the accused entered a thorned enclosure at the well of the complainant and was about to enter a smaller enclosure in which the cattle were tethered when he was interrupted by the complainant :

Held : that the accused intended to steal the cattle and that he could not carry out his intention on account of intervention by the owner and so he was guilty of attempt to commit theft. [P 147 C 2]

Ghulam Mohi-ud-din—for Petitioner.

Jai Lal—for the Crown.

Judgment.—The facts of this case as found by the learned Sessions Judge are as follows : On the night of the 17th of April 1923 the prisoner Jaimal entered a thorned enclosure at the well of the complainant Shahamad, and was about to enter a smaller enclosure in which the cattle were tethered when he was interrupted by Shahamad. There can be no doubt that accused intended to steal the cattle, and that he could not carry out his intention on account of intervention by the owner.

The question arises whether these facts constitute an attempt to commit theft. Now, the judgment of the Punjab Chief Court in *Ghasita* v. *Emperor* (1), is similar to the present case and I am not prepared to dissent from the rule laid down in that judgment. It is no doubt difficult to frame an exact definition of the word "attempt" but it has been pointed out in a Bombay case that an attempt is an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment. In other words when a man does an intentional act with a view to attain a certain end and fails in his object through circumstances independent of his own will, then that man has attempted to effect the object at which he aimed.

There can be no doubt that the prisoner in this case intended to commit theft, and that he also did an act which would have

(1) [1919] 13 P. R. (1919) Cr.=20 Cr. L. J. 492

ended in the consummation of the offence but for the intervention of circumstances independent of his will. I must, therefore, hold that he has been rightly convicted. The application for revision is dismissed.

Application dismissed.

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* A. I. R. 1926 Lahore 148

MOTI SAGAR, J.

Hira Singh and *others*—Plaintiffs—Appellants.

v.

Arjan Singh and *others*—Defendants and Plaintiffs—Respondents.

Second Appeal No. 1504 of 1922, Decided on 21st January 1924, against a decree of the Dist. J., Ludhiana, D/- 4th March 1922,

* *Registration Act, S. 17 (b)—Agreement by a collateral in the Punjab not to contest in future, gift of ancestral property by a childless proprietor is neither compulsorily registrable nor illegal—T.P. Act, S. 6.*

An undertaking by a collateral not to contest a gift of ancestral property by a childless proprietor at any future time is not an extinguishment or assignment of any rights in immovable property and therefore the document does not require registration under S. 17 of the Registration Act, Also, the agreement is not one to transfer an expectancy and so not illegal under S. 6 of the T.P. Act. *A.I.R.* 1923 *P.C.* 189, *Dist.* [P. 149, C. 1]

Fakir Chand—for Appellants.

Balwant Rai—Respondents.

Judgment.—On the 1st of March 1916 one Ram Ditta, a Jat of Mauza Chima in the Ludhiana Tehsil, executed a deed of gift in respect of 12 bighas 12 biswas and 1 biswansi of land and one-half share of two houses in that village in favour of one Arjan Singh, the daughter's son of one Basawa Singh, his first cousin. This gift was assented to by some of the reversioners of Ram Ditta who are now represented by the present appellants and in token of their assent they executed a document on the 13th of June 1916 by which they admitted that they had no rights in the property gifted and undertook not to raise any objections in respect thereof at any future time. Ram Ditta having died the present suit was brought on the 6th of February 1920 by his reversioners in whom were included also the reversioners who were the signatories of the document of the 13th of June 1916 on the allegation that Ram Ditta was a childless proprietor and was not authorized to make a gift according to the Customary Law of the Province by which he was admittedly governed. The defendants denied the ancestral character of the land and pleaded that the gift was valid by custom. It was further contended that some of the plaintiffs had assented to the gift and that they, at any rate, were not entitled to maintain this suit.

Both the Courts below have held that the property was ancestral and that the gift was invalid by custom. With regard to the reversioners who were parties to the agreement dated the 13th of June 1916, it was found that they had assented to the gift and that the suit, so far as it related to their shares in the property concerned, should be dismissed.

The plaintiffs, whose suit has been dismissed, have now come up in second appeal to this Court and two contentions have been raised on their behalf by their learned vakil Mr. Fakir Chand. His first contention is that the document, dated 13th June 1916, which according to the defendants bars the plaintiffs' suit, is inadmissible in evidence for want of registration, and S. 17 (1) (b) of the Indian Registration Act is relied on in support of this contention. In my opinion there is no force in this contention. According to S. 17 (1) (b) all non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 or upwards to or in immovable property are compulsorily registrable. The question for decision is whether the document in question purports to declare or extinguish any rights in present or in future in immovable property of the value of Rs. 100. Now looking to the terms of the document it appears to me that it was clearly outside and beyond the scope of this section. All that the executants of the document had at the time the document was executed was a spes successonis as reversioners. In the document they neither purport to convey anything nor to declare or extinguish any vested or contingent rights in any property. They merely give their consent to the gift which had been made by Ram Ditta and undertaken not to raise any objection in

respect thereof at any future time. The relevant portion of the document is to the following effect :—

Jo ke arazi Musammi Ram Ditta urf Ram Singh, pisr Khazan Singh, Quam Jat, sakna Chima, Tahsil Ludhiana, ne banam Arjan Singh, apne dhote ko hiba kardi hai, is arazi mazkura bala par mazharana ka kisi kisim ka wasta nahin raha. Ainda ko babat arazi kisi kism ka tanaza nah karenge.

These words, in my opinion, which only embody an undertaking by the executants of the document not to contest the gift at any future time, clearly do not amount to an extinguishment of any rights in the property and I must, therefore, hold that the learned District Judge was right in holding that the document did not require registration.

Next, it was argued that the agreement was illegal on the ground that it dealt with an expectancy. S. 6 of the Transfer of Property Act and a recent ruling of their Lordships of the Privy Council reported as *Ananda Mohan Roy* v. *Gour Mohan Mullick* (1) were relied on in support of this contention. Here again the words of the document are very clear and cannot by any stretch of language be held to mean that any rights in expectancy were being transferred. As already observed, there was no renunciation of any rights and all that was undertaken was that the executants of the document would not object to the gift which Ram Ditta had executed in favour of Arjan Singh. The statement in the document that the executants had no rights in the property gifted was surely not intended to mean that the reversionary rights which they undoubtedly possessed in that property were being conveyed or transferred in favour of any other person. S. 6 of the Transfer of Property Act, which prohibits the transfer of expectancy rights, is wholly irrelevant and cannot possibly apply to the facts of the present case. The Privy Council ruling relied on related to a case where an expectant heir actually sold certain immovable property to which he expected to succeed upon the death of a certain widow and agreed to transfer it to the vendee upon possession accruing to him. It was held that the contract was void under S. 6 of the Transfer of Property Act which forbids the transfer of expectancies. It is obvious that in the present case no expectancy rights have been transferred and the ruling relied upon cannot, therefore, apply.

In my opinion the decision of the lower Court is correct and there is no force in this appeal. The result is that the appeal fails and is dismissed with costs throughout.

Appeal dismissed.

(1) A. I. R. 1923 P. C. 189.

A. I. R. 1926 Lahore 149

SHADI LAL, C. J.

Nura and *others*—Accused—Petitioners.

v.

Emperor—Opposite party.

Criminal Revision No. 2082 of 1923, Decided on 11th April 1924, on a report by the S. J., Shahpur at Sargodha.

(a) *Public Gambling Act* (3 *of* 1867), *S.* 13—*Public place is place where public go—Serai used as a stand for hackney carriages and resorted to by public is a public place.*

A place which is in any way dedicated to the use of the public is of course a public place, but where it is owned privately and no such dedication has taken place, the question whether it is a public place depends on the character of the place itself and the use actually made of it. A public place is a place where the public go, no matter whether they have a right to go or not. A serai taken by the Municipality on rent and used as a stand for hackney carriages, and which is resorted to by the public, is a public place within the section: *Reg.* v. *Wellard*, (1884) 14 *Q.B.D.* 63), *Approved.* [P. 149, C. 2, P. 150, C. 1]

Din Dayal—for the Crown.

Order.—The question for consideration is whether the place where the gambling took place is a public place within the meaning of S. 13 of the Gambling Act III of 1867. Now the place in question is a serai taken on rent by the Municipal Committee of Sargodha and is used as a stand for hackney carriages. The evidence on the record shows that the public have a right of access to the serai and that they sometimes stay there for 5 or 10 minutes. Now a place which is in any way dedicated to the use of the public is of course a public place, but where it is owned privately and no such dedication has taken place, the question whether it is a public place depends on the character of the place itself and the use actually made of it

As pointed out by Grove, J., in *Reg* v. *Wellard* (1) "a public place is a place where the public go, no matter whether they have a right to go or not."

Now, there can be no doubt that the serai in question is a place resorted to by the public and I am of opinion that it is a public place within the meaning of the section. The recommendation of the Sessions Judge cannot, therefore, be accepted.

Recommendation not accepted.

(1) [1884] 14 Q.B.D. 63=54 L.J.M.C. 14=51 L. T. 604=33 W. R. 156=15 Cox C.C. 559=49 J.P. 296.

A. I. R. 1926 Lahore 150

BROADWAY AND CAMPBELL, JJ.

(*Dr.*) *Bodh Raj*—Plaintiff—Petitioner.

v.

Secretary of State—Defendant—Respondent.

Civil Revision No. 17 of 1922, Decided on 29th January 1924, for revision of a decree of the Small Cause Court Judge, Kasur, Dist. Lahore, D/ - 30th November 1924.

Provincial Small Cause Courts Act (9 of 1887), S. 2, Art. 35, (j)—Suit to recover price of goods wrongfully attached and sold—Suit is not Small Cause.

A suit to recover the price of goods wrongfully attached and sold in execution of a decree falls witnin the purview of Art. 35(j) and is excluded from the cognizance of Small Cause Court. If, therefore, such a case is tried by a Judge having both powers, Small Cause and Regular, the trial should be held as one on Regular side though the proceedings as conducted gave room to suspect that it was tried as Small Cause.

[P. 151, C. 2.]

Tek Chand and *Nanak Chand*—for Petitioner.

Jai Lal—for Respondent.

Judgment.—A preliminary objection has been taken to the hearing of this petition which is based on two separate contentions. Firstly, it is urged that inasmuch as the suit was tried by a Munsif of the First Class an appeal against his decree was competent and that, therefore, this revision did not lie. Secondly, that the suit itself, not being of the nature of a Small Cause, was excluded by Art. 35 (j) of the Small Cause Courts Act from the jurisdiction of a Small Cause Court and could only have been tried as an ordinary suit by the Court.

As to the first point it has been contended that the proceedings were clearly conducted as though the suit was one of the nature of a Small Cause. A reference to the records lends some colour to this contention. No issues were settled and an adjournment was given after the first hearing in order to enable the counsel for both sides to argue the case. On the other hand, the plaint was presented, according to the heading, in the Court of the Munsif and not of the Judge of the Small Cause Court. The judgment is signed by the Presiding Officer as Judge, Small Cause Court, as also in the record.

On the other hand in the body of the decree itself the officer is clearly described as Munsif, First Cla s. Admittedly the Presiding Officer in this case had been given the powers of a Judge of the Small Cause Court. If, therefore, the suit was one falling within the powers of a Judge, Small Cause Court, S. 16 of the Small Cause Courts Act would render it incumbent on the Presiding Officer to deal with the case as one of the nature. To this extent Mr. Tek Chand's contention is perfectly correct.

As to the second point namely, whether the case is one of the nature of a Small Cause, it has been contended by the learned Government Advocate that suit being one for compensation for illegal, improper, or excessive distress, the jurisdiction of the Small Cause Court is specifically excluded by S. 15 of the Act. in support of this contention reference has been made to *Pamu Sanyasi* v. *Zamindar of Jaipur* (1), *Chamabai* v. *Dhula Kuppa* (2), *Muhammad Kazim* v. *Rukia Begam* (3), and *Seth Karimje* v. *Kirpal Singh* (4). The last two decisions relate to a question of limitation and were cited merely with a view to assisting in arriving at a definition of the word, "compensation." On the other hand, Mr. Tek Chand has strongly contended that his client's case is not a suit for compensation but for the price of articles sold under an illegal distraint. He has referred to *Chairman of Sontipur Municipality* v. *Bepin Behary Sen* (5), *Chakradharudu* v. *Venkataramayya* (6), *Dewan Roy* v.

(1) [1902] 25 Mad. 540.
(2) [1919] 21 Bom. L. R. 281.
(3) [1919] 41 All. 443=17 A. L. J. 677.
(4) [1886] 123 P. R. 1886.
(5) [1909] 3 I. C. 429.
(6) [1899] 22 Mad. 457.

Sunder Tewary (7), *Karuppanan Ambalam* v. *Ramasami Chetti* (8). *Senthivelu Mudaliar* v. *Varada Charriar* (9) and *Manbodh Acharaya* v. *Ananta Karu* (10). A reference to these cases shows that the facts in them are not on all fours with the facts in the present case. For instance, in the first case cited no distress had been levied, payment had been made under pressure of distraint and there had been no tort alleged. The same is the case in *Chakradharudhu* v. *Venkataramayya* (6), as well as in *Karupanan Ambalam* v. *Ramasami Chetti* (8); in *Dewan Roy* v. *Sunder Tewary* (7), their Lordships pointed out that: "A suit for money paid to redeem a distress is not on a different footing from a suit for other money which can be recovered as being paid under distress of person or of goods or by abuse of legal process." The fundamental point in that decision appears to be that there had been a payment redeeming the distress and the suit being one for a refund of money so paid it was held to be on the same footing as any other claim for money. In the present case there was an actual attachment and sale and the suit is one not for refund of any money paid, but for the price of the goods wrongfully sold. The decision in *Senthivelu Mudaliar* v. *Varada Charriar* (9), is brevity itself and the facts are not therein stated. On the other hand, there is a case reported as *Rup Kishen* v. *Sobhi* (11) in which the facts were that certain crops were wrongfully attached in execution of a decree. The owner of the crops made objections, but it was struck off without any adjudication. The objector then filed a suit in the Small Cause Court for the recovery of the price of the crops. It was held by Richards, J., that the Small Cause Court had no jurisdiction to entertain this suit, and that the mere fact that the suit was limited to a claim for the price or the value of the crops which was handed to the decree-holders by the Court executing the decree, did not make the suit any the less a suit for illegal attachment within the meaning of Art. 35 (j) of Schedule 2 of the Provincial Small Cause Courts Act. In the course of the judgment it was remarked that the Court i. e., the Small Cause Court, could not possibly give a decree without deciding the issue whether the attachment was legal or illegal and that, it appears to us, is the real reason for the exclusion, for the Small Cause Court, of cases of this nature. In our opinion S. 35 (j) of the Small Cause Court Act, was applicable and excluded this case from the jurisdiction of the Small Cause Court. The trial must be considered to have been held by a Munsif sitting as a Munsif and an appeal against his decree was competent. The present revision, therefore, fails and is dismissed. In the circumstances we direct that the parties pay their own costs in this Court.

Revision dismissed.

(7) [1897] 24 Cal. 163.
(8) [1898] 21 Mad. 239=8 M. L. J. 165.
(9) [1906] 16 M. L. J. 353.
(10) [1910] 6 I. C. 415.
(11) [1911] 8 A. L. J. 187.

A. I. R. 1926 Lahore 151

ZAFAR ALI, J.

Fazal Ahmad and *another*—Petitioners.

v.

Abdullah Khan—Respondent.

Misc. Criminal Case No. 158 of 1925 Decided on 6th October 1925, for transfer of the case.

Criminal P. C., S. 526—Magistrate's attitude hostile to complainant—Transfer was allowed.

Where further proceedings having been stayed by the High Court's order one of the two complainants appeared before the Magistrate on the date fixed for a hearing and apprised him of that order but the Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared.

Held: that there was no justification for this action of the Magistrate. That the Magistrate's attitude was clearly hostile to the complainants and the case must be transferred.

[P. 151, C. 2, P. 152, C. 1]

Shamair Chand—for Petitioners.

Ram Lal and *Aziz Ahmad*—for Respondents.

Zafar Ali, J.—It appears that the complainants-petitioners have a well founded apprehension that a fair and impartial trial cannot be had in the Court of the Magistrate where their complaint under S. 420, Indian Penal Code, is now pending. Besides the fact stated in the application there has lately occurred an incident which strengthens their apprehension. Further proceedings, having been stayed by order of this Court one of the two complainants appeared before the Magistrate on the date fixed

for a hearing and apprised him of that order. The Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared. There was no justification for this action of the Magistrate and the learned counsel who appear on behalf of the Crown and the accused to oppose this application admit that it cannot be justified. The Magistrate's attitude was clearly hostile to the complainants and I therefore aceept the application and direct the District Magistrate to withdraw the case from his Court and to send it to the Court of any other Magistrate subordinate to him who may be competent to try it.

Application accepted.

A. I. R. 1926 Lahore 152

CAMPBELL, J.

Munshi Ram—Defendant—Appellant.

v.

Bhagwan Das and *others*—Plaintiffs and Defendants—Respondents.

Misc. Second Appeal No. 640 of 1925, Decided on 27th October 1925, from the order of the Additional Dist.-Judge, Hoshiarpur, D/- 8th December 1924.

Limitation Act, Arts. 83 *and* 64—*Suit to recover losses incurred as commission agents for defendants—Art.* 83 *applies.*

A suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook as commission agents on behalf of the defendants is governed by Art. 83 and not by Art. 64. [P 152 C 1, P 153 C 2]

Fakir Chand—for Appellant.

Mehr Chand—for Respondents.

Campbell, J.—This was a suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in lac which they undertook as commission agents on behalf of the defendants. The first Court held that the suit came within the scope of Art. 83 of the Indian Limitation Act and that the plaintiffs had failed to prove that it was within time. On appeal the learned Additional Judge held that Art. 64 was the article applicable and that the suit was within time, since by Punjab Act I of 1904 the period of limitation under that article was enlarged to six years.

One of the defendants challenges this finding in second appeal.

The plaintiffs made on behalf of the defendants two purchases, each of 100 maunds of lac, in Mirzapur, one in August and the other in September 1916. Delivery was to be on the 15th October 1916. On that date an entry was made in the plaintiff's account book by which the defendants acknowledged a balance of Rs. 2,550 against them and agreed to repay it with interest at As. 8 per cent. per mensem. The plaintiff set forth this in his plaint describing the account as "*Hisab yaddasht zabani mutabiq kharid-o-farokht*" and stated that on the one contract a loss of Rs. 1,875 had been estimated and on the other a loss of Rs. 1,450. To these sums Rs. 225 commission was added and the total came to Rs. 3,550. From this were deducted two payments of Rs. 500 each made in advance by the defendants and thus the balance against them was Rs. 2,550. The plaint went on to set forth other and subsequent accounts which ignored the balance of Rs. 2,550 and commenced afresh with the charge of Rs. 3,550 against the defendants. They were debited further with Rs. 2-5-0 miscellaneous charges for telegrams etc., Rs. 713-7-9, described as the actual loss subsequently ascertained as having been incurred on one of the contracts, and an extra charge of Rs. 71-8 for commission on the other contract. On the other side the defendants were given credit for Rs. 1,000 (the two advance payments of Rs. 500 each), for Rs. 492-8 representing a subsequent advance payment for yet another transaction which had not materialized, and for Rs. 1,875 which had been the estimated loss calculated on the 15th October 1916 of the transaction on which the actual loss was afterwards found to be Rs. 713-7-9 only. The plaintiffs in due course produced their books showing the accounts set forth as described after the signed balance. The learned Additional Judge observed that the plaint had been unhappily worded but that in his opinion the claim was not one by a commission agent for the reimbursement of losses paid on bebalf of his principal, but a suit on accounts stated in writing signed by the defendants; that is to say, the account balanced on the 15th October 1916. The subsequent accounts he regarded merely as certain sums

credited later in good faith by the plaintiffs thinking that the defendants were entitled to them. He held that from the 15th October 1916 the risk on the two contracts had become that of the plaintiff and that the defendants could not have been called upon to pay more than Rs. 2,550 if the losses had been found later on to exceed that sum.

A flaw in this view is that the plaintiff actually claimed Rs. 71-8 as commission in addition to the commission item of Rs. 225 included in the balance. In my opinion the claim made in the plaint was not based on the balance at all, but mention of the balance was only designed to meet a possible plea that the transactions were mere gambling transactions and the claim was made on other and subsequent figures which superseded and ignored the balance altogether.

The suit was not one for money payable on accounts stated between the parties instituted within six years of the date on which the accounts were stated in writing signed by the defendants.

I hold the decision of the first Court to have been right, that Art. 83 governed the suit. This decision is supported by ***Manglu Ram*** v. *Ram Saran Das* (1) and by other subsequent rulings. It has been urged by the learned counsel for the respondents that in any case under Art. 83 the suit would be in time in respect of the claim for Rs. 713-7-9 but all that appears regarding this is a statement by the plaintiff that the amount was debited against the defendants in his books on the 31st July 1919. There is no evidence of when the plaintiff actually had to pay it and I agree with the first Court that the plaintiff has failed to prove the date of damnification in respect of any of his claim.

I, therefore, accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

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(1) [1915] 23 P. R. 1915=35 P. W. R. 1915=100 P. L. R. 1915.

A. I. R. 1926 Lahore 153

CAMPBELL, J.

Firm Pala Mal-Narain Mal (through *Munshi Ram*)—Plaintiff—Appellant.

v.

Fauja Singh—Defendant—Respondent.

Second Appeal No. 522 of 1923, Decided on 15th January 1924, from a decree of the Additional Judge, Lahore, D/- 12th February 1923.

Civil P. C., O. 1, R. 10—One defendant discovered to have been dead on the date of the suit—Court may strike his name and proceed against the other defendant.

Where during the pendency of a suit against two defendants one of them was found to have died before the institution of the suit, the proper procedure is for the Court to strike out the name of the deceased defendant and to allow the suit to proceed against the other defendant alone.

[P. 154, C. 1]

Daulat Ram—for Appellant.

Dina Nath Mehra—for Respondent.

Judgment.—The plaintiff sued on a bond purporting to be executed by two brothers, Fauja Singh and Masa Singh. The two defendants entered in the plaint were Fauja Singh and Mit Singh who were described as brothers. When Fauja Singh appeared in Court he pleaded on the 28th June 1921, that he had no brother named Mit Singh, but he had had a brother named Masa Singh who had died a year previously.

On this the Trial Court adjourned the suit till 29th July 1921 for arguments as to whether it could proceed. On that date the plaintiff put in an application asking that the name of Mit Singh be struck off the plaint as he had nothing to do with the case.

On the 9th August 1921 the trial Court recorded an order dismissing the suit on the ground that it had been brought against two defendants, one of whom was dead. This order was affirmed on appeal by the Additional Judge of Lahore.

What appears to have influenced the Courts below was a quotation on the page 74 of Woodroffe and Amir Ali's Civil P.C. from an American case where it was held that judgment against a principal debtor and a surety was void against the former for the reason that the surety had been dead at the time of the institution of the suit. This is not the situation here, for there has been no judgment or decree. The Courts below realized that the case could not be treated as one

against a sole defendant, who was dead at the time of the institution of the suit but they overlooked O. 1, R. 9, which expressly enacts that no suit shall be defeated by reason of the misjoinder of parties. The trial Court ought to have acted under R. 10 of O. 1 and should have struck out the name of Mit Singh and allowed the suit to proceed against Fauja Singh.

I accept the appeal and order that this be done. Whether Fauja Singh is liable in any way will be for the trial Court to determine now. The suit is remanded for re-decision under O. 41, R. 23. Stamps on appeals will be refunded and costs will be costs in the cause.

Case remanded.

⁂ A. I. R. 1926 Lahore 154

SHADI LAL, C. J.

Fazal Karim—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 510 of 1924, Decided on 2nd June 1924, against the order of the S. J., Delhi, D/- 11th February 1924.

⁂ (a) *Criminal P. C., Ss. 342 and 540—Accused once examined under S. 342—Re-examination of the accused after any witness under S. 540 is examined is not necessary—Criminal P. C., Ss. 540 and 342.*

Section 540 is not controlled by S. 342 and therefore where the accused is once examined as required by S. 342 and then a witness is examined under S.540, Criminal P.C., a Court is not bound to examine the accused again after recording the statement of that witness. [P 154 C 2, P 155 C 1]

⁂ (b) *Criminal P. C., S. 342—Accused examined after conclusion of prosecution evidence—Accused need not be examined again after further cross-examination of prosecution witnesses.*

When the accused has been examined under S. 342 after the conclusion of the prosecution evidence it is not necessary to examine him again after the further cross-examination of the prosecution witnesses : A. I. R. 1924 *Lah.* 84, *Ref.* [P 155, C 1]

Shuja-ud-Din—for Petitioner.

Zafrulla Khan—for the Crown.

Judgment.—On the 24th May 1923, one Ahmad Hassan went to the shop of Abdul Ghani at the Kashmir Gate in the town of Delhi and there presented a Rs. 100 note for purchase of a watch. The shopkeeper was suspicious as to the genuineness of the note and questioned Ahmad Hassan. The letter thereupon informed the shopkeeper that he had two other notes of Rs. 100 each. The matter was then reported to the police, who discovered in a room occupied by Ahmad Hassan a large number of currency notes of Rs. 100 each, and all these notes have been proved to be counterfeit.

Now, the Courts below have concurred in holding that the notes were entrusted to Ahmad Hassan by the prisoner Fazal Karim and after hearing arguments on both sides I see no adequate ground which would justify interference by a Court of revision with a finding of fact. It is a common ground that Ahmad Hassan is a transfrontier youth of 17 years of age, and it is admitted by the convict himself that he had brought the boy to Delhi and put him to school about August 1922. It is clear that the boy was a protege of the accused, and there is apparently no reason why he should falsely implicate his benefactor.

It must be remembered that Ahmad Hassan declared at once that he had received the notes from Fazal Karim, and his statement receives support from the letter, P. A., which is proved by him to have been written by the prisoner. This letter contains a veiled reference to the bundle of notes and enjoins Ahmad Hassan to keep it concealed in his room and not to disclose it to any person The Courts below have believed the testimony of Ahmad Hassan and there can be no doubt that upon that evidence the petitioner is guilty of an offence described in S. 489-C of the I. P. C.

The learned counsel for the petitioner invites my attention to the fact that the trial Magistrate, after recording the evidence on both sides, summoned a witness suo motu in order to prove that the notes were counterfeit, and contends that the Magistrate should have again examined the prisoner after recording this formal evidence. There can be no doubt that the accused knew from the very beginning that he was charged with having in his possession counterfeit currency notes, and that the witness summoned by the Court was intended to remove a defect which was discovered by the Magistrate himself. Now, S. 540 empowers the trial Court to summon and examine a witness, if the evidence of the witness appears to the Court essential to the just decision of the case. This section is

not controlled by S. 342, Criminal P. C., which imposes upon the Court the duty of questioning the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. It is admitted that the accused was once examined as required by S. 342, and my attention has not been invited to any ruling which lays down that if the Court examines a witness under S. 540, Criminal P. C., it must examine the accused again after recording the statement of that witness. Moreover, the record shows that the prisoner did not wish to make any further statement and, indeed, he asked his counsel not to argue the case. In these circumstances, it cannot be seriously urged that the petitioner has been prejudiced by the procedure adopted by the Magistrate.

With regard to the contention that the accused should have been examined again after the second cross-examination of the prosecution witnesses it is sufficient to refer to the judgment in the case, *Byrne* v. *Emperor* (1), which decides that a second examination of the accused is not necessary.

The guilt of the petitioner is proved beyond all reasonable doubt and the application for revision is accordingly rejected.

Revision rejected.

(1) A. I. R. 1924 Lah. 84.

A. I. R. 1926 Lahore 155

SHADI LAL, C. J.

Mt. Ghasiti and *another*—Petitioners.

v.

King-Emperor—Respondent.

Criminal Revision No. 1734 of 1924, Decided on 13th February 1925, reported by the S. J., Ambala, on 3rd December 1924.

(a) *Criminal P. C., Ss. 256 and 537—Failure to record reasons under S. 256 is irregularity curable by S. 537.*

The provision contained in S. 256 is not mandatory, but merely directory and the irregularity can be cured under S. 537, provided that there has been no consequent failure of justice and where it is clear that the omission to record the reasons has not caused any prejudice to the accused, the trial is not illegal. [P. 155, C. 2]

(b) *Criminal P. C., S. 253—Collective examination of two accused vitiates proceedings.*

Where the Magistrate does not examine each accused separately, but records their statements collectively it is an illegality which vitiates the proceedings. [P 155, C. 2]

Shadi Lal, C. J.—On the 22nd of July, 1924, the Magistrate, after framing a charge against the accused, asked them to state whether they wished to cross-examine any of the witnesses for the prosecution; and to this question the accused gave a reply in the negative.

Now, S. 256, Criminal Procedure Code, enacts that an accused person shall be required to state, at the commencement of the next hearing of the case, or if the Magistrate, for reasons to be recorded in writing so thinks fit forthwith, whether he wishes to 'cross-examine any, and, if so which of the witnesses for the prosecution whose evidence has been recorded; and the question arises whether the failure of the Magistrate to record his reasons vitiates the trial. While I hold that the Courts should always comply strictly with the provisions of the law, I do not think that the failure of the Magistrate to record his reasons renders the trial illegal. The provision contained in S. 256 is, in my opinion, not mandatory, but merely directory; and the irregularity can be cured under S. 537 of the Criminal Procedure Code, provided that there has been no consequent failure of justice. It is clear that the omission to record the reasons has not caused any prejudice to the accused in this case.

I cannot, therefore, endorse the view of the learned Sessions Judge that the trial should be set aside on the ground that the Magistrate did not record his reasons in writing for requiring the accused to state forthwith whether they wished to cross-examine prosecution witnesses. It, however, appears that the Magistrate did not examine each accused separately, but recorded their statements collectively; and this is an illegality which vitiates the proceedings. Accordingly, I set aside the conviction and sentence and remit the case to the Magistrate for trial in accordance with law from the stage at which the illegality was committed.

Revision accepted.

A. I. R. 1926 Lahore 156

ZAFAR ALI, J.

Bagh Ali—Complainant—Petitioner.

v.

Muhammad Din and *others*—Accused—Respondents.

Criminal Misc. No. 121 of 1925, Decided on 29th September 1925, against the order of transfer of the Dist. Mag., Gujrat, D/- 30th April 1925.

(a) *Criminal P. C., S. 526—Cognizable case—Complainant can apply for transfer but his rights are subordinate to those of Crown in case of conflict.*

Even in a cognizable case sent up for trial by the police a complainant is entitled to apply for transfer under S. 526. but his rights are subordinate to those of the Crown, so that where there is a conflict between the private prosecutor and the Public Prosecutor in the matter of a transfer of a case, the right of the latter must prevail : 4 *Pat. L. J.* 656, *Foll.* [P 156 C 2]

(b) *Criminal P. C., S. 528—Transfer without notice to opposite party is not illegal.*

A transfer under S. 528 is not illegal for want of notice to the opposite party : 23 *P. R.* 1902, *Cr. Dissented from*; 21 *Bom. L.R.* 276, *Foll.*[P 156 C 2]

Ram Chand Manchanda — for Petitioner.

Moti Sagar, *Aziz Ahmad* and *Abdul Ghani*—for Respondents.

Order.—A case under S. 366/147, Indian Penal Code, was pending in the Court of Lala Kundan Lal, Magistrate, 1st Class, Gujrat, and he had recorded some evidence when the District Magistrate, on the application of the accused, but without notice to the other side, transferred the case to the Court of another Magistrate of the 1st Class, namely, Chaudhri Nadir Khan. Bagh Ali, who was interested in the case, inasmuch as it was his wife who, it was stated, was abducted, has filed in this Court an application under S. 526, Criminal Procedure Code, with certain allegations against Chaudhri Nadir Khan, and requests that the order of transfer made by the District Magistrate be set aside.

Mr. Moti Sagar who appears on behalf of the accused-respondents raises a preliminary objection, namely, that this being a cognizable case which was sent up for trial by the police, a private person is not competent to apply for a transfer, as was held by a Division Bench of the Patna High Court in *Jamuna Kanth* v. *Rudra Kumar* (1). The Bench consisted of two Judges, one of whom, i. e., Mr. Justice Mullick, held that a private person who sets the law in motion by giving information to the police is not entitled to apply for a transfer of the case under S. 526, Criminal Procedure Code (1898). But the other Judge held to the contrary, that a complainant is entitled to apply for transfer under S. 526, but his rights are subordinate to those of the Crown ; so that where there is a conflict between the private prosecutor and the Public Prosecutor in the matter of a transfer of a case, the right of the latter must prevail. This latter view appears to be sound, being quite in accordance with the expressed terms of Cl. 3 of S. 526. In the present case the application is not opposed by the Crown and therefore could be heard and disposed of on the merits, but the learned counsel who appears for the applicant does not ask for a transfer, and confines himself to impugning the order of the District Magistrate, stating that it was illegal as it was made without notice to the other party. In support of this contention he cites *Bakhsha* v. *Tahlu Ram* (2) which was based on *Umrao Singh* v. *Fakir Chand* (3) ; *Teacotta Shekdar* v. *Ameer Majee Hafiz Paikar* (4) and *Imperatrix* v. *Sadashiv Narayan* (5). But both the Allahabad and Bombay High Courts have lately adopted the view that a transfer under S. 528, Criminal Procedure Code, is not illegal for want of notice to the opposite party. In *In re Hawaji Sakharam* (6) occurs the following passage :

" No doubt the trend of the decision in this Court appears to have been that an order under S. 528, made without notice, is illegal : *Imperatrix* v. *Sadashiv Narayan* (5) ; *In re Nageshwar Sitaram* (7) ; and *Vedu Bapu* v. *Bhagwandas* (8). But these cases were doubted in *In re Virji* (9) and I understand that the recent practice of this Court has been to treat want of notice as not amounting to illegality * * * * * For the section does not require issue of notice and that too is the

(1) [1919] 4 P.L.J. 656=(1920) P.H.C.C. 42=20 Cr. L.J. 648.

(2) [1902] 23 P.R. 1902 Cr.
(3) [1881] 3 All. 749=(1881) A.W.N. 53.
(4) [1882] 8 Cal. 393=10 C.L.R. 239.
(5) [1896] 22 Bom. 549.
(6) [1918] 21 Bom. L.R. 276=20 Cr. L. J. 320.
(7) [1899] 1 Bom. L.R. 347.
(8) [1903] 5 Bom. L.R. 28.
(9) [1904] 6 Bom. L.R. 856.

view of the Allahabad High Court: see *In the matter of the petition of Dukhi Kewat* (10). The question of notice seems to me to be one of propriety rather than of legality."

In the present case the application was made on behalf of the accused and the District Magistrate, after recording some evidence in support of their allegations, came to the conclusion that they had some reason to apprehend that they would not have a fair trial in the Court where the case was pending. It would not, therefore, be proper to revise his order merely on the ground that it was passed without notice to the complainant. But if the latter has some misgivings about the impartiality of the Magistrate to whose Court the case has been transferred, he may apply to the District Magistrate for a transfer from that Court. This application is dismissed.

Application dismissed.

(10) [1906] 28 All. 421=3 A. L. J. 224=(1906) A. W. N. 76=3 Cr. L.J. 327.

A. I. R. 1926 Lahore 157

CAMPBELL, J.

Amritsaria and *another*—Defendants—Appellants.

v.

Prabh Dial and *others*—Plaintiffs—Respondents.

Second Appeal No. 2847 of 1923, Decided on 16th April 1924, from a decree of the Dist. J., Jullunder, D/- 18th July 1923.

Evidence Act, S. 32 (6)—*Entry in deceased priest's bahi regarding blood relationship is admissible.*

The statement contained in a deceased priest's bahi regarding the relationship by blood between persons deceased, before the question in dispute arose, is admissible in evidence under Cl. (6). 15 *I. C.* 625, *Relied on*; 30 *All.* 510 (*P. C.*), *Dist.*

[P. 158, C. 1]

B. D. Qureshi—for Appellants.

Behari Lal Mehr Chand—for Respondents.

Judgment.—In the suit out of which the present second appeal arises ten persons were plaintiffs, alleging themselves to be the agnates of one Mula Mal Sunar. They sued for possession of house property, land held in mortgage and moveables against the sister's son of Mula Mal, Amritsaria and two others. The trial Court decreed the claim in part and gave the plaintiffs possession of the land and of a shop. Their suit for the rest of the house property and for moveables was dismissed.

Against this decision seven of the plaintiffs, the descendants of Ram Ditta, appealed in regard to the portion of the claim disallowed, and the defendant Amritsaria also appealed against the partial decree given to plaintiffs. Three plaintiffs, Phallu, Tulsi and Ramun, did not appeal. The points for decision before the learned District Judge were, first, whether the plaintiffs were collaterals of Mula Mal; and secondly, if so, to what property left by Mula Mal they were entitled. The learned District Judge held that the respective common ancestors of the plaintiffs and Mula Mal, Ratna and Bahadur were brothers, accepted the plaintiffs' appeal, held that the descendants of Ratna were entitled to the possession of the whole property claimed and modified the decree of the lower Court by granting all the plaintiffs, including the three who had not appealed, a decree for possession of the whole property. The appeal of Amritsaria was dismissed.

Amritsaria has come to this Court in second appeal and it is clear from the note regarding the value of the appeal for Court-fee appended to the memorandum of appeal that he only appeals in respect of the land and shop decreed originally by the trial Court. There is no appeal against the additional decree given by the learned District Judge.

The first point taken is that the question of the relationship between Ratna and Bahadur has been decided on inadmissible evidence, since the District Judge relied largely upon a prohit's bahi produced by Hira Lal of Hardwar and stated by him to have been written by his maternal grandfather. It has been found by the learned District Judge that this maternal grandfather was the original priest of the parties and that Hira Lal is now their priest. A Division Bench of the Calcutta High Court laid down in *Collector of Farrukhabad* v. *Gajraj Singh* (1), that entries in panda's books are admissible under S. 32 (6) of the Indian Evi-

(1) [1912] 15 I. C. 625.

dence Act, and this decision, with which I see no reason to disagree, disposes of the appellants' objection against the admissibility of the bahi now in question. No authority has been shown to me to the contrary. The Privy Council decision in *Kalka Parshad* v *Mathura Parshad* (2) is on a somewhat different point. Under S. 32 (6) a written statement made by a person deceased regarding the existence of any relationship by blood between persons deceased, if made on any "other thing on which such statements are usually made," and when such statement was made before the question in dispute was raised, is admissible in evidence, and the statement contained in the Hardwar priest's bahi regarding the relationship of Bahadur and Ratna comes within this definition.

The second point argued is that the shares of Phallu, Tulsi and Ramun, the plaintiffs who did not appeal to the District Judge, should not have been decreed. I have already stated that this appeal has nothing to do with the additional property decreed by the learned District Judge. It has been urged that Phallu as a witness for defendants in the trial Court said that he had no desire to make a claim against them, but he admitted that he signed the plaint, and I see no reason in law why the trial Court should not have included him in the decree-holders. In fact, if he had not done so, the omission might have been open to exception. It was not a point taken in the appeal to the District Judge that no decree should have been passed against Phallu. In any case this man did not specifically surrender anything in favour of the defendants, and if he wishes to do so, there is no reason why he should not give them his share hereafter when the decree is executed. As for the two. Tulsi and Ramun, nothing can be pointed as having taken place in the trial Court which would indicate that they abandoned any claim which they had against the defendants.

Thirdly, an attempt has been made to contend that the plaintiffs have not shown that they are preferential heirs to Amritsaria, the sister's son. They are proved to be related in the male line of descent to Mula Mal in the fifth degree and as such they are sapindas. Amritsaria is nothing more than a bandhu, and according to the rule of Mitakshara succession, the plaintiffs come in as his heirs long before he does. There is no force in this point.

Nothing further has been argued, and I dismiss the appeal with costs.

Appeal dismissed

(2) [1908] 30 All. 510=35 I. A. 166=13 C. W. N. 1=8 C. L. J. 447=5 A. L. J. 701=18 M. L. J. 424=10 Bom. L. R. 1088=11 O. C. 362=4 M. L. T. 380 (P. C.).

A. I. R. 1926 Lahore 158

LE ROSSIGNOL AND HARRISON, JJ.

Nirbhe Ram-Nagar Mal—Plaintiff—Appellant.

v.

Murari Lal-Bhagirat Mal — Defendant—Respondent.

Second Appeal No. 288 of 1921, Decided on 18th January 1924, from the decree of the D. J., Delhi, D/- 9th December 1920.

Civil P. C., S. 100—Finding of fact—Appellate Court merely endorsing trial Court's finding—Finding is not binding in second appeal.

Where a finding of fact arrived at by a trial Court was upheld by the appellate Court in the following words : "After hearing both counsel I am not able to say that the decision is clearly wrong. It is certainly not perverse. Cogent grounds for upsetting it are not forthcoming. It must therefore, prevail."

Held : that it was not an independent finding on the evidence such as can be treated as a finding of fact closing the door to a second appeal.

[P. 159, C. 1]

Sardha Ram—for Appellant.

Shamiar Chand—for Respondent.

Judgment.—The plaintiff firm Nirbhe Ram-Nagar Mal sued the defendant firm for recovery of Rs. 1,901-1-6 damages due for breach of contract, the allegations being that on the 27th October 1918 the parties made an agreement in accordance with which the defendant was to take delivery of 5 bales of cloth on the following day, the 28th October and to pay the price thereof at Rs. 23-4-0 a piece at the time of the delivery ; that the defendant refused the goods which were subsequently sold at a heavy loss.

Both the trial Court and District Judge have concurred in finding that the defendant actually sent the money to the plaintiff firm by the hand of his munim and

that delivery was refused. On this finding the suit has been dismissed.

The following passage occurs in the judgment of the learned District Judge:

"But the lower Court's decision on the matter of fact that defendants did tender money and were refused delivery is based upon evidence and consideration of the prevailing circumstances of the time, and after hearing both counsel I am not able to say that the decision is clearly wrong. It is certainly not perverse. Cogent grounds for upsetting it are not forthcoming. It must, therefore, prevail."

This is not an independent finding on the evidence such as can be treated as a finding of fact closing the door to a second appeal. All the District Judge has found is that he is not prepared to interfere with the finding of the trial Court, and this is not sufficient.

Counsel has taken us through the record and we find ourselves unable to accept the evidence regarding the tendering of money, as the statement of witnesses are vague and unconvincing. We find that the defendant, on whom the onus lay, has wholly failed to establish that he did tender the money and that delivery was refused.

We, therefore, accept the appeal and reverse the decision on this preliminary point and remand the case under O. 41, R. 23 for decision of the remaining points contained in the Issues Nos. 1, 3 and 4.

Stamp on appeal will be refunded and costs will follow the result.

Case remanded.

A. I. R. 1926 Lahore 159

SHADI LAL, C. J., AND ZAFAR ALI, J.

Firm Prabhu Mal-Ghula Mal—Defendants—Appellants.

v.

Firm Babu Ram-Basheshar Das—Plaintiffs—Respondents.

Second Appeal No. 2554 of 1921 Decided on 29th April 1924, against the decree of the Dist. J., Ludhiana, D/- 7th June 1921.

(a) *Contract Act, S. 65—The section does not apply to an agreement void ab initio and known to the parties to be such.*

The section has no application to an agreement which is ab initio void and is known to be such to the parties at the time it is entered into. [P 159 C 2]

(b) *Contract Act, S. 65—As long as a void agreement remains unperformed, money received must be paid back to the person who paid it—Trusts Act, S. 84.*

As long as an unlawful or void agreement remains unperformed, any money paid under it may be recovered back as received to the use of the person who so paid it; 9 *Bom.* 358, *Diss*: 194 *P. R.* 1882, *Foll.* [P 160 C 1]

Meher Chand Mahajan for *Jagan Nath*—for Appellants.

Naval Kishore—for Respondents.

Judgment.—The facts which are relevant to the question of law arising in this second appeal, are briefly as follows:—

On various dates in the month of March and April 1919 the defendants entered into three contracts with the predecessors-in-interest of the plaintiffs by which they agreed to sell three wagons of salt and received Rs. 300 as earnest money. The Courts below have found that these contracts were badni transactions, and the question for determination is whether the plaintiffs are entitled to recover the advances made to the defendants. Now, there can be no doubt that the agreements were void to the knowledge of both the parties at the time when they were made, and it cannot, therefore, be said that they were discovered to be void, within the meaning of S. 65 of the Indian Contract Act. That section lays down that when an agreement is discovered to be void or when a contract becomes void, any person, who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. This section applies to two cases: (1) Where an agreement is discovered to be void; (2) where a contract becomes void. Now, in the case before us there was never a contract enforceable by law, and though there was an agreement that agreement was ab initio void and was known to be such to the parties at the time it was entered into. It is, therefore, clear that the provisions of the section have no application to the facts of the present case.

The learned vakil for the appellants relies upon the judgment in *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (1) which no doubt lays down that advances made in pursuance of a badni transaction cannot be recovered by a suit. But a contrary view has been taken

(1) [1885] 9 Bom. 358.

by a Division Bench of the Punjab Chief Court in *Ganga Ram* v. *Baldewa* (2), and after considering the matter carefully we are not prepared to dissent from the rule laid down by the Punjab Chief Court. It seems to us that the Bombay Court confined its attention to the provisions of S. 65 of the Indian Contract Act and did not consider the effect of S. 84 of the Indian Trusts Act on cases of this kind. That section provides that where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferrer is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferrer.

The principle of this section was given effect to by the Division Bench in *Ganga Ram* v. *Baldewa* (2), and it was held that as long as an unlawful or void agreement remains unperformed, any money paid under it may be recovered back as received to the use of the person who so paid it. The judgment has been followed by the District Judge and we are not prepared to hold that the rule laid down therein is incorrect. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(2) [1882] 194 P. R. 1882.

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LE ROSSIGNOL, J.

Ganpat Rai—Plaintiff—Petitioner.

v.

Nihal Devi—Defendant—Respondent.

Civil Revision No. 561 of 1923, Decided on 21st January 1924, for revision of a decree of the Senior Sub-J., First Class, Sheikhupura, D/- 7th May 1923.

(a) *Accounts—Dealings for many years—Acknowledgment by defendant of the liability but failure to pay—Suit for recovery of the same is maintainable.*

Where a suit was brought on the strength of many years' dealings between the plaintiff and the defendant's deceased husband and on an acknowledgement of the debt by the defendant as representative of her deceased husband and the plaintiff produced his accounts in support of his prayer.

Held: that the suit was not based merely upon the acknowledgment of debt by defendant and was therefore maintainable: 119 *P. R.* 1908, *Dist.*

K. J. Rustomji—for Petitioner.

Durga Das—for Respondent.

Judgment.—The plaintiff sued the defendant, a widow, as the representative of her deceased husband, and in his plaint recited that he had transactions for many years with the husband of the defendant, and that after the death of the original debtor the widow after consideration of the account struck a balance acknowledging her liability for the debt, but had hitherto failed to liquidate it. The trial Court dismissed the suit on two grounds:

(1) That the suit was based upon the acknowledgment of debt which contained no promise to pay and was, therefore, not maintainable and (2) that, as a matter of fact, the acknowledgment of the debt was not thumb marked by the defendant.

On appeal the learned Senior Subordinate Judge did not deal with the question of fact but dismissed the appeal solely on the ground that the suit being based on a mere acknowledgment was not maintainable. The plaintiff has come to this Court in revision and, in my opinion, deserves to succeed. The plaint clearly recites that the suit is brought on the strength of many years dealings between the plaintiff and the defendant's deceased husband and on an acknowledgment of the debt by the defendant as representative of her deceased husband. Moreover the plaintiff produced his accounts in support of his prayer. For these reasons the case is readily distinguishable from that reported as *Pala Mal* v. *Tula Ram* (1).

I accept the petition, set aside the decree of the Court below and remand the case to it for decision on the merits. The costs of this hearing shall follow the final event of the case.

Petition accepted.

(1) [1908] 119 P. R. 1908.

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LEROSSIGNOL AND MARTINEAU JJ.

Duni Chand Dhani Ram—Petitioners.

v.

Commissioner of Income-tax, Punjab—Respondent.

Civil Misc. No. 509 of 1924, Decided on 20th January 1926, made by the Commissioner of Income-Tax, Punjab, Lahore.

Income-tax Act (1922), *Ss.* 23 (2), 22 (4) *and* 37—*Notice under S.* 23 (4)—*Accounts produced*—*Notice under S.* 23 (2) *is essential before accounts can be rejected*—*Income-tax Officer should proceed judicially.*

When a return is furnished and accounts are put in in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not always available particularly in the case of petty traders who very often have only a poor knowledge of accounts. The production of accounts is a substantial compliance with the notice under S. 22 (4) and the assessment will be illegal if the assessee received no opportunity under S. 23 (2) to appear and meet the objections to the return and accounts produced by him.

The Income-tax Officer should always proceed on judicial principles. [P, 162, C. 1, 2]

Jagan Nath Agarwal—for Petitioners.

C. H. Carden Noad—for Respondent.

LeRossignol, J.—This is a case stated and referred by the Commissioner of Income tax, Punjab, under Cl. (3) of S. 66 of the Income tax Act of 1922. The learned Commissioner prefaces his reference with a suggestion that this Court has no jurisdiction to issue a mandamus in this case on the ground that the Commissioner's own order in review of the appellate order passed by his assistant was, equally with the appellate order of his assistant, incompetent. The learned Government Advocate states that he is unable to support this contention which obviously has no force. The Commissioner's order still subsists and has not been set aside; and it would be opposed to all ideas of congruity, legal or other, to hold that an order cannot be challenged on the ground that it should never have been issued.

The disputed assessment, which is confined to an item of Rs. 10,000 in respect of interest was in respect of the year 1922-23. The return authorized by S. 22 of the Act was made on the 9th September 1922, and that showed an income from interest of only Rs. 866. On the 12th February 1923, in obedience to an order issued under S. 22, Cl. (4) the assessee produced his accounts before the Assessing Officer, and on the 23rd February received an assessment order to pay a tax on an income of Rs. 30,000. The assessee applied for cancellation of the assessment under S. 27, but the Income-tax Officer rejected it on the 18th April 1923 by the following order:

"Section 27 does not apply to this case; return was submitted; accounts were seen. The pleas raised are relating to appeal." The assessee then appealed to the Assistant Commissioner who entertained the appeal and remanded the case for fresh enquiry. The appeal was subsequently dismissed, and an application made to the Commissioner for review met with the same fate, but on the merits.

Now, the main contention on behalf of the assessee is that he made a return which was recognised as a return. He produced all the books he had, and if the Income tax Officer was not prepared to accept his accounts he should have acted in a judicial manner, and before proceeding to assess by a rule of thumb should have issued notice under S. 23 (2) to the assessee to appear and answer the criticisms directed against his return and accounts.

The procedure under the Income-tax Act is as follows:—A return of income is called for from the assessee and must be furnished. If that return is not furnished the assessee places himself at the mercy of the Income-tax Officer who shall then make the assessment to the best of his judgment, and the assessee will have no right of appeal.

If a return is made, it is open to the Assessing Officer to accept it and to base the assessment entirely upon it. If he is not prepared to accept it forthwith, he may issue notice to the assessee to appear before him and justify his return by his accounts. If the assessee, although he has furnished the return, fails to produce his accounts in suppport of that return he is placed in the same position as if he had made no return at all. If, however, he has made a return and has produced his accounts in obedience to an order under S. 22 (4), the Income-tax Officer is not justified in rejecting the return and the accounts and in assessing

on a rule of thumb until he has given notice to the assessee under S. 23 (2) of the Act to appear before him and justify his return.

In this case no such notice was issued to the assessee. The Income-tax Officer rejected his accounts which had been produced in compliance with a notice under S. 22 (4) and proceeded forthwith to make the assessment to the best of his judgment. In this connexion we should like to draw the attention of the learned Commissioner to the great laxity which prevails in the office of the Income-tax Officer in the matter of the issue of notices. Probably, with the object of avoiding the multiplicity of notice forms, a form is used which may be a notice either under S. 22 (4) or under S. 23 (2). If the notice is under S. 22 (4) certain erasures are necessary before the notice issues. If the notice is one under S. 23 (2) other portions of the notice must be erased. We find, however, that notices issue without any reasures, so that it is not possible for the assessee to know whether he is being summoned under S. 22 (4) or S. 23 (2). S. 37 of the Act indicates that the procedure of Income-tax Officers is of a judicial nature, and in making his assessment the Income-tax Officer should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay.

Next, S. 13 is invoked as justifying the assessment by the Income-tax Officer. That section provides that if no method of accounting had been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. Now, the Income-tax Officer's application of this section was as follows : "As regards income from interest the Inspector's estimate seems to me a little high. My own estimate is about Rs. 10,000." We do not regard this wholly arbitrary assessment as one justified by S. 13 ; for the Income-tax Officer does not lay down any basis, nor does he indicate how he arrives at his estimate of Rs. 10,000. Had he found that the sums loaned were a certain figure, and had he calculated a flat rate upon those sums, we should have regarded his action as in conformity with the provisions of the section. But a bare statement that his estimate is so and so we regard as a mere guess without any obvious basis. Had the Income-tax Officer even said "The income from interest last year was Rs. 10,000 and the assessee has shown me no reason for holding that his income from interest has diminished this year"—even that would have shown some appreciation of the limitations placed upon him by S. 13.

When a return is furnished and accounts are put in in support of that return the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not always available particularly in the case of petty traders who very often have only a poor knowlege of accounts.

We accept the view that the production by the petitioner of his accounts was a substantial compliance with the notice received under S. 22 (4), and we hold the assessment illegal inasmuch as he received no opportunity under S. 23 (2) to appear and meet the objections to the return and accounts produced by him. The petitioner shall receive costs of this reference from the respondent.

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* A. I. R. 1926 Lahore 162

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Roshan—Defendant—Appellant.

v.

Nigahia and *others*—Plaintiffs and Defendants—Respondents.

Letters Patent Appeal No. 17 of 1925, Decided on 23rd November 1925, from the judgment of Harrison, J., in Civil Appeal No. 447 of 1924 on 19th December 1924.

* *Civil P. C., S.* 11, *Expl.* 4—*Defendant in possession must resist claim on all possible grounds.*

A defendant in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward : 11 *M. I. A.* 50. *Foll.* [P. 163, C. 1]

Muhammad Tufail—for Appellant.

Dev Raj Sawhney—for Respondents.

LeRossignol, J.—Nigahia, Roshan and Jani were cosharers in a piece of land,

but Jani's share was already mortgaged to Nigahia when Jani contracted to sell his equity of redemption to both Roshan and Nigahia for Rs. 700. The transaction, however, fell through and subsequently Jani sold the equity of redemption of his share to Roshan alone. Roshan then sued Nigahia and Jani for redemption and obtained a decree on payment of Rs. 300. In that suit Nigahia did not plead that one half of Jani's share had been sold to him, but contended merely on the footing of the mortgage that over Rs. 500 were due to him. Then Nigahia brought the suit out of which the present appeal arises for possession of one half of Jani's share on the ground that it had been sold to him.

The District Court and the trial Court dismissed the suit, holding that the matter was res judicata ; but the learned Judge in Single Bench has held that the matter is not res judicata, inasmuch as " Nigahia could not have pleaded in the redemption suit that he hoped in time to assert his rights and become owner by purchase of one half of Jani's share." From that judgment the present Letters Patent appeal has been preferred and we consider that it must succeed.

The present suit is not a suit for specific performance of the alleged contract of sale. The facts now alleged by Nigahia are the same facts as existed at the time of the redemption suit and what he now pleads is a completed sale. At the time of the redemption suit he was in possession of the land and had he alleged and proved in that suit what he must prove in this suit, in order to succeed, Roshan's suit for possession of one half of Jani's share would have failed. The rule laid down in *Srimat Rajah Moottoo Vijaya* v. *Katama Natchair* (1), is defendant being in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward. Now at the time of Roshan's suit Nigahia, on his present pleas, was in possession and the owner of one half of Jani's share. He did not plead that in respect of that half share his mortgage charge had merged into a sale. On the contrary he accepted the contest on the footing of the mortgage and claimed merely that before ouster he was entitled to Rs. 516 which included a sum representing the improvements which he alleged he had effected in the land.

For the foregoing reasons we accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

(1) [1866] 11 M. I. A. 50=10 W. R. 1.=2 Sar. 212 (P. C.).

A. I. R. 1926 Lahore 163

SCOTT-SMITH AND FFORDE, JJ.

Gujar Khan—Defendant — Appellant.

v.

Ghulam Khan — Plaintiff — Respondent.

Second Appeal No. 2043 of 1921, Decided on 24th April 1925, against the decree of the Dist. J., Attock, at Campbellpur, D/- 24th June 1921.

(a) *Custom (Punjab)—Chundawand custom may prevail in one family but not in another.*

The chundawand custom frequently prevails in one family of a tribe while it does not prevail in another family of the same tribe. [P. 164, C. 2]

(b) *Custom (Punjab) — Special custom is not established though the balance of evidence very slightly inclines in favour of person alleging.*

A special custom cannot be held to be established merely because the balance of evidence inclines very slightly in favour of the person alleging its existence. [P. 164, C. 2]

(c) *Custom (Punjab) — Succession—Property distributed according to the rule of pagwand—Burden of proving that it is governed by chundawand is on the person so alleging.*

Where in cases of collateral succession arising in the Punjab, the decision of which is governed by custom, and in which a portion of the property of a common ancestor of the deceased and of the claimants is in dispute it appears that the property of the common ancestor was distributed according to the rule of pagwand ; the burden of proving that the whole blood excludes the half blood in succession lies upon the person alleging its existence ; 4 *P. R.* 1891 (*F. B.*), *Foll.* [P. 164, C. 2, P. 165, C. 1]

M. S. Bhagat—for Appellant.

Shuja-ud-Din for *Abdul Qadir* — for Respondent.

Judgment.—Bahadur Khan, a Ferozal Khattar of Thatti Gujran in the Fateh Jang Tehsil of the Attock District, died leaving three sons, Ghulam Khan and Ali Khan by one wife and Gujar Khan by the other. His land was mutated in favour of his three sons in equal shares. Subsequently Ali Khan died and his widow remarried. Mutation of Ali Khan's share was effected by the revenue authorities in the names of Ghulam Khan and Gujar

Khan equally. The suit out of which the present second appeal arises was brought by Ghulam Khan, who contended that under the rule of chandawand mutation of his uterine brother's share should have been effected in his favour alone and that his brother of the half blood had no right to share in it. The Courts below have decided in favour of the plaintiff and decreed his claim. Gujar Khan has filed a second appeal to this Court on a certificate granted by the District Judge.

Now it is clear from the above that when Bahadur Khan died succession of his sons to his land was according to the rule of pagwand and the question is whether the plaintiff has proved the special custom set up by him, namely, that succession subsequently among the sons of Bahadur Khan is according to the rule of chundawand. In the Customary Law of Attock District by Mr. Kitchin the answer to Question No. 2 is that the pagwand custom is almost universally prevalent in the district. The first piece of evidence relied upon by the plaintiff was the iqrarnama chakwar of the ilaqa Khatran prepared at the First Regular settlement in 1862. The answer given here was in favour of the defendant's contention and against the special custom set up by the plaintiff, and the answer was supported by a specific instance; but three lambardars gave a contrary opinion. The entry in this document, therefore, is partly in favour of the appellant and partly in favour of the respondent. The next piece of evidence relied upon by the plaintiff was a judgment by Mr. Martineau, Divisional Judge, Rawalpindi, dated 26th May 1913, in the case of *Waris Khan* v. *Sher Mohammed Khan and others*, in which the custom set up by the plaintiff was found to obtain. Mr. Bhagat objects to this decision on the ground that it was an obiter dictum. In that case the first issue was whether the alienor had power to alienate his property without necessity, and it was found that he had such a power. Under these circumstances the finding on the second issue, namely, that the whole blood excluded the half blood, was unnecessary, but all the same it is a piece of evidence in support of the custom put forward by the plaintiff. There, as here, the parties were Ferozal Khattars, but they were living in a different district and we cannot think that this instance is of much use for the purpose of proving that a similar custom prevails in a village in the Fateh Jang Tehsil of the Attock District even though this tehsil formed a part of the old Rawalpindi District. The chundawand custom is one which frequently prevails in one family of a tribe and does not prevail in another family of the same tribe. Plaintiff also relied upon a mutation from village Karala, dated the 4th of March 1916, which is an exact instance of the rule set up by him. This instance is not of very much importance as the question of succession was subsequently made the subject of a suit which was under appeal when the present case was decided by the District Judge. Counsel are unable to inform us whether the suit has been finally decided yet or not. There is also on the record a copy of the judgment of Khan Bahadur Abdul Ghafur Khan, District Judge of Attock, in which the custom set up by the plaintiff was found to prevail in another family of the same tribe as that to which the parties belonged.

The learned District Judge considered that the balance of evidence in the present case inclined, though very slightly, in the plaintiff's favour and he laid special stress on Mr. Martineau's judgment. In our opinion Mr. Martineau's decision helps the plaintiff very little and we do not consider that a special custom can be held to be established merely because the balance of evidence inclines very slightly in favour of the person alleging its existence.

In *Gholam Muhammad* v. *Muhammad Bakhsh* (1) it was held that in cases of collateral succession arising in the Punjab of which the decision is governed by custom, and in which a portion of the property of a common ancestor of the deceased and of the claimants is in dispute, when it appears: (a) that the property of the common ancestor was distributed according to the rule of chundawand; or (b) that the property of the common ancestor was distributed according to the rule of pagwand: the Court may presume, until the contrary is proved, in case (a) that the whole blood excludes the half blood; and in case (b) that the whole blood and half blood succeed together.

Following this it is clear that in the present case the burden of proving that

(1) [1891] 4 P.R. 1891 (F.B.).

the whole blood excludes the half blood in succession to the share of Ali Khan lay upon the plaintiff and, in our opinion, he has quite failed to discharge it. We, therefore, accept the appeal, and, setting aside the order of the lower Courts dismiss the suit with costs in all Courts.

Appeal accepted.

A. I. R. 1926 Lahore 165

MARTINEAU AND JAI LAL, JJ.

Nand Kishore—Plaintiff—Appellant.

v.

Sultan Singh and *another*—Defendants—Respondents.

First Appeal No. 2567 of 1916, Decided on 20th October 1925, from the decree of the Senior Sub-J., Delhi, D/- 30th May 1916.

(a) Civil P. C., S. 47—Applicability—Positions of judgment-debtor suing to avoid execution sale to decree-holder and of decree-holder suing for possession of property purchased in execution, differ.

The position of a judgment-debtor who brings a suit contesting an execution sale to the decree-holder differs as regards the applicability of S. 47, from the position of a decree-holder who sues for the possession of the property he has purchased in execution : 8 *P. R.* 1918 and 31 *All.* 82 (*F. B.*), *Dist.* [P 165 C 2]

(b) Civil P. C., O. 21, R. 92 (3)—Sale confirmed—Judgment-debtor cannot afterwards sue questioning sale.

After execution sale is confirmed, a judgment-debtor cannot sue for a declaration that he is the owner of a particular share of the property. [P 165 C 2]

(c) Civil P. C., S. 47—Suit asked in appeal to be treated as application under S. 47—Plaint not presented to executing Court—Prayer was not granted.

Where a suit was asked, in appeal, to be treated as an application under Civil P. C., S. 47.

Held : that as the plaint had not been presented to the executing Court, the request should not be granted. [P 165 C 2, P 166 C 1]

M. S. Bhagat—for Appellant.

Sardha Ram and *Jagan Nath Bhandari*—for Respondents.

Martineau, J.—One Shafkat Ullah mortgaged his Rs. 0-3-9-1/2 share in certain shops to the defendants who in 1914 obtained a decree in the Court of the District Judge of Delhi for sale on the mortgage. The property was sold in execution and purchased by the defendants themselves with the permission of the Court. The sale confirmed and formal possession was delivered to the defendants. The present plaintiff, Nand Kishore was a party to the suit brought on the mortgage and was one of the judgment-debtors, but the application for execution was made against Shafkat Ullah only and it was only his share which purported to be sold. The plaintiff alleges that he had purchased a Re. 0-3-4 share in the property from Shafkat Ullah in 1912, that after that only a Re. 0-0-5-1/2 share remained with Shafkat Ullah ; and that the sale of a share in excess thereof in the execution proceedings was invalid ; and he asks for a declaration that he is the owner of a Re. 0-3-4 share. The suit has been dismissed as barred by S. 47 of the Civil Procedure Code and the plaintiff appeals.

Reliance is placed for the appellant on *Chotha Ram* v. *Karmon Bai* (1), which followed *Bhagwati* v. *Banwari Lal* (2). In those cases it was held that a decree-holder who purchases at an auction sale with the permission of the executing Court occupies the same position as any other auction-purchaser ; that a question arising between him and the judgment-debtor, whose property has been sold, as to the possession thereof after the confirmation of the sale, is not a question relating to the execution, discharge, or satisfaction of the decree ; and that the decree-holder is not precluded by the provisions of S. 47 of the Civil Procedure Code from bringing a separate suit to recover possession of the property purchased by him. It is to be observed that those were cases in which the plaintiff was seeking to obtain possession of the property on the strength of the sale, which had taken place in his favour, and are therefore not applicable to the present case, in which the plaintiff is seeking to avoid the sale, which he contends, was invalid. Further, whether or not S. 47 of the Civil Procedure Code applies, we are of opinion that, the sale having been confirmed and become absolute, the present suit, in which the plaintiff is virtually seeking to have the sale set aside, is baared by O. 21, R. 92 (3).

The appellant has also asked, that if the suit does not lie his plaint may be

(1) [1918] 8 P. R. 1918.
(2) [1908] 31 All. 82=6 A. L. J. 71 (F. B.).

treated as an application under S. 47; but we are not prepared to grant this request, seeing that the plaint was not presented to the executing Court, which was the Court of the District Judge, but to the Court of a Subordinate Judge.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 166

SHADI LAL, C.

Emperor

v.

Piara Singh—Accused.

Criminal Revision No. 1127 of 1925, Decided on 9th December 1925, from the S. J., Sialkot, D/- 23rd June 1925.

(a) *Punjab Excise Act (I of 1914), S. 61 (1)—Offence under—Punishment must be deterrent.*

In awarding punishment for an offence under the Excise Act the Courts must always bear in mind that illicit distillation implies a good deal of preparation, and results not only in the loss of excise revenue, but also in drunkenness. The offence also often escapes detection and it is necessary to impose a sentence which would have a deterrent effect: 19 *P. R. (Cr.)* 1916, *Foll.*

[P 167 C 1]

(b) *Criminal P. C., S. 562—Offence implying previous preparation and often escaping detection—S. 562 cannot be invoked.*

Section 562 cannot be reasonably invoked by a person convicted of an offence which not only implies previous preparation but often escapes detection. It cannot be urged on behalf of such a convict that he had succumbed to a sudden tempatation and that the Court should therefore exercise its discretion under the aforesaid section in his favour and give him another chance.

[P 167 C 1]

Case reported by the Sessions Judge, Sialkot, under Criminal P. C., S. 438, recommending enhancement of the sentence imposed by the trial Magistrate.

In the course of his report the learned Sessions Judge remarked as follows:

In support of the contention that the accused has been given a very lenient sentence the Public Prosecutor cites 19 *P. R. Criminal* 1916 (*Emperor* v. *Sajan Singh*) which lays down that deterrent sentence in such cases where the offence of manufacturing illicit liquor has been made out is absolutely necessary and that the principle of first offence has no application to such cases because when a man is caught manufacturing illicit liquor he has probably done it at least a dozen times before undetected.

The circumstances of the case, reported on page 282 of 17 *Criminal Law Journal Reports* as (*Lehna Singh* v. *Emperor*) were peculiar. The petitioner was there an old man of 65 or 70 and it was found that the accused in that case was keeping the *mat* of lahan not for his own use but on behalf of another. Here the accused is a young man of about 19 years of age in appearance, though he mentions it to be 15 or 16, and he was caught manufacturing illicit liquor on the spot red-handed. Therefore the sentence of fine in his case seems inadequate. The ruling *Lehna Singh* v. *Emperor* is dated the 21st January 1916, while the ruling *Emperor* v. *Sajan Singh* is dated the 3rd April 1916. So it is desirable that the latter ruling be followed. There is another ruling of the Lahore High Court reported as *Emperor* v. *Budha* (1). It is dated the 7th January 1921 and therefore more recent. Herein it was held that to award any period of imprisonment was not necessary and the fine was enhanced from Rs. 30 or Rs. 65 to Rs. 200 in the case of each accused. But in that case only 14 seers 8 chhataks of lahan was found in possession of the accused. Here a large quantity of lahan has been discovered; therefore, the sentence of fine is not adequate. I recommend an enhancement of sentence in the present case and submit the record on the revision side to the High Court.

Gobind Ram Khanna—for the Crown.

Mohsin Shah—for Accused.

Order of the High Court.

Shadi Lal, C. J.—There is ample evidence on the record to prove the fact that on the night between the 14th and 15th of February 1925, the accused Piara Singh was distilling illicit liquor in his field; and it is common ground that a distilling apparatus, a large quantity of lahan and two bottles containing illicit liquor were recovered from the field. The Courts below have concurred in holding that Piara Singh is guilty of an offence described in Cl. (a) of S. 61, sub-S. (1) of the Punjab Excise Act I of 1914; and I have no hesitation in endorsing their conclusion.

The trial Magistrate has sentenced the convict to a fine of Rs. 200, but the learned Sessions Judge considers the sentence to be inadequate and has submitted

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(1) [1921] 22 Cr. L. J. 258.

the record to this Court under S. 438, Criminal P. C., with a recommendation that the sentence be enhanced. In awarding punishment for an offence under the Excise Act the Courts must always bear in mind that illicit distillation implies a good deal of preparation and results, not only in the loss of excise revenue, but also in drunkeness. Judicial experience also shows that the offence often escapes detection, and, as laid down in *Crown* v. *Sujan Singh* (2), it is necessary to impose a sentence which would have a deterrent effect. That this was the intention of the Legislature is clear from the fact that the maximum term of imprisonment for manufacturing illicit liquor was raised in 1914 from four months to one year, and has recently been further enhanced to two years: vide S. 2 of the Punjab Excise (Amendment) Act II of 1925.

In view of the large profits derived from illicit distillation and the fact that the crime is not always detected, I do not think that the sentence of a mere fine can have any deterrent effect. Nor do I consider that the principle embodied in S. 562, Criminal P. C., which, as amended by Act 18 of 1923, applies, not only to persons who are convicted of an offence punishable under the Indian Penal Code, but also to those who are found guilty of an offence punishable under a special or a local Act, can be reasonably invoked by a person convicted of an offence like the present which, as I have already observed, not only implies previous preparation but often escapes detection. It cannot be urged on behalf of such a convict that he had succumbed to a sudden temptation and that the Court should therefore exercise its discretion under the aforesaid section in his favour and give him another chance.

Having regard to the principles enunciated above, I am of opinion that the sentence awarded by the Magistrate is manifestly inadequate. While dismissing the application for revision preferred by the convict I accept the recommendation made by the learned Sessions Judge so far as to impose upon the convict a sentence of rigorous imprisonment for 6 months in addition to the fine inflicted by the Magistrate.

(2) [1916] 19 P. R. 1916 Cr.

A. I. R. 1926 Lahore 167

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Sunder Singh and *others*—Plaintiffs—Appellants.

v.

Ram Nath and *another*—Defendants—Respondents.

Letters Patent Appeal No. 174 of 1924, Decided on 12th November 1925, from the judgment of Scott-Smith, J., D/- 28th May 1924.

(a) *Transfer of Property Act, S. 53—Payment of debts takes precedence over right of maintenance.*

A Hindu made a gift of the whole of his immovable property to his wife and infant son. Three years later he was declared an insolvent.

Held: under his personal law the donor is bound to maintain his infant son and wife; but that obligation is a personal obligation and the payment of debts take precedence over a right of maintenance. The last clause of S. 53 of the Act refers only to a transferee for value who has acted in good faith, and if good faith has not been established the transaction will be vitiated although the transfer may be one for value and not a gratuitous one. [P 168 C 1]

(b) *Civil P. C., O. 22, R. 2—Suit by creditor to set aside fraudulent transfer by debtor—Some parties (creditors) dying—Legal representative not substituted in time— Suit does not abate.*

One creditor alone can maintain a suit on behalf of all for setting aside as fraudulent a transfer by the debtor. Hence the death of some of the creditors who were parties originally to such a suit does not cause an appeal therein to abate though legal representatives are not substituted in time. [P 168 C 1]

Fakir Chand—for Appellants.

Badri Das—for Respondents.

LeRossignol, J.—In May 1915 Labhu Ram gifted in favour of his wife and his infant son a shop and land, apparently the whole of his immovable property. In 1918 he applied to be adjudicated an insolvent and was so adjudicated in March 1919, whereupon certain of his creditors instituted the suit out of which this appeal arises to avoid the aforesaid gift on the ground that it was a fraudulent transaction made for the purpose of defeating the alienor's creditors at a time when he was financially embarrassed.

The trial Court and the first appellate Court decreed for the creditors on the finding that at the time of making the gift the donor was unable to pay his debts and the transaction was carried out in fraud of his creditors and with the intention of concealing his property.

On second appeal to this Court the Single Bench came to the conclusion that "the real object of the gift was to make provision for the maintenance of Labhu Ram's wife and son, his own financial condition at the time being embarrassed." "There is no suggestion that if there was any fraudulent intention on the part of the donor, his wife was privy thereto," and it upheld the gift. Before this Bench it is contended on behalf of the creditors that the finding that the transaction was a fraudulent one was a question of fact which could not be impeached in second appeal, and that in any case the transaction was a gratuitous one, and any claim by the donees in respect of maintenance must be postponed to the claims of the donor's legitimate creditors. On behalf of the respondents it is contended that the gift was not gratuitous, inasmuch as the donor was under a legal obligation to maintain his wife and infant son.

Our finding is that the transaction was clearly fraudulent. No doubt under his personal law the donor is bound to maintain his infant son and wife, but that obligation is a personal obligation and the payment of debts takes precedence over a right of maintenance. The last clause of S. 53 of the Transfer of Property Act refers only to a transferee for value who has acted in good faith, and in this case good faith has not been established.

We agree that the transfer was fraudulent, and accepting the appeal we decree for the plaintiff's with costs throughout.

For the respondents a preliminary objection was raised that three of the parties to the suit died long ago and their representatives had not been brought on the record. Of these persons one was a plaintiff and two were defendants (creditors). but the appeal has not abated for that reason; for one creditor alone could have maintained this suit on behalf of all. We overrule the preliminary objection.

Appeal accepted.

A. I. R. 1926 Lahore 168

BROADWAY AND ZAFAR ALI, JJ.

Ishar Das-Dharamchand— In the matter of.

Misc. Civil Case No. 655 of 1923, Decided on 20th January 1925, under S. 66 (3) of the Income Tax Act 11 of 1922.

(a) *Income Tax Act* (11 *of* 1922), *S.* 9—*Loss caused by standing surety to another firm is not loss in business.*

Loss incurred by a firm in standing surety to another firm is not loss in the course of the business and so cannot be deducted from the total assessable income for income-tax. [P 169, C 1, 2]

(b) *Income Tax Act* (11 *of* 1922), *S.* 66 (2) *and* (3)—*Application should state all questions of law desired by the petitioner to be referred—Out of several points, if one point only is referred by Commissioner, objection cannot be taken.*

The application under S. 66 (2) to the Commissioner should state the questions of law which the petitioner desires to be referred to the High Court and the Commissioner should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. If the Commissioner confines his reference to one point out of several points, objection cannot be taken to his action. [P 169, C 2; P 170 C 1]

Badri Das R. B.—for Petitioners.

Dalip Singh—for Respondent.

Broadway, J.—A joint Hindu family carrying on business under the style of Ishar Das-Dharam Chand in Amritsar and elsewhere, was assessed to income-tax by the Income Tax Officer on the 25th of March 1923. It was found, after what appears to have been a very full enquiry, that the income of this business, liable to taxation, amounted to over a lac. The assessee then undertook to pay tax on a round sum of one lac. This offer was accepted by the Income Tax Officer and the assessment was made accordingly. The firm then petitioned the Assistant Commissioner of Income Tax. The Assistant Commissioner, after going thoroughly into the points raised, upheld the assessment of the Income Tax Officer. Thereupon Messrs. Ishar Das-Dharam Chand moved the Income Tax Commissioner under S. 66 (2) of the Income Tax Act and raised the following points:

(1) That the rejection of the statement of accounts submitted by the petitioner is opposed to law.

(2) That the assessing authorities were not justified in applyiug a flat rate of 5 per cent. to determine the assessable income.

(3) That the refusal to allow a loss of

Rs. 25,000 incurred in Bombay as a business deduction was illegal.

(4) That the petitioners being members of an undivided family were entitled to a reduction of Rs. 75,000 for purposes of super-tax. It was asked that these questions of law be referred to the High Court. The Income Tax Commissioner allowed the prayer as to the reduction of Rs. 74,000, for purposes of super-tax, but declined to refer the case to this Court on the ground that no questions of law were involved.

The petitioners then came up to this Court under S. 66 (3) of the Income Tax Act and asked this Court to take the action provided for by that sub-section in connexion with the deduction of Rs. 25,000 referred to in the third ground mentioned above. This Court not being satisfied with the correctness of the Commissioner's decision required him to state the case and to refer it. The Income Tax Commissioner thereupon stated the case. He pointed out that the direction of this Court did not confine the statement of the case to the only point raised before the Court and, therefore, he stated the case relating to the three points, Nos. 1, 2 and 3, raised before him. Before us the case has been argued on behalf of the petitioners by Mr. Badri Das, while the learned Government Advocate has addressed us on behalf of the Commissioner.

Mr. Badri Das has addressed us on two points only. He has urged : (1) that the application of a flat rate was without any material on the record and was, therefore, erroneous and illegal ; and (2) that a sum of Rs. 25,000 should have been deducted from the total income and treated as a loss. The second point is the point which was taken in the petition to this Court.

It appears that the petitioners have got a branch of their business at Bombay. There they stood surety for another firm. That firm became insolvent with the result that the petitioners had to pay the sum of Rs. 25,000. It has been held by the Income Tax Officer that the loan for which the petitioners stood surety had nothing whatever to do with the petitioners' business. The petitioners stood surety in order to do friends of theirs a kindness. It is unfortunate that they have been called upon to pay up for their friends but inasmuch as this standing of surety was not in the course of the petitioners' business, it cannot be said that the loss was incurred in connexion with the petitioners' business. The refusal to allow this amount to be deducted from the total assessable income was, therefore, perfectly correct.

As to the first point the learned Government Advocate urged : firstly, that inasmuch as the only point raised before this Court by the petitioners was that relating to the deduction of Rs. 25,000 the statement of the case in so far as it related to any other points was unnecessary. In the alternative he contended that the decision on that point was one of fact and that the application of a flat rate was justified. The language of S. 66 (3) is wide and it is not easy to say whether it was the intention of the Legislature that this Court should confine itself to the points raised before it, or whether the raising of one point in the application to the Court would necessitate the statement of all the points raised before the Commissioner although not pressed in the application to this Court. Under S. 66 (3) an assessee may apply to the Commissionor "requiring him to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court." If the Commissioner refuses to do this on the ground that no question of law arises the assessee may under S. 66 (3) apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

It seems to me that the application under S. 66 (2) to the Commissioner should state the questions of law which the petitioner desires to be referred to the High Court and I am also inclined to the view that the application under S. 66 (3) should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. In the present case three points were taken before the Commissioner in the application under S. 66 (2). One question alone was raised in the application to this Court under S. 66 (3), and it seems to me that

had the Commissioner confined his reference to the point raised before this Court objection could not have been taken to his action. As he has, however, stated the case on the other question I think it necessary to dispose of it.

In this connexion an examination of the proceedings shows that the enquiry was not a cursory or a summary one. The Income Tax Officer called for the accounts and after an examination of them, as well as of an auditor's report based on them came to the conclusion that they were not reliable. This undoubtedly is a pure question of fact. The Income Tax Officer then after a consideration of the dealings accepted the turnover as shown by the petitioners and came to the conclusion that a flat rate of 5 per cent. was a reasonable amount to fix. His finding that a profit had been made is also a question of fact and the assessment based on a 5 per cent. flat rate cannot be regarded as unreasonable. Further, in the present case it will be seen that the petitioners themselves offered to pay on one lac, and I would, therefore, hold that the conclusions arrived at by the Income Tax Officer are correct and would dismiss the application with costs.

Zafar Ali, J.--I concur.

Application dismissed.

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* A. I. R. 1926 Lahore 170

ZAFFAR ALI AND ADDISON, JJ.

Rang Ilahi—Defendant—Appellant.

v.

Mahbub Ilahi and *another*—Plaintiffs—Respondents.

First Appeal No. 1302 of 1921, Decided on 19th November 1925, from the decree of the Senior Sub-J., Jhang, D/- 4th February 1921.

* *Muhammadan Law—Minor — Alienation of minor's property by his mother is void—But alienee must be compensated for benefit done to minor's estate—Specific Rel. Act, S. 41.*

A Muhammadan mother has no power to alienate the property of her minor son. Such alienation is void ab initio and the alienee's position is no better than that of a trespasser : [45 *Cal.* 878, *Foll.*] The minor is, therefore, entitled to recover possession of the property ; but in setting aside the alienation the Court may, under S. 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were benefited ; 30 *Cal.* 539 (*P. C.*) ; 28 *Bom.* 181 and *A. I. R.* 1925 *Bom.* 499, *Foll.* [P. 171, C 1 and 2]

Fakir Chand and *J. L. Kapur*— for Appellant.

Niaz Muhammad and *Sheikh Muhammad Monier*—for Respondents.

Zafar Ali, J.—The property in suit, consisting only of certain portions of a house, devolved on the plaintiffs on the death of their father Allah Ditta in April 1905, when they were minors of tender ages. In February 1906 their mother raised Rs. 3,000 by mortgaging this property on their behalf to the defendant who is the owner of the rest of the house. The deed of mortgage executed by her was duly registered and, as stated therein, the term of mortgage was 60 years. The plaintiffs now sue to recover possession of the property stating that as their mother had no authority to alienate it the mortgage was void and inoperative as against them. The defendant mortgagee pleaded that the mortgage having been made for the benefit of the minors was binding on them ; that the suit was barred by time; and that in addition to the mortgage money he was, according to the express terms of the mortgage, entitled to recover Rs. 1,100 on account of the costs of the improvements to the house made by him. The Court below came to the conclusion that the suit was within time and the mortgage was void, but that the plaintiffs were bound to pay the amount by which they were benefited. It further found that out of the mortgage money Rs. 2,500 was paid to the creditors of plaintiffs' father who had shortly before his death executed a bond hypothecating certain house property for this amount and agreeing to pay interest thereon ; that as the father died poor and left no money the mother required Rs. 500 to bring up the plaintiffs and that Rs. 400 was payable to the defendant on account of improvements to the house. A decree for possession of the house, on condition of payment of Rs. 3,400, was accordingly passed and the parties were left to bear their own costs.

The defendant appeals to urge : (1) that the suit should have been dismissed because the mother was competent by custom to make the alienation and also because it was barred by time as one of the plaintiffs was over 21 years of age at the time of the institution of the suit; and (2) that in any case he is entitled to the full amount of the costs of the

improvements. The plaintiffs have filed cross-objections against the order for payment of Rs. 3,400.

Counsel for the plaintiffs-respondents raised a preliminary objection that the appeal is not properly stamped. The value of the suit was Rs. 5,200, but the appeal is valued at Rs. 1,800 only. Counsel for the appellant states that the trial Court having allowed him Rs. 3,400 he valued the appeal at Rs. 1,800. But the relief sought in appeal being dismissal of the suit, and not merely enhancement of the amount allowed, Court-fee was obviously payable on the value of the suit. The appellant's counsel was therefore put on his option either to make good the deficiency in Court-fee or to confine his appeal to the matter for which he paid the Court-fee. He chose the latter course and therefore the only question for determination as regards the appeal is whether the defendant is entitled to recover from the plaintiffs Rs. 700 more on account of the well that he has constructed in the house. This point and the cross-objections can be dealt with together.

Now, it is settled law, as is laid down by their Lordships of the Privy Council in *Imambandi* v. *Mutsanddi* (1), that a Muhammadan mother has no power to alienate the property of her minor son. This being so the mortgage in the present case was void ab initio and the mortgagee's position was no better than that of a trespasser. The plaintiffs are therefore entitled to recover possession of the property and the question is whether in accordance with the provisions of S. 41 of the Specific Relief Act the relief to which they are entitled should be granted subject to the condition of their making compensation to the defendant. In *Mohori Bibee* v. *Dharmodas Ghose* (2) their Lordships of the Privy Council made the following observations with regard to this section :—" Another enactment relied upon as a reason why the mortgage money should be returned is S. 41 of the Specific Relief Act (1 of 1877) which is as follows :—'S. 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' S. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised." In view of the above it was held in *Dattaram* v. *Vinayak* (3) and recently in *Limbaji Ravji* v. *Rahi Ravji Hajare* (4) that " in setting aside a sale made on behalf of a minor by an unauthorized person the Court may under S. 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were benefited."

We find that in the present case the minors and their estate were benefited to the extent of Rs. 3,400 and we, therefore, consider that justice requires that they should pay this amount to the mortgagee before taking possession of the mortgage property. We agree with the Court below that the construction of the well in the house was not necessary and does not constitute an improvement, and we are of opinion that the costs of the well was rightly disallowed. The result is that we dismiss the appeal as well as the cross-objections and leave the parties to bear their own costs.

Appeal and cross-objections dismissed.

(1) [1918] 45 Cal. 878=45 I. A. 73 (P. C.).
(2) [1903] 30 Cal. 539=30 I. A. 114 (P. C.).
(3) [1904] 28 Bom. 181.
(4) A. I. R. 1925 Bom. 499.

A. I. R. 1926 Lahore 171

MARTINEAU AND JAI LAL, JJ.

Khizar Hayat and *another*—Defendants—Appellants.

v.

Allah Yar Shah—Plaintiff—Respondent.

First Appeal No. 498 of 1921, Decided on 7th November 1925, from the decree of the Senior Sub-J., Jhang, D/- 1st October 1920.

(a) *Custom—Punjab—Sayyads of Kot Isa Shah, Jhang Tahsil—Daughter not marrying in father's family—Daughter and her sons are excluded by collaterals.*

Among Sayyads of Kot Isa Shah in the Jhang tahsil, having regard to entries in the Riwaj-i-

ams prepared at the Settlements of 1880 and 1994, a near collateral has a preferential claim to a daughter's sons whose mother has not married in the family of her father. [P. 217, C. 1]

(b) *Custom:—Punjab—Gift to person who will succeed by inheritance, apart from gift—Property is not donee's self-acquired one.*

Where the gift is to a person who will succeed to it by inheritance apart from the gift property originally ancestral does not become the self-acquired property of the donee; *A. I. R.* 1924 *Lah.* 538 (*F. B.*), *Foll.* [P. 217, C. 2]

Niaz Muhammad and *Muhammad Monier*—for Appellants.

Tek Chand, M. L. Puri and *Moti Ram*—for Respondent.

Jai Lal, J.—Two pedigree-tables will be found at pages 207 and 209, respectively, of the printed paper book.

Maksud Shah and Abdullah Shah were two brothers. Abdullah Shah's daughter, Sahib Khatun, was married to Maksud Shah's son, Pir Kamal. They had two sons, Ghulam Murtaza and Nur Zaman. Pir Kamal had two other sons by different wives. One of them is Allah Yar Shah, the plaintiff, and the other is Karam Hussain, who is a pro forma defendant in this case. After the death of Abdullah Shah his widow, Mt. Said Bibi, gifted some land to Nur Zaman, but Nur Zaman died sonless. She, therefore, made a gift of the same land to Ghulam Murtaza. The deed of gift is witnessed by Pir Kamal. Ghulam Murtaza having died, his widow, Mt. Allah Jawai, made a gift of the land to Defendants Nos. 1 and 2, who are the sons of Mt. Mundai, a daughter of Ghulam Murtaza, by Mt. Allah Jawai. This gift was made on the 13th July 1915. The plaintiff instituted this suit for a declaration that the gift by Mt. Allah Jawai was invalid without the consent of the reversioners, alleging that the property in the hands of Ghulam Murtaza was ancestral qua the plaintiff. He therefore claimed possession of a half share in a part of the property which was in the actual possession of the defendants, and a declaration as regards the other part which was in possession of a mortgagee. Karam Hussain was alleged by the plaintiff to be the owner of the other half, and it was alleged that he had declined to join in the suit. He was, therefore, impleaded as a defendant. The suit was contested by Defendants Nos. 1 and 2 on various grounds, but it was decreed by the Senior Subordinate Judge of Jhang, who held that the property was ancestral, that the defendants were not the legal heirs of Ghulam Murtaza, and that the gift made by Mt. Mundai was not for necessity." Presumably he meant by this last expression that Mt. Mundai was incompetent to make the gift. Both parties were agreed that they were governed by custom and not by Muhammadan Law.

The decree of the learned Senior Subordinate Judge is attacked before us on there grounds, namely:

1. That Mt. Mundai, the daughter of Ghulam Murtaza, was married to one Saleh Shah, who was a collateral of Ghulam Murtaza, and therefore, according to the special custom prevailing among the parties, Mt. Mundai and through her Defendants Nos. 1 and 2 were the heirs of Ghulam Murtaza.

2. That it had not been proved that the property was originally ancestral, and that in the case of non-ncestral property daughters succeed in preference to collaterals.

3. That the gift by Mt. Said Bibi to Ghulam Murtaza was not to an heir, but was to one of several heirs, and therefore the gifted property became the self-acquired property of Ghulam Murtaza.

That there was a special custom governing the parties according to which a widow was competent to make a gift of the estate in her hands.

After hearing counsel we are of opinion that the conclusions of the learned Senior Subordinate Judge are correct. The parties are Sayyads of Kot Isa Shah in the tahsil of Jhang. The learned counsel on both sides rely on the riwaj-i-ams prepared at the Settlements of 1880 and 1904.

We will first dispose of the contention of the learned counsel for the appellants that Defendants Nos. 1 and 2 were entitled to succeed to the estate of Ghulam Murtaza owing to their mother Mt. Mundai having been married to Saleh Shah, a collateral. He is stated to be a collateral in about the 20th degree (see the statement of Sayyad Allah Yar Shah, D. W. 21, at page 188 of the printed record). Beyond this our attention was not drawn to any other evidence regarding the relationship of Saleh. The riwaj-i-am prepared at the Settlement of 188 provides that a daughter and her descendants succeed only if the former be married in the family of a near

relation. The riwaj-i-am prepared in connexion with the Settlement of 1904 provides that married daughters do not generally succeed, but if a collateral descended from a common grandfather be not in existence, then such daughters succeed provided they are married in the family of the father. It is quite clear that Saleh Shah is not a near relation, nor does he belong to the family of Ghulam Murtaza. Therefore, according to the custom Mt. Mundai, would not succeed to the estate of Ghulam Murtaza in preference to the plaintiff, and consequently her sons, Defendants 1 and 2 cannot claim the property in dispute as heirs of Ghulam Murtaza. In this connexion the learned counsel for the appellant relied upon the statement of Allah Yar Shah, plaintiff, which is to be found at pages 145 and 146 of the printed book, and in which he stated that the descendants of Pir Kamal, Shah Jamal, Abdul Rehman and Sher, the ancestors of the parties, are considered as members of the same kuf (family), and that if a daughter is married in the same family (kuf) she gets the property. But in the same statement the witness made it quite clear that the daughter of Ghulam Murtaza was married in another family and therefore was not entitled to inherit the property left by Ghulam Murtaza. In our opinion, having regard to the pleadings and taking his entire statement into consideration. Allah Yar Shah cannot be taken to admit the claim of Defendants Nos. 1 and 2 to succeed to the property in suit in preference to the plaintiff. The riwaj-i-am is quite explicit on the point and we have no hesitation in holding that the plaintiff was entitled to succeed to the ancestral property of Ghulam Murtaza in preference to Defendants Nos. 1 and 2.

We find that there is no distinction according to the riwaj-i-am between the ancestral and self-acquired immovable property for the purposes of succession. We are further of opinion that the property in the hands of Ghulam Murtaza was ancestral qua the plaintiff and that it did not lose its character as such by the fact of the gift made in favour of Ghulam Murtaza by Mt. Said Bibi.

According to the riwaj-i-am Ghulam Murtaza was the next male heir to Mt. Said Bibi because his mother Mt. Sahib Khatun, having been married to Pir Kamal, a nephew of Abdullah Shah, was entitled to succeed in preference to the collaterals. The gift, therefore, by Mt. Said Bibi was to a person who was connected with the donor and who would have succeeded to the property apart from the gift. Under such circumstances property which was originally ancestral did not become the self-acquired property of the donee. *Mt. Attar Kaur* v. *Nikkoo* (1) is an authority in support of this proposition.

We agree with the Senior Subordinate Judge that the property in the hands of Mt. Said Bibi was the ancestral property of her husband. The learned counsel for the appellant did not seriously contest this finding, and therefore we need not discuss it at any length. We may remark in passing that the whole of the property in suit was not the subject of gift by Mt. Said Bibi. Only a very small fraction of it was gifted by her. The rest of it appears to have come to Ghulam Murtaza by inheritance and not by gift.

There is no satisfactory evidence in support of the contention of the appellant that a widow among the Sayyads of Kot Isa Shah in the Tahsil of Jhang has by special custom power to make a valid gift of property inherited by her from her husband. The learned counsel for the appellant practically conceded that on the present record it was not possible for him to claim that such a custom had been proved.

We are, therefore, of opinion that the property in suit is ancestral as regards the plaintiff, and that Mt. Allah Jawai was not competent to make a gift thereof to Defendants Nos. 1 and 2. The plaintiff's suit was rightly decreed by the learned Senior Subordinate Judge, and we dismiss this appeal with costs.

Appeal dismissed.

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(1) A. I. R. 1924 Lah. 538 (F. B.).

A. I. R. 1926 Lahore 174

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Shankar Das —Defendant—Appellant.

v.

Shambu Nath and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 302 of 1925, Decided on 12th December 1925, from the judgment of Campbell, J., D/- 29th October 1925, in Civil Appeal Case No. 1649 of 1925.

Letters Patent (Lahore), Cl. 10—Final order staying execution is judgment.

Order directing the issue of notice to the respondents in Europe, which will have the effect of postponing the hearing of the appeal indefinitely, cannot be held to be a judgment. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit or appeal is not a judgment within the meaning of the Letters Patent. However, making the ad interim order staying execution absolute constitutes a judgment within the meaning of Cl. 10. [P. 174, C. 2]

Jagan Nath Agarwal and *Mukand Lal Puri*—for Appellant.

M. S. Bhagat—for Respondents.

Shadi Lal, C. J.—This appeal arises out of the proceedings taken in pursuance of a preliminary decree passed by the Subordinate Judge of Lahore for partition of the estate belonging to the late Rai Bahadur Buta Mal. It appears that Bihari Lal, one of the sons of Rai Bahadur Buta Mal, without the authority of the Receiver appointed by the Court, granted a lease of certain immovable property forming part of that estate to Shambu Nath and six other persons (who will be described hereinafter as lessees); and that, when the matter was brought to the notice of the trial Judge, he passed an order on the 23rd of June 1925, directing their ejectment.

Against this order of ejectment the lessees preferred an appeal to the High Court, which was admitted on the 26th of June, and they also obtained ex parte an ad interim order staying their ejectment pending the decision of the appeal. On the 29th of October the appeal came up for hearing before Mr. Justice Campbell who, upon an objection raised by the lessees, adjourned the hearing of the case and directed that notice of the appeal should issue to all the respondents including certain persons who were in Europe. It is to be observed that the respondents residing in Europe, who are descendants of the sons of Rai Bahadur Buta Mal, have taken no interest in the proceedings and were not represented before the Subordinate Judge who ordered the ejectment of the lessees. They were, however, impleaded by the lessees as respondents to the appeal and the lessees, having obtained an order staying their ejectment, are now anxious to delay the decision of the appeal. It is obvious that there is no reasonable chance of promptly effecting service of the notice of the appeal upon the respondents residing out of India, especially upon the son of Bihari Lal who is in collusion with the lessees, and the dilatory tactics adopted by them are likely to be successful.

In these circumstances Mr. Jagan Nath, for Rai Sahib Shankar Das, another son of Rai Bahadur Buta Mal, asked the learned Judge to discharge the ad interim order, but his prayer was not granted because the lessees gave an undertaking that they would " pay into the lower Court all rents which may fall due from them " from the 29th October 1925.

From this order of the single Bench Rai Sahib Shankar Das has preferred an appeal under Cl. 10 of the Letters Patent, and Mr. Bhagat for the lessees raises a preliminary objection that the order in question does not amount to a " judgment " within the meaning of the said clause. Now, there is a considerable diversity of judicial opinion as to the interpretation to be placed upon the word " judgment," but the matter has been settled, so far as this Court is concerned, by the decision in *Ruldu Singh* v. *Sanwal Singh* (1). Applying the test laid down in that case we consider that, while the order directing the issue of notice to the respondents in Europe will have the effect of postponing the hearing of the appeal indefinitely, it cannot be held to be a judgment. As pointed out by the Division Bench an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit or appeal is not a judgment within the meaning of the Letters Patent. There is, however, no doubt that the decision of the learned Judge making the ad interim order absolute constitutes a judgment within the meaning of Cl. 10 of the Letters Patent and that an appeal lies from that decision.

(1) A. I. R. 1922 Lah. 380.

On the merits we are convinced that the lessees, secure as they are in possession of the property, desire to obstruct the disposal of the appeal by resorting to every dodge of which they can avail themselves. We cannot too severely condemn these tactics, and we have no hesitation in holding that the lessees are not entitled to any discretionary remedy which is calculated to retard the proceedings of the Court.

We accordingly accept the appeal, and discharging the ad interim order, we direct the Subordinate Judge to take prompt measures to execute the order passed on the 23rd June and to recover from the lessees such sum of money as may be due from them in pursuance of the undertaking given by them on the 29th October. Mr. Jagan Nath also urges that they should be called upon to pay rent or damages for the use and occupation of the property for the period from the 23rd June 1925 to the 29th October 1925. This is, however, a matter which, upon the material before us, we are unable to determine, and we must remit it for decision to the trial Judge.

The lessees must pay the costs incurred by the appellant in this Court.

Appeal accepted.

A. I. R. 1926 Lahore 175

ABDUL RAOOF, J..

Attar Singh and *others*—Plaintiffs—Appellants.

v.

Kirpa Singh and *others*—Defendants—Respondents.

Second Appeal No. 999 of 1924, Decided on 19th November 1924, from a decree of the Dist. J., Jullundur, D/- 28th January 1924.

Cosharer—Cosharer whose rights are invaded by another cosharer's exclusive possession can maintain a suit without proof of special damage.

Cosharers whose rights may be invaded by exclusive possession of another cosharer can maintain a suit without proving material and substantial injury, 29 *P. R.* 1918, *Dist.*

Where a cosharer perfectly knew that he had no right to take exclusive possession of any portion of the common land and that with his eyes open he commenced and completed the building,

Held; that an injunction can be granted to demolish without proving special damage. 1 *Lah.* 249 and 2 *Lah.* 73, *Foll.* [P 175, C 2, P 176, C 1]

Balwant Rai for *Badri Das*—for Appellants.

D. C. Ralli for *Dalip Singh*—for Respondents.

Judgment.—The defendant Kirpa Singh built a kotha on a plot of land belonging jointly to the plaintiffs and the defendants. The present plaintiffs-appellants brought a suit for demolition of that kotha on the ground that the particular plot had been left open by the common consent of all the cosharers to be used on ceremonial occasions.

The trial Court decreed the claim and granted the mandatory injunction prayed for.

In appeal the lower appellate Court has set aside the decision of the trial Court and has dismissed the suit mainly upon the ground stated in its judgment. "There is, I think, no doubt from the evidence that he has been in possession for some time but that he only recently erected this particular kotha to which the plaintiffs object. This is pratically admitted by both parties. The leading case applicable to the present one seems to me to be that reported in *Majju* v. *Teja Singh* (1), and it was there laid down that a suit of this description could only be maintained when the action of one of the proprietors had actually caused such material and substantial injury as could not be remedied by partition of the joint land. In the present case although this particular plot has not been partitioned but was left open, I do not see how it can be said that material and substantial injury has been caused to the plaintiffs, seeing that the greater number of proprietors seem to acquiesce in the erection of the kotha."

The learned Judge appears to be under the impression that cosharers whose rights may be invaded by the exclusive possession of another cosharer cannot maintain a suit without proving material and substantial injury. No doubt this at one time was the view adopted in this Court but the recent decisions on this question have set the matter at rest.

Now, the facts to be taken into consideration in this particular case are these. The defendant was one of the many cosharers and he perfectly knew that he had no right to take exclusive possession of any portion of the common land and that

(1) [1918] 29 P. R. 1918=114 P. W. R. 1918 =118 P. L. R. 1918.

with his eyes open he commenced and completed the building. Now when he is confronted with a suit by the plaintiffs he turns round and says: "You cannot disposses me without showing special damage."

This was the very argument put forward in the case of *Manji* v. *Ghulam Muhammad* (2). I examined almost all the authorities bearing upon this question and came to the conclusion that a plaintiff under these circumstances was entitled to sue without proving special damage. This view was upheld by a Bench of this Court in Letters Patent appeal which is reported as *Manji* v. *Ghulam Muhammad* (3). The learned Judge of the Court below has altogether ignored these two decisions and has based his decision upon an older ruling which must be considered to be no more law. Mr. Ralli, however, has contended that after all it was only a discretionary relief which the Court might have declined to grant and that it is not open to this Court to interfere with the discretion exercised by the lower appellate Court. Now as a matter of fact the Court of first instance had given this relief in the exercise of its discretion. Therefore, the lower appellate Court ought not to have interfered with the decision of the first Court. But leaving this question aside, is the defendant really entitled to any consideration in the matter? He knew perfectly well that this piece of land could never be partitioned and the injury, if any, caused to the plaintiff could never be remedied, and he also knew the limited right of joint owership that he possessed and yet he persisted in erecting this building. He is not entitled to ask this Court either not to grant the injunction, or to refuse the prayer altogether or compensate the plaintiffs by awarding damages only.

In my opinion, the lower appellate Court was not justified in interfering with the decision of the trial Court. I accordingly accept this appeal, set aside the decree of the lower appellate Court and restore that of the first Court with costs throughout.

Appeal accepted.

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(2) [1920] 1 Lah. 249.
(3) [1921] 2 Lah. 73.

A. I. R. 1926 Lahore 176

ABDUL RAOOF, J.

Gahra—Accused--Petitioner.

v.

Emperor--Opposite Party.

Criminal Revision No. 262 of 1925, Decided on 22nd May 1925, from an order of the S. J., Ferozpore.

Penal Code, S. 498—Wife neglected by husband, both not being on good terms—Heavy sentence is not necessary,

Where in a case under S. 498 the husband and wife were not on good terms and the wife had a sheer contempt for her husband who did not care much about her and took no action on the commission of the offence till the lapse of many months, it is not necessary to inflict a heavy punishment on the accused.

Muhammad Rafi—for Petitioner.

Des Raj Sawny and *Sagar Chand*—for the Crown.

Judgment.--On the facts found all the ingredients of the offence contemplated by S. 498, Indian Penal Code, are found to exist. The offence has, therefore, been clearly established against the petitioner. I must, therefore, uphold the conviction.

The evidence, however, shows that the complainant and Mt. Sodhan were not on very good terms. She appears to have had a sheer contempt for her husband so far so that she treated her daughter with callousness when face to face with her in Court. I haye also to take into consideration the fact that although the complainant was informed of the abduction of the woman immediately after the occurrence he took no action until after about eight months. This fact also shows that he did not care much about the woman. The woman has turned a Muhammadan, and all these months she has been living as the wife of the petitioner. By the conviction of the petitioner the authority of the law has been fully vindicated. It is, however, not necessary to inflict a heavy sentence on the petitioner under the circumstances of the case.

I, therefore, accept the petition for revision so far as to reduce the sentence to the period already undergone which is over four months. The fine and the order as to compensation shall stand.

Sentence reduced.

* A. I. R. 1926 Lahore 177

MARTINEAU, J.

Bishen Singh and *others*—Defendants—Appellants.

v.

Wasawa Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1576 of 1924, Decided on 20th January 1925, from a decree of the Addl. Dist. J., Amritsar, D/- 19th March 1924.

(a) *Decree—Setting aside—Fraud—Actual positive fraud must be proved—Constructive fraud is not sufficient.*

In order to obtain a reversal of the judgment given in a former case it is not sufficient for the plaintiffs to prove constructive fraud, but they must prove actual positive fraud, a meditated and intentional contrivance to keep the parties, and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance: 41 *Cal.* 990, and 4 *O. L. J.* 520. *Foll.* [P. 177, C. 2]

* (b) *Decree—Setting aside — Mistake not in the decree, but in a document on which judgment is based—Suit to rectify mistake does not lie.*

Where a decree has been procured by some grave mistake so as to vitiate the whole character of the decree, and to permit its execution would amount to an abuse, the Court has power to rectify the error or mistake upon which the decree is founded in an independent suit; but where a mistake has been made, not in the judgment or decree, but in a document forming part of the evidence on which the judgment is based, a suit to rectify does not lie. [P. 177, C. 2; P. 173, C. 1]

Sahib Dayal—for Appellants.

Dev Raj Sawhney—for Respondents.

Judgment.—Hira Singh, a collateral of the present plaintiffs, was an occupancy tenant of the land in suit. After his death the present defendants, who are the landlords, obtained a decree against the present plaintiffs for possession of the land, the Court finding that the latter had failed to prove that the land had been in the occupation of their and Hira Singh's common ancestor. In the present case the plaintiffs sue for possession on the ground that the former judgment was obtained against them by fraud or mistake the land having been entered in the Settlement Record of 1865 under the wrong khasra numbers.

The suit was dismissed by the first Court which found that, though a mistake had been made in the revenue records, no fraud on the part of the present defendants had been proved; and that the judgment in the former case was, therefore, res judicata and the plaintiffs had no cause of action.

On appeal the District Judge, Col. Nicholas, held that the plaintiffs were entitled to maintain the suit as the point in issue had not been before the Court in the former case, and he remanded the suit to the trial Court for disposal on the remaining issues. The suit was again dismissed by the Subordinate Judge on the ground that no fraud had been proved. The plaintiffs appealed, and the Additional Judge, Lala Chuni Lal, has accepted their appeal and passed a decree in their favour, holding: (1) that a mistake had been made in the khasra numbers in the Settlement Record of 1865; (2) that the mistake was a constructive fraud on the Courts; and (3) that Col. Nicholas had, by his judgment, decided that the mistake was tantamount to constructive fraud, and that that judgment not having been appealed against had become final. The defendants have preferred a second appeal to this Court.

I am unable to agree with the lower appellate Court that Col. Nicholas gave any decision on the question of fraud. He decided only that the judgment in the former suit was not a bar to the present suit, as the points in issue in the two suits were not the same.

Further, in order to obtain a reversal of the judgment given in the former case, it is not sufficient for the plaintiffs to prove constructive fraud, but they must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and the obtaining of that decree by that contrivance, as was held in *Nunda Kumar* v. *Ram Jibon* (1): see also *Sarup Narain* v. *Sheo Shankar Lal* (2), and Kerr on Fraud and Mistake, 5th Edition, page 344.

It has also been observed by the learned Additional Judge that where a decree had been procured by some grave mistake so as to vitiate the whole character of the decree and to permit its execution would amount to an abuse, the Court has power to rectify the error or mistake upon which the decree is founded in an independent suit. *Sreenath Das* v. *Ghansham Naik* (3) is an authority for this proposition, but that was a case in which a mistake had been made in the drawing

(1) [1914] 41 Cal. 990=18 C. W. N. 681=19 C. L. J. 457.
(2) [1917] 4 O. L. J. 520.
(3) [1918] 3 P. L. J. 465.

up of a decree, and the proposition is not applicable to the case of a mistake contained, not in the judgment or decree, but in a document forming part of the evidence on which the judgment is based.

As an actual fraud on the part of the defendants has been proved, the suit must fail, and I accordingly accept the appeal, reverse the decree of the lower appellate Court, and restore the decree of the first Court dismissing the suit ; but in view of the fact that the decision in the former case was due to a mistake in the entries of the Settlement Record of 1865, I direct that the parties shall bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 178

ABDUL RAOOF AND HARRISON, JJ.

Ganga Singh—Plaintiff—Appellant.

v.

Bhan Singh and *another*—Defendants—Respondents.

First Appeal No. 2356 of 1920, Decided on 5th March 1924, from a decree of the Senior Sub-Judge, Ferozepore, D/- 9th August 1920.

(a) *Jurisdiction—Civil and Revenue Court—Suit for declaration that certain land was partitioned though shown as joint in Revenue papers, is cognizable by civil Court.*

A suit for a declaration that a certain land has been partitioned privately by the parties, though in the Revenue papers it is shown as joint property of the parties, and is, therefore, not capable of partition, is a suit cognizable by a civil Court.

[P. 178, C. 1, 2]

(b) *Civil P. C., S. 11—Decision of Revenue Officer regarding question of title when he could have tried but did not as civil Court, is not res judicata.*

Where in partition proceedings a question of title was open to a Revenue Officer to be tried as a civil Court, following the procedure of a civil Court as the Presiding Officer of such a Court, but he did not try it as a civil Court, it is not barred by the rule of res judicata in a subsequent civil suit.

[P. 178, C. 2, P. 179, C. 1]

Sheo Narain—for Appellant.

Kharak Singh and *Jawahar Singh*—for Respondents.

Judgment.—This was a suit for a declaration that the land measuring 3,553 kanals out of 3560 kanals 10 marlas situate at Mouza Nathuwala, Tehsil Moga, has been partitioned privately by the parties, though in the revenue papers it is shown as joint property of the parties and is, therefore, not capable of partition. The suit was resisted mainly on two preliminary pleas:—(1) that it was barred by the principle of res judicata;(2) that it was not cognizable by a civil Court.

The facts leading to the litigation are few and simple. Vir Singh applied for partition of the land in dispute under the Land Revenue Act. Ganga Singh filed objections stating that by reason of a private partition the land of which partition was sought had fallen to his share and that it was no more joint land belonging both to Vir Singh and Ganga Singh. The Assistant Collector by his order dated 3rd March 1917 disallowed the objections summarily without going into the question of title raised. Upon an appeal to the Collector the case was remanded by an order dated the 11th June 1917 for decision after taking evidence.

Clearly on the objections a question of title arose. It was then open to the Revenue Officer to try the question of title himself as a civil Court or to stay the partition proceedings and direct the parties to have the question of title decided by a competent civil Court. From the proceedings it appears that the Revenue Officer adopted neither of these courses. He did decide the question adversely to the objector but without following the procedure of a civil Court or describing himself as the Presiding Officer of a such a Court. No decree sheet was prepared. Against this decision the applicant for partition appealed to the Collector. Evidently he took it to be a decision of a Revenue Officer. The Collector decided in favour of the applicant and accepted the appeal. He also refrained from drawing up a decree. The objector then appealed to the Commissioner and the Financial Commissioner without success.

The question now before us is whether the present suit is barred by res judicata. The contention of the counsel for the respondents is that because the question of title has been decided, however irregularly and under whatever misapprehensions regarding the powers of the Presiding Officer that decision must stand and must be treated by some process of visualisation as a decree of a competent civil Court and the order on appeal passed by the Collector must in a similar manner be treated as an order and a decree of the District Court. We find that this is wholly impossible,

The lower Court accepted the contention of the defendants and held that the suit was barred by the rule of res judicata and also that it was not cognizable by a civil Court. Seeing that a question of title was raised, that the suit was cognizable by a civil Court and that the Revenue Officer did not decide the question of title as a civil Court the suit is neither barred by the rule of res judicata nor is it cognizable by a Revenue Court. We overrule the decision of the Court below upon both these preliminary points and setting aside the decree remand the case to the Court under O. 41, R. 23 with the direction that the suit be re-instated on its original number in the register of pending suits and be disposed of according to law. Costs will abide the result.

Case remanded.

A. I. R. 1926 Lahore 179

SHADI LAL, C. J., AND ZAFAR ALI, J.

Choghatta—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 21 of 1921, Decided on 11th April 1924, from an order of the S. J., Attock, at Campbellpur, D/- 8th December 1923.

(a) *Criminal P. C., S. 154—Ruqa by police officer embodying substance of complainant's report and some result of investigation and neither signed nor thumb-marked by complainant is not first information.*

A ruqa drawn up by a police officer during investigation embodying the substance of the report of the complainant previously made and some result of the investigation made by him and neither signed nor thumb marked by the complainant cannot fall within the definition of "first information." [P. 180, C. 2]

(b) *Evidence Act, S. 157—First information report can be used only for corroboration or contradiction of a subsequent statement—Criminal P. C., S. 154.*

First information report is not substantive evidence by itself, but it can only be used under S. 157 as a previous statement to corroborate or contradict a statement made subsequently in Court. [180, C. 2, P. 181, C. 1]

Khurshaid Zaman—for Appellant.

D. R. Sawhney—for Opposits Party.

Judgment.—The two appellants, Khan Muhammad and his son-in-law Choghatta, who are blacksmiths of the village Saggar, District Attock, have been convicted of the murder of Fazal and awarded capital sentence under S. 302, Indian Penal Code. The convicts have lodged separate appeals and the case is also before us under S. 374 of the Criminal P. C.

Fazal, deceased, was the full brother of Khan Muhammad accused but there was no love lost between them. They had been quarrelling ever since the death of their father Shera, so much so that in June 1921 they and their wives were put on security to keep the peace. This animosity between the brothers was produced by an act of Shera himself which was that he gifted all his landed property to Khan Muhammad to the exclusion of his other son Fazal. On the death of Shera which took place some three years before the murder, Fazal brought a suit against Khan Muhammad for his share of the property and obtained a decree with costs. In execution of that decree a quantity of grain belonging to Khan Muhammad was attached and in prosecution of his application for sale of that grain Fazal attended the executing Court at Talagang on the fateful day (25th June 1923) but did not return home at night. The suspicion that some evil had happened to him was roused in a fortuitous way almost immediately after his murder. As he was leaving for Talagang in the morning Sultan Muhammad (P. W. No. 11) had asked him to find out the price of cotton in the market there. In order to ascertain what information Fazal had brought on this point Sultan Muhammad proceeded to his residence at the time of night prayers, i. e., long after dusk, when he was expected to have returned. On the way Sultan Muhammad came across his cousin Fatta (P. W. No. 3) who metioned to him that as he (Fatta) had been passing close to the area known as Shahidan he heard a voice crying in the dark: "I am alone and being murdered." On arrival at Fazal's house Sultan Muhammad found that Fazal had not returned and suspecting foul play he related to Mt. Bakhat Bhari, wife of Fazal, what Fatta had told him. Khan Muhammed and Choghatta who had not gone to Talagang that day were found absent from home at that time. Therefore, Mt. Bakhat Bhari felt alarmed and at once set out on a search for her husband.

Accompanied by Sultan Muhammad and her uncle Jan Muhammad, she went at first to Shahidan and thence proceeded to the village Kufri which is on the way to Talagang, because her husband used to pay visits there to his cousin and namesake Fazal for his advice and assistance in the litigation against his brother. The party reached Kufri at midnight and were told by Fazal that the deceased came to him that evening on his return from Court but went his way home after having a drink and smoke at his place. After a fruitless search Mt. Bakhat Bhari came back to her village and found that her husband was still absent while Khan Muhammad and Choghatta had both returned. The next day (26th June) she appeared at the police station at 6 A. M. and gave a detailed account of all the facts and circumstances stated above, and a description of the clothes that her husband was wearing when he departed from home, and stated that she strongly suspected that Khan Muhammed and his son-in-law Choghatta had murdered her husband. Further, she expressed suspicions against Baza and his father and a third man on the ground that they were fast friends of Khan Muhammad and might have taken part in the crime. This report was entered in the diary of the police station because it was not yet known for certain that Fazal had been killed. The Sub-Inspector of Police, however, proceeded to the spot at once to make an enquiry nnder S. 174 of the Criminal P. C. Baza, who is a youth of about 20 years, confessed the next day (27th June), showed the scene of murder where marks of blood and struggle were observable, and also led to a ravine wherein the body of Fazal was found floating. The body was naked with a ligature round the neck. The Sub-Inspector then wrote a ruqa embodying therein Mt, Bakhat Bhari's report of the 26th June and added thereto an account of the discovery of the body with the direction to the clerk at the Police Station that the first information report should be drawn up in accordance with the ruqa. The clerk copied this ruqa in the charge register as the first information report in the case.

Counsel for the appellants contends that as the ruqa was not signed or thumb-marked by the complainant, Mt. Bakhat Bhari, it could not constitute a first information report within the purview of S. 154 of the Criminal P. C., and should be excluded from consideration as such. This objection appears to be well founded and there are several rulings of tha Calcutta High Court and the Punjab Chief Court also in support of it. Though the ruqa contains information relating to the commission of a cognizable offence, i. e., murder, that information was not given by anybody to "the officer in charge of police station," but was sent to the police station by that officer himself for the purpose of registering a charge of murder. The rulings, however, are that a statement recorded in the course of a police investigation cannot be treated as a first information report. Where on the report of a person, that his brother was missing, the Sub-Inspector did not record it as required by S. 154, Criminal P. C., but commenced investigation, and after four days, when the matter had so developed that there was some reason to believe that the missing man had been murdered, he for the first time recorded the brother's statement as the first information report, it was held that such a practice was contrary to the provisions of the section and that a statement recorded under such circumstances cannot be regarded as a first information : *Emperor* v. *Kampu Kuki* (1). And where on the information given by a chaukidar which was duly recorded in the station diary, the Sub-Inspector went to the hospital and took down the statement of the dying man and filed it as the first information it was held that the statement could in no sense he regarded as the first information : *King-Emperor* v. *Daulat Kanjra* (2). In the present case the information to the police was that entered in the station diary on the 26th June, but the original record of that report was not proved which should have been done to make it admissible in evidence. The ruqa of the Sub-Inspector, in which it was re-produced, was not signed or thumb-marked by Mt. Bakhat Bhari and that ruqa cannot fall within the definition of "first information." But no information report is substantive evidence by itself. It can only be used under S. 157 of the Evidence Act as a

(1) [1907] 11 C. W. N. 554=6 Cr. L. J. 86.
(2) [1902] 6 C. W. N. 921.

previous statement to corroborate or contradict a statement made subsequently in Court. This ruqa, therefore, is to be excluded from consideration and the case for the prosecution is to be judged by the evidence of the witnesses produced in Court.

The main question for determination in this Court is whether the evidence of Baza who accepted a tender of pardon and appeared as a witness for the Crown is sufficiently corroborated by the other evidence. We are, of opinion that it is. In the first place there can be no manner of doubt that the act of overpowering and strangling the deceased could not have been done by anybody single handed and that one of the culprits was Baza, approver, who knew where the body was. Young and inexperienced as he is, it is quite conceivable that he readily entered into the conspiracy to kill Fazal because his father was a partisan of Khan Muhammad and had given evidence in his favour and against Fazal in the civil suit between them. Secondly, there is no denying the fact that Khan Muhammad had a strong motive for taking the life of his brother. Thirdly, there is the evidence of quite independent and trustworthy witnesses that Choghatta produced the shoes of the deceased on the 27th June from over the roof of the shop of one Megh Raj which was 100 or 150 feet from his (Choghatta's) house and that Khan Muhammad, accused, produced on the day following (28th June) blood-stained clothes of the deceased from a heap of manure in his yard. The shoes and the clothes were duly identified by Mt. Bakhat Bhari and other witnesses. Fourthly, there is the evidence of Hayat Muhammad and Sarfraz Khan, that on the night of the occurrence they were going from Kufri to the village Saggar when on the way Khan Muhammad, Choghatta and Baza met them coming from Saggar. Another witness, i. e., Shah Nawaz (P. W. No. 7), deposed that on the night of the occurrence he was going to Dhok Usri from Saggar when the three met him before dawn coming from the direction of Dhok Baza and that Khan Muhammad was carrying a bundle of clothes at that time. A clue to these three witnesses was given by the accused themselves. No reason could be assigned for disbelieving the evidence of any one of these witnesses. The story of the approver as to the manner of causing death was corroborated by the medical witness who made the post mortem examination and found that the cause of death was strangulation.

Having regard to all the facts and evidence reviewed above we have come to the conclusion that the appellants have been rightly convicted of the murder of Fazal.

The result is that we dismiss the appeal and confirm the sentences of death.

Appeal dismissed.

A. I. R. 1926 Lahore 181

LEROSSIGNOL, J.

Sahdev Singh—Appellant.

v.

Vidyawati and *others*—Respondents.

First Appeal No. 1481 of 1923, Decided on 30th January 1924, from an order of the Senior Sub-J. Delhi, D/- 24th March 1923.

(a) *Civil P. C., O. 22, R. 5—Order as to a person being a legal representative is not appealable.*

An order under R. 5 deciding whether a certain person is or is not the legal representative of a deceased party is not appealable. [P. 181 C. 2]

(b) *Civil P. C., O. 22, R. 10—Rule applies only to cases not provided for by preceding rules.*

Rule 10 is a residuary rule governing only those cases which are not provided for by the preceding rules. [P. 182, C. 1]

L. C. Mehra—for Appellant.

Badri Das and *Nawal Kishore*—for Respondents.

Judgment.—In 1916 one Dwarka Nath Singh obtained a decree for the sale of mortgaged property in satisfaction of his mortgage-debt and died in November 1918. His widow was brought on the record in execution proceedings in 1919 and the present appeal arises out of an application by a nephew of the decree-holder to be brought on the record as a legal representative of the decree-holder. The Court below has held that he is not the legal representative and has refused to bring him on to the record as such.

He has appealed to this Court and the preliminary objection taken by the respondents is that the appeal is not competent. The order of the Court below was passed under O. 22, R, 5 and that order is not appealable. Appellant's

Counsel urges that O. 22, R. r. 10, applies to the case, but that rule is clearly a residuary rule governing only those cases which are not provided for by the preceding rules.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 182

HARRISON, J.

Sita Ram—Defendant—Appellant.

v.

Nanak Chand—Plaintiff—Respondent.

Second Appeal No. 1868 of 1924, Decided on 17th January 1925, from a decree of the Dist. J., Hissar, D/- 8th April 1924.

T. P. Act, S. 55 (1)—Vendor guaranteeing peaceful enjoyment, is liable to make good any loss suffered by vendee.

Where the vendor guaranteed peaceful enjoyment to his vendee and the clause was not confined to any patent defect of title existing before sale, but covered the inherent and potential defect, viz., liability to preemption suit, which would become tangible and real, as soon as a suit for pre-emption was brought.

Held : that the vendor was liable to make good the losses by the vendee. [P 182 C 2]

Nanak Chand—for Appellant.

Anant Ram for *Jagan Nath Agarwal*—for Respondent.

Judgment.—The only points in this case are whether a vendee whose sale was pre-empted was entitled by a clause in his covenant to recover from his vendor the loss which he suffered, and whether apart from this clause on general principles his confession of judgment in the sense that he admitted the plaintiff's right to pre-empt debars him from obtaining the relief which has been given to him by both the lower Courts. Finally there is a cross-objection in which he claims Rs. 25, the sum allowed by the trial Court and disallowed by the District Judge, being the costs incurred by him in execution in endeavouring to obtain an order from the executing Court that his vendor was liable to make good the sum re-payable to the pre emptor and thereby save the whole of this litigation. The relevant portion of the contract of sale runs as follows :

" *Yeh bai sahi hai aur bila kisi shart ke hai, jaidad mazkur manmuqirr ne Musammain Shams-ud-Din wa Abdur Rahman wa Munawer pisran Salah-ud-Din wa Musammat Allah Jawai bewa Salah-ud-Din qaum Sheikh, sakin Hissar se kharidi hai, agar baian ya un ko koi waris jaidad mazkur ke mutulliq kisi kism ka dawa karen aur us se koi nuqsan kisi kism ka mushtri ko ho to us nugsan wa kharcha muqaddama ka manmuqirr bazat-i khud zimmawar hoga, aur meri jaidad uski zimmewar hogi, niz baad tahrir wasiqa haza agar koi sahim wa sharik mera ya aur koi shakhs kisi kism ka dawa jaidad mubaia ki babat karega to us ki zimmewari manmuqirr ki hogi aur aise dawe se jo kuchh harjwa nuqsan mushtri ka hoga uski adaigi ka manmuqirr zummewar hoga, mushtri ko ikhtiar hoga ke woh harjana wa nuqsan meri zat wa jaidad har kism se jis tarah chahen wasul kar le.*"

It has been held that under this clause the vendor is liable to recoup the vendee for his losses. Counsel on appeal relies on *Ghulam Jilani* v. *Imdad Husain* (1) which, though not expressly dissented from in *Wazira* v. *Shadi Khan* (2), was certainly not followed. It appears to me that whatever may be the view taken of the words used in the contract which forms the subject-matter of *Ghulam Jilani* v. *Imdad Husain* (1) the words " *aur koi shakhs kisi kism ka dawa jadad mubaia ki babat karega* " most certainly cover a pre-emption suit. The vendor guaranteed peaceful enjoyment to his vendee and the clause was not confined to any patent defect of title existing before sale, but covered the inherent and potential defect which would become tangible and real as soon as a pre-emption suit was lodged by a competent person. I find, therefore, agreeing with the learned District Judge that under this clause the defendant is liable to make good the losses by the plaintiff.

The second point appears at first sight to be very much stronger than it really is. In the pre-emption suit the defendant-vendee admitted the title of the pre-emptor and at first the vendor denied it, and an issue was framed as to whether the subject-matter of the suit really

(1) [1882] 4 All. 357=(1882) A. W. N. 67.
(2) [1881] 67 P. R. 1881.

consisted of shops regarding which there was no right of pre-emption. On going through the record of the pre-emption case I find that on the 5th of October 1917 the vendor himself stated on solemn affirmation that he did not contest the pre-emptor's right to bring the suit. Counsel urges that he may have been induced to do so because of the craven conduct of the vendee; but it is impossible to get over the fact that he himself confessed judgment on this point and cannot now plead that the whole of the losses of the suit are due to the carelessness or dishonesty of his vendee. On this point also, therefore, there is no reason why the plaintiff should not succeed.

As to the cross-objection the District Judge was apparently under the impression that this sum of Rs. 25 formed part of the costs incurred in the pre-emption case proper. They were incurred, and I think bona fide, in execution proceedings, and this being so I think the plaintiff is entitled to recover.

I dismiss the appeal with costs, and I accept the cross-objections also with costs. The decree will be in the same form as granted by the District Judge, i. e., against Sita Ram to the extent only that he received property from Jai Kishan Das, his father.

Appeal dismissed.

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* A. I. R. 1926 Lahore 183

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Relu Mal and *others*—Plaintiffs-Appellants.

v.

Ahmad and *others*—Defendants—Respondents.

Letters Patent Appeal No. 238 of 1924, Decided on 18th November 1925, from the decree of Abdul Raoof, J., D/- 12th November 1924, in Civil Appeal No. 956 of 1924.

* *Contract Act, Ss. 59, 60, and 61—Debtor's intimation must synchronize with payment—Creditor can appropriate even upto trial.*

When a debtor owes several distinct debts to one person and makes a payment to him, it is the direction, either express or implied, of the debtor with regard to the application of the payment which governs that payment's destination. That intimation must be synchronous with the payment. Where, however, the debtor has not taken adavntage of the power conferred upon him by S. 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt actually due and payble to him from the debtor. The creditor may apply payments up to the very last moment even up to the time of the trial.

[P. 183, C. 2, P. 184, C. 1,]

Shamair Chand—for Appellants.

Mehr Chand Mahajan—for Respondents.

LeRossignol, J.—This appeal arises out of a suit brought on a deed of hypothecation for the recovery of Rs. 200 principal plus Rs. 530 interest, total Rs. 730. The original creditor was one Ulfat Ram and the plaintiffs are his representaives. The main defence pleaded was a complete repayment of the claim and the further contention that other payments in respect of other debits had been made to the widow of Ulfat Ram. On the production of Ulfat Ram's account book it was found to contain in the defendant's account seven entries on the debit side and five on the credit side. The first item on the debit side was, strangely enough, the item secured by the deed of hypothecation; the other items were unsecured. Of the items on the credit side two were specifically appropriated; the other three had not been specificaliy appropriated to the unsecured debit items; but it is significant that the total credits tallied with the total unsecured debits. On these facts the Courts below have concurred in holding that though the main defence is false the unappropriated credit items must be applied in reduction of the present claim on the hypothecation deed as being the earliest debit, and for this course they have sought and found justification in S. 61 of the Contract Act.

For the plaintiffs it has been urged before us that inasmuch as the debtor did not take advantage of the privilege conferred upon him by S. 59 of the Contract Act, S. 60 of that Act gives the creditor plenary discretion to apply any payment at any time, even up to the time of trial, to any debt he chooses; and after having heard counsel for both sides we hold that the appeal must succeed.

Now, it is indubitable that when a debtor owes several distinct debts to one person, and makes a payment to him, it is the direction, either express or implied of the debtor with regard to the application of the payment which governs that payment's destination. A careful con-

sideration of S. 59 of the Indian Contract Act leaves no doubt, however, that that intimation must be synchronous with the payment. Where, however, the debtor has not taken advantage of the power conferred upon him by S. 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt actually due and payable to him from the debtor. The learned Judge in Chambers, following *Kundan Lal* v. *Jagan Nath* (1), holds that S. 59, 60 and 61 of the Contract Act were enacted to embody the rule laid down in Clayton's case (15 Revised Reports, page 161). It holds that the creditor can take advantage of the discretion allowed to him by S. 60 only at the time of the payment and is not at liberty to make any ex post facto appropriation. Now, Clayton's case was based on peculiar facts. The question which the Courts were called upon to decide was whether a customer of a Bank was justified in claiming that payments made to him by the Bank were payments made against particular credit items in his account and not against the account as a whole, and it was held that the payments were made against the whole account and that the creditor was not at liberty to urge ex post facto that particular payments to him should be debited against particular credit items. In that case, however, the learned Master of the Rolls stated that he was not called upon to determine the general question of the creditor's right to make the application of indefinite payments, so that the decision clearly has no general application. The view that the creditor may apply payments up to the very last moment, even up to the time of the trial, was adopted in *Cory Brothers and Company Limited* v. *The Owners of the Turkish Steamship "Mecca" The "Mecca"* (2) and in *Seymour* v. *Pickett* (3) and has been followed by the High Courts of Bombay, Madras and Patna. On the other side is only the ruling relied upon by the Court below, and the main reason of the view of that Court appears to be that where the law as laid down in *Cory Brothers and Co.* (2) accepted, there would remain no scope for the application of S. 61 of the Contract Act which provides that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time. This objection, however, does not impress us ; for it is not difficult to imagine cases in which neither party, either by oversight or mistake, has made any appropriation. Moreover, a Code attempts to provide for all possibilities.

In our opinion the Courts below might well have held on the peculiar circumstances of this case that the original creditor Ulfat Ram, did appropriate the payments to the unsecurred debts; but we are bound by the finding of fact that he did not do so. Holding, however, that S. 60 of the Contract Act grants to the creditors plenary discretion to make the appropriation at all times up to the time of trial (and it is obvious that this rule contravenes no principle of justice or equity), we consider that the plaintiffs at the institution of the suit, had appropriated payments to the unsecured debts and were not restricted in the exercise of this discretion to the point of time when the payments were actually made.

We accordingly accept the appeal, set aside the decrees of the Courts below and decree in full for the plaintiffs with costs throughout.

(1) [1915] 37 All. 649=13 A. L. J. 908.
(2) [1897] A. C. 286=66 L. J. P. C. 86=76 L T. 579=45 W. R. 667=8 Asp. M. C. 266.
(3) [1905] 1 K. B. 715=74 L. J. K. B. 413=92 L. T. 519.

A. I. R. 1926 Lahore 184

CAMPBELL, J.

Maya Ram—Plaintiff—Appellant.

v.

Tulhi Ram and *others*—Defendants—Respondents.

Mis. Second Appeal No. 1246 of 1923, Decided on 19th January 1924, from the order of the Dist. J., Amritsar, D/- 21st April 1923.

Civil P. C., O. 41, R. 23—No reversal of decree—No disposal of suit on preliminary point—Remand is improper—Court should proceed, if necessary, under O. 41, R. 25 or O. 27.

Where the decree was not reversed on appeal nor was the suit dispcsed of upon a preliminary point, the appellate Court should not remand the case under O. 41, R. 23. But if the evidence on the record is sufficient for the prcper decision of the issues, it should decide the issue itself; or, if it requires further evidence, it should proceed under R. 25 or R. 27 of O. 41. [P. 185, C, 1]

Nand Lal—for Appellant.

Niranjan Das—for Respondents.

Judgment.—The learned counsel on both sides agree that the learned District Judge acted contrary to law in remanding the case under O. 41, R. 23, Civil P. C., The decree was not reversed on appeal, nor was the suit disposed of upon a preliminary point, and by using O. 41, R. 23, the learned District Judge forced the respondent to come to this Court on second appeal at a most inconvenient stage. The learned District Judge stated in his order that the evidence already on the record was probably sufficient for the proper decision of the two issues to which he referred, viz., Issues Nos. 4 and 5. That being so he should have decided the issue himself, or, if he required further evidence he should have proceeded under R. 25 or R. 27 of O. 41.

I accept the appeal, set aside the order remanding the case under O. 41, R. 23, and direct that the appeal be disposed of by the learned District Judge on all the points for decision. Costs in this Court will be costs in the appeal.

Appeal accepted.

A. I. R. 1926 Lahore 185

SHADI LAL, C. J., AND ZAFAR ALI, J.

Tirkha Mal—Defendant—Appellant.

v.

Gurji Mal—Plaintiff—Respondent.

Second Appeal No. 2536 of 1921, Decided on 29th April 1924, from a decree of the Dist. J., Hissar, D/- 13th June 1921.

(a) *Hindu Law—Separation of one member—Shares of all defined—Others are to hold their property as separate.*

Where, in the deed of partition, the shares of other coparceners also are defined on separation of one member, the legal inference is that they are to hold the property allotted to them in those shares as separate owners. [P 185, C 2]

(b) *Hindu Law—Joint family—Separation of one member—No presumption exists as to others remaining joint or re-united*

When one member of a joint Hindu family separates, there is no presumption that the remaining members remain united or to re-unite must be proved like any other fact: *A. I. R.* 1923 *P. C.* 136, *Foll.* [P 185, C 2]

Jagan Nath—for Appellant.

G. S. Salarya—for Respondent.

Judgment.—This was a suit between two Hindu brothers who, together with a third named Madan Lal, once constituted a joint Hindu family. In June 1903 the plaintiff separated from the other two and a deed of partition was duly executed defining the shares of all three. After the separation of the plaintiff, Madan Lal and the defendant, who was then a minor, continued to live together and the two transacted business jointly. Madan Lal died later on leaving a son Sohan Lal. The latter has not been heard of for over seven years and the plaintiff, therefore, maintained that he was dead and sued to recover half of his share in the property of which he and the defendant were co-owners. The trial Court dismissed the suit holding that the defendant and Madan Lal had remained united and that, therefore, the defendant was entitled to succeed to the whole of the property of Madan Lal's son by right of survivorship. On appeal the learned District Judge reversed the judgment and decree of the first Court on the ground that it was not proved that the defendant Madan Lal remained united or re-united after the partition.

The only point urged before us on behalf of the defendant-appellant in this second appeal is that the deed of partition referred to above fully indicated that the two brothers remained joint and that the finding of the lower appellate Court to the contrary was erroneous and unsupportable. But in the said deed the shares of the defendant and his brother Madan Lal were defined and the legal inference, therefore, is that they were to hold the property allotted to them in those shares as separate owners. In the recent Privy Council case, *Mt. Jatti* v. *Banwari Lal* (1), their Lordships of the Privy Council decided that when one member of a joint Hindu family separated there was no presumption that the remaining members remained united, and that an agreement to remain united or to re-unite must be proved like any other fact. In the present case there was no evidence to establish that the defendant and Madan Lal remained united or agreed to re-unite. We are, therefore, of opinion that the conclusion arrived at by the learned District Judge is correct and dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1923 P. C. 136.

A. I. R. 1926 Lahore 186

ZAFAR ALI AND ADDISON, JJ.

Ralla Singh—Plaintiff—Appellant.

v.

Bishna and *others*—Defendants—Respondents.

Second Appeal No. 2752 of 1922, Decided on 1st December 1925, from the decree of the Dist. J., Ambala, D/- 10th August 1922.

(a) *Minor—Minor is deemed a party to proceedings without a guardian.*

An appeal in which a respondent is a minor should be deemed to have been filed not on the day on which the name of his guardian is entered in the memo of appeal, but on the original date of its presentation. 4 *All.* 37 and 30 *All.* 55, *Foll.* [P 186, C 1]

(b) *Custom (Punjab) — Alienation must be challenged as a whole.*

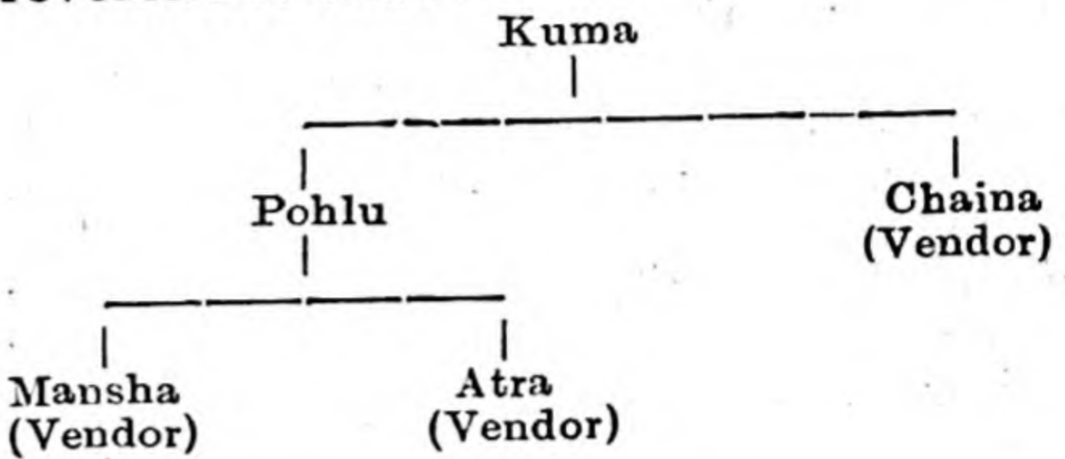
Where co-owners sell their joint land the sale when impeached by the reversioner, cannot be split up into parts. The transaction affects him as a whole, and he is entitled to assail the whole of it. [P 187, C 1]

Nand Lal—for Appellant.

Jagan Nath Aggarwal—for Respondents.

Zafar Ali, J.—This was a declaratory suit by a reversioner to avoid a sale of ancestral land on the usual ground that the sale was devoid of consideration and without necessity. The plaintiff did not succeed in the trial Court and his appeal to the District Judge having also failed he appears in this Court in second appeal. Counsel for the respondents raises a preliminary objection that the appeal is barred by time because the name of the guardian ad litem of the minor respondent Ishar Singh is not mentioned in the memo of appeal. An application for entering his name was filed, but long after the expiration of the period allowed for filing the appeal. That application is also before us for disposal. The objection, however, possesses no force because, as held in 4 *All.* 37 which was followed in 30 *All.* 55, an appeal in which a respondent is a minor, should be deemed to have been filed not on the day on which the name of his guardian is entered in the memo of appeal, but on the original date of its presentation. Though no proceedings against a minor who is impleaded as a defendant in a suit or is made a respondent in an appeal can be taken until his guardian for the suit or appeal is appointed to represent him, the nomination of a guardian is not an essential requirement for the filing of a suit or the presentation of an appeal, and the guardian can be nominated and appointed subsequently. The guardian ad litem of the minor is also one of the respondents and the respondents are represented in this Court by counsel. We, therefore, overrule the objection and grant the application.

Turning to the merits we find that the vendors were related to the plaintiff reversioner thus :



The land was sold for Rs. 1,000 which was paid thus.—

(1) Rs. 798 before the the Sub-Registrar.

(2) Rs. 187 left in the hands of the vendees to redeem the mortgage to which the land was subject.

(3) Rs. 15 for registration expenses.

To prove item No. 2 the vendees produced the registered mortgage deed which they had received from the mortgagee on payment of the mortgage money to him and they examined a witness also who deposed to the payment. This evidence was in our opinion sufficient to prove the payment of this item and this being a just antecedent debt its payment was a necessity.

But no necessity was proved for the balance. Chaina, who was the owner of one-half share in the land sold presumably got half of Rs. 798, which was paid before the Sub-Registrar, but it is not known how he spent that money. The other two vendors bought a mortgage of land for Rs. 400 about four days after the sale in question. The mortgagor was a widow. It cannot be said that to sell ancestral land for the purpose of buying a mortgage of land where the mortgagor is a widow is a prudent act or is an act of good management. We, therefore, are unable to hold that this money was raised for a valid necessity. The estate of the vendors which has ultimately to devolve on the plaintiff, has, however, benefited by

this investment and justice requires in accordance with the principle laid down in S. 41 of the Specific Relief Act, that the plaintiff should pay this amount to the vendees before taking possession of the land in suit. His counsel agrees to this and states that he will pay it.

Lastly there is the plea of acquiescence. It was argued on behalf of the vendees that the plaintiff was not entitled to impeach the sale in respect of the shares of Mansha and Chaina in the land sold because his father had acquiesced in the sale thereof by them. But where co-owners sell their joint land the sale when impeached by the reversioner cannot be split up into parts. The transaction affects him as a whole and he is entitled to assail the whole of it.

We, therefore, accept the appeal and, reversing the judgment and decree of the Court below, we grant the plaintiff a declaratory decree to the effect that the sale is inoperative as against his reversionary rights, but that he is liable to pay Rs. 587 to the vendees before taking possession of the land. The parties to bear their own costs throughout.

Appeal accepted

A. I. R. 1926 Lahore 187

CAMPBELL, J.

Salig Ram—Defendant—Appellant.

v.

Bakhtawar Singh and *another*—Plaintiff and Vendor—Respondents.

Second Appeal No. 256 of 1923, Decided on 15th January 1924, from a decree of the Dist. J., Ludhiana, D/- 20th November 1922.

Indian Soldiers Litigation Act (9 *of* 1918) —*Applicability.*

S. 11 of the Indian Soldiers (Litigation) Act is applicable only to a plaintiff who is an Indian soldier at the time when he brings his suit: *A. I. R.* 1923 *Lah.* 655, *Foll.*

Badri Das—for Appellant.

Shamair Chand—for Respondents.

Judgment.—Bakhtawar Singh, plaintiff, sued to pre-empt a sale of land which took place on the 6th March 1917. He instituted his suit on the 11th August 1920 and stated in his plaint that he had been on war service with the Patiala Lancers and that for that reason his suit was within time. The defendant vendee pleaded that he knew nothing of the plaintiff being in the Patiala Lancers; that he was in the village at the time of the sale; and that his suit was time barred.

The plaintiff offered evidence of the dates on which the Patiala Lancers had been mobilized, and both the trial Court and the lower appellate Court held that his suit was within time. The trial Court found that the Patiala Lancers returned from overseas on the 16th of February 1919 and were demobilized, and that they were again mobilized on the 14th April 1919 and demobilized on the 8th November 1919. The plaintiff was then granted long leave from the 19th December 1919 to the 20th of August 1920.

The vendee, Salig Ram, has preferred a second appeal and has contended that some of the evidence on which the above dates were fixed is inadmissible. He must, however, succeed on the ground that the plaintiff has never proved or attempted to prove that he is an Indian soldier within the meaning of Act IX of 1918. The term "Indian soldier" means any person subject to the Indian Army Act, 1911. The persons subjected to the Indian Army Act of 1911 are: (a) Indian Officers and Warrant Officers, to which category the plaintiff certainly does not belong; (b) persons enrolled under the Act; and (c) persons not otherwise subject to Military Law who, on active service, etc., are employed by, or are in the service of, or are followers of, or accompany portion of, His Majesty's Forces.

There is no proof that plaintiff is or ever was a person enrolled under the Indian Army Act. If, as a member of an Imperial Service Corps, he could be brought within (c) above during the period that he was on actual active service, he certainly ceased to be an Indian soldier when the regiment returned to Patiala and was demobilized in November 1919. As ruled in *Piara Singh* v. *Mula Mal* (1), S. 11 of the Indian Soldiers (Litigation) Act is applicable only to a plaintiff who is an Indian soldier at the time when he brings his suit.

The plaintiff thus has failed to prove that his suit is within limitation. I accept the appeal, set aside the decree of the Courts below, and order that the plaintiff's suit be dismissed with costs throughout.

Appeal accepted.

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(1) A. I. R. 1923 Lah. 655.

A. I. R. 1926 Lahore 188

JAI LAL, J.

Mahomed Ghaus—Defendant—Appellart.

v.

Mahomed Ali Shah and *others*—Defendants and Plaintiffs—Respondents.

Misc. Appeal No. 1291 of 1924, Decided on 27th January 1925, from an order of the Dist-J., Lyallpur, D/- 13th March 1924.

Punjab Limitation (Custom) Act (1 of 1920), S. 6—S. 6 gives additional one year's period to those who were entitled to bring suits when the Act, came into force.

Section 6 really gives an additional period of one year to those who were at the time, when the Act came into force, entitled to institute suits for declaration but could be successfully met by a plea of limitation owing to the repeal of the Act of 1900 and the consequent reduction of the limitation by the new Act. [P 188, C 2 ; P 189, C 1]

Badri Das—for Appellant.

Sagar Chand for *Shah Nawaz*—for Respondents.

Judgment.—The legal point involved in this second appeal is of considerable difficulty. In order to understand it the following statement of facts will be useful :

Raji Shah, the father of the two plaintiffs, sold the land in dispute to Defendants Nos. 1, 2 and 3 on the first of April 1913. Mahomed Ali Shah, plaintiff, was a minor at that time and Imam Shah, the other plaintiff, had not yet been born. Mahomed Ali Shah attained his age of majority on the 3rd July 1921 and this suit was instituted on the 23rd May 1923 for a declaration that the sale in question was fictitious and without consideration or necessity and did not, therefore, affect the reversionary rights of the plaintiffs on the death of the alienor.

The first Court dismissed the suit as barred by limitation, but the District Judge held it to be within time and remanded the case to the first Court for decision on the merits. The defendant vendees have appealed to this Court.

At the time of the sale the period of limitation for such suits was provided by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, which provided a period of 12 years, but that Act was repealed by the Punjab Limitation (Custom) Act, 1920 which came into force on the 4th January 1920. This Act reduced the period for such suits to six years. It is contended on behalf of the defendant-appellant that the present suit is barred by limitation on the ground that limitation for such suits in relation to alienation which took place before the 4th June 1920 is only one year by virtue of S. 6 of the Punjab Limitation (Custom) Act, 1920.

Section 5 of the Act runs as follows :

" Subject to the provisions contained in Ss. 4 to 25 (inclusive) of the Limitation Act, 1908, and notwithstanding anything to the contrary contained in the First Schedule of the said Act, every suit of any description specified in the Schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the Schedule, shall be dismissed although limitation has not been set up as a defence."

And S. 6 reads as follows :—

" *Notwithstanding anything herein contained*, ay suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, may be instituted within the period of one year next after the commencement of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, whichever period expires first."

It is admitted by Mr. Badri Das, who appeared for the appellant, that if the present suit is governed by S. 5 then the suit is within limitation by virtue of Ss 6 and 8 of the Limitation Act. The difficulty is really created by the opening sentence, which we have italicized, of S. 6 of the Act of 1920, which if read by itself might be interpreted to mean that S. 5 of the Act does not govern cases to which the Punjab Limitation (Ancestral Land Alienation) Act, 1900, applied but has ceased to do so by virtue of its repeal by the Act of 1920 ; in other words, cases in which the cause of action to contest alienation has already arisen. We must say that the phraseology of S. 6 of the Act of 1920 is obscure and open to misconstruction, but we do not consider that the contention of Mr. Badri Das is sound. The point is one of first impression and reading the two sections together i, e, Ss. 5 and 6 of the Act of 1920, we hold that S. 6 really gives an additional period

of one year to those who were at the time, when the Act came into force entitled to institute suits of the nature as the one before us, but could be successfully met by a plea of limitation owing to the repeal of the Act of 1900 and the consequent reduction of the limitation. In the case before us the limitation would have expired on the 1st April 1925 under the Act of 1900 and on the 3rd July 1924 under S. 5 of the Act of 1920 read with Ss. 6 and 8 of the Limitation Act. The opening sentence of S. 6 of the Act of 1920 being vague we are unable to hold that it had the effect of depriving the plaintiffs of their right which they had under S. 5.

We therefore, hold that S. 6 of the Act of 1920 does not apply to the case of the plaintiffs in the suit before us. In view of our finding on this point the other point involvee does not arise. The result is that this appeal is dismissed with costs

Appeal dismissed.

A. I. R. 1926 Lahore 189

MARTINEAU, J.

Thakur Das—Appellant.

v.

Daulat Ram and *others*—Defendants—Respondents.

Second Appeal No. 1927 of 1924, Decided on 30th March 1925, from an order of the District Judge, Multan, D/- 3rd April 1924.

(a) Civil P. C., O. 22, R. 4—One respondent not likely to be affected by the point in dispute, dying during appeal—Representatives not brought on record—Appeal does not abate.

Failure to bring on record the legal representative of a deceased respondent who was not in any way concerned with the point in dispute in a appeal does not cause the appeal to abate. [P 189, C 2]

(b) Court-fees Act, S. 7 (iv) (f)—Accounts suit—Defendant appealing from preliminary decree may put his own valuation.

A defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and pay the Court-fee on that valuation, and is not bound to accept the valuation given by the plaintiff in his plaint; *A. I. R.* 1922 *All.* 228, *Foll.* [P 190, C 1]

Hargopal—for Appellants.

Fakir Chand—for Respondents.

Judgment.—This appeal arises out of a suit for dissolution of partnership and rendition of accounts. On the objection of Kanshi Ram, Defendant No. 7, Thukar Das was added in the trial Court as a defendant, and the question for determination was whether Thakur Das was a partner in the business or only a sub-partner with Kanshi Ram. The Subordinate Judge held on the strength of a judgment given in a suit which Thakur Das had brought for rendition of accounts, that he was a partner in the concern and passed a preliminary decree in which he declared that Thakur Das had a half-anna share. Thakur Das appealed to the District Judge, paying a Court-fee of Rs. 10 on the appeal. The District Judge held that the Court-fee should have been paid ad valorem on Rs. 130, the value of the suit as given in the plaint, and that there was no sufficient reason for giving time to the appellant to make up the deficiency, and he accordingly dismissed the appeal. Thakur Das has filed a second appeal in this Court.

A preliminary objection is taken on behalf of the respondents that the appeal cannot proceed because Udho Ram, one of the defendants, died on the 27th February 1924 (while the appeal to the District Judge was pending) and his representative has not been brought on the record. I think there is no force in this objection as Udho Ram was in no way affected by the only point which was in dispute in the case, namely, whether Thakur Das was a partner or only a sub-partner with Kanshi Ram. It was only Thakur Das and Kanshi Ram who were concerned with that matter. *Raj Chunder Sen* v. *Ganga Das Seal* (1) and *Jamna* v. *Sarjit* (2) which have been cited by counsel for the respondents, are not in point, and I overruled the preliminary objection.

The plaintiff valued his suit at Rs. 130 and paid a Court-fee of Rs. 10 which was sufficient under the Court-fees Act, which was in force when the suit was instituted. Before the appeal in the District Court was filed, the old Act had been amended by Act 7 of 1922, under which the Court-fee payable on a valuation of Rs. 130 is Rs. 14-10-0. But under S. 7 (iv) (f) of the Act the amount of fee payable in a suit for accounts is to be computed according to the amount at which the relief sought is valued in the plaint or memo-

(1) [1904] 31 Cal. 487=31 I. A. 71=14 M. L. J 147=8 C. W. N. 442=1 A. L. J. 145=3 Sar. 623 (P. C.).

(2) [1919] 67 P. R. 1919.

randum of appeal and in *Kanhaiya Lal* v. *Ram Sarup* (3) it was held that a defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and pay the Court-fee on that valuation, and is not bound to accept the valuation given by the plaintiff in his plaint. Now in the memorandum of appeal filed in the District Court (i. e., the vernacular memorandum) the actual value was not entered, but the value was stated to be fixed. This being so, as the appellant was entitled to put his own valuation on the appeal and was not bound to accept the valuation given in the plaint, it cannot be said that the Court-fee paid on the the appeal in the District Court was insufficient.

I accordingly accept the present appeal, set aside the lower appellate Court's decree and remand the case to that Court under O. 41, R. 23, Civil P. C., for decision on the merits. The Court-fee paid on the appeal in this Court will be refunded, and other costs will be costs in the case.

Case remanded,

(3) A. I. R. 1922 All. 228.

A. I. R. 1926 Lahore 190

HARRISON, J.

Abdulla--Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 538 of 1925, Decided on 29th May 1925, made by the S. J., Karnal, on 22nd March 1925.

Criminal P. C., S. 110—*Immediately after acquittal of accused on a charge under S.* 411, *I.P.C., order under S.* 110, *Cr. P. C., is improper.*

Where in a case under S. 411, I. P. C., the accused is acquitted and immediately an order was passed against him under S.110 of the Criminal P. C.

Held : that he should not have been restricted under S. 110, Criminal P. C., immediately after without a very strong case being made out against him. [P 191, C 1]

Shamair Chand—for Petitioner.

C. H. Carden Noad—for the Crown.

Report of the Case.—Abdulla was restricted to his village for one year by order, dated 16th August 1924. of Agha Muhammad Sultan Mirza, Magistrate, First Class. Karnal. The appeal was rejected by the District Magistrate on 24th November 1924. Abdulla has now applied to this Court for revision

Sixteen witnesses appeared for the prosecution and 27 in defence. The learned District Magistrate has upheld the conviction because he was of opinion that the Magistrate who made the inquiry and saw the witnessess had come to the conclusion that the evidence for the prosecution was to be believed and not that of the accused and also because among the prosecution witnesses there were a Station Master and a Sub-Inspector who suspected the appellant in cases of thefts of their own properties. A perusal of the evidence in detail, however, shows that the evidence for the prosecution does not prove much. Prosecution Witresses Nos. 5 and 8 do not say anything against the accused ; P. W. No. 12 says that his reputation is not very bad ; P. W. No. 11 says that he is not a professional thief ; P. W. No. 4 says that one Santu suspected the accused of theft of his buffalo, but Santu appeared as D. W. No. 26 and stated that no buffalo of his had ever been stolen. Accused has had litigation with P. Ws. Nos. 7 and 9 as appears from the copies of judgments which are on the record. Prosecution Witnesses Nos. 10, 13, 14 and 15 admit in their cross-examination that they gave evidence in the previous case under S. 411, Indian Penal Code, against the accused in which the accused was acquitted. This leaves only five witnesses, P. Ws. Nos. 1, 2, 3, 6 and 16. Of these, P. Ws. Nos. 1, 3 and 16 are Sub-Inspectors and P. W. No. 2 is the Station Master. The Station Master says that he suspected the accused of theft of his buffalo and that accused had agreed to pay him Rs. 50, but did not keep his promise and yet he admits that in the report to the police he made no mention of accused's name. Daulat Ram Sub-Inspector, P. W. No. 3, says that he suspected the accused in a theft of his own, but he was unable to find anything or to challan the accused. A mere suspicion is no proof of anything against the accused. As opposed to these prosecution witnesses we have got the consistent testimony of 27 witnesses for the defence who all say that the accused is of good character. The Sub-Inspector (P. W. No. 1). admits that he challaned the accused in a case under S. 411, Indian Penal Code, but

he was acquitted in that; and after that there have been no complaints received by the Sub-Inspector against accused. The accused was similarly challaned under S 110 in 1919, but was discharged, In my opinion the evidence on the record does not justify the conviction of the appellant. The case is, therefore, reported to the High Court for revision with a recommendation that the conviction be set aside.

Order.—Abdulla was restricted to his village for one year by an order, under S. 110, Criminal P. C. His appeal was dismissed by the District Magistrate. The case has been sent up by the learned Sessions Judge who has recommended that the order should be set aside, and he supports his recommendation by various reasons, one of which that for discrediting the evidence of the Station Master is shown by counsel to be incorrect. For the reasons given by the learned Sessions Judge and also because the accused having just been acquitted in a 411 case, should not in my opinion huve been restricted immediately after without a very much stronger case being made out, I accept the application for revision and cancel the order.

Application accepted.

A. I. R. 1926 Lahore 191

LEROSSIGNOL, J.

Fatheullah and *others*—Plaintiffs—Petitioners.

v.

Abdul Rahim and *others*—Defendants—Respondents.

Civil Revision Petition No. 74 of 1925, Decided on 26th March 1925, for revision of an order of the Senior Sub-J., Lyallpur, D/- 1st December 1924

Civil P. C., Sch. 2, Para. 15—Arbitration proceedings are not separate case—No revision lies from order setting aside award.

Arbitration proceedings entered upon by the parties in the course of a trial of a suit are proceedings in that suit and do not constitute a separate case within S. 115 and, therefore, an order of lower Court setting aside award and directing the suit to proceed before it is not open to revision. *A. I. R.* 1924 *Lah.* 425, *Appr.*

[P. 192, C. 2]

Muhammad Shafi and *Muhammad Rafi*—for Petitioners.

Tek Chand and *Mehar Chand Mahajan*—for Respondents.

Judgment.—This is an application for the revision of an order of the Senior Subordinate Judge setting aside an award on various grounds, and a preliminary objection is raised by the respondents that the application is not competent, inasmuch as the Senior Subordinate Judge's order is an interlocutory order, and, therefore, not subject to revision: *Lal Chand-Mangal Sen* v. *Beharilal-Mehar Chand* (1).

On behalf of the petitioners it is retorted that the ruling cited by the respondents does not apply to this case, inasmuch as arbitration proceedings are special proceedings which take place before special tribunal and, therefore, are not merely proceedings in the suit, but constitute a "case" by themselves. In support of his argument the learned counsel has referred me to the "contents" table of the Civil P. C., and has dilated on the fact that arbitration is dealt with under Part V of the Code which is entitled "special proceedings," and he has also referred me to certain reported cases in which Courts have interfered in revision in such cases.

The real issue is whether arbitration proceedings entered upon by the parties in the course of a trial of a suit are proceedings in that suit, or within the meaning of S. 115 of the Code constitute a separate case, and, in my opinion, the answer must be that they are merely proceedings in the suit. The fact that Part V of the Code is entitled "special proceedings" is of no significance in this connexion, for we find under the same part that certain suits also are dealt with. S. 89 of the Code reads as follows:

"All references to arbitration, whether by an order in a suit or otherwise." * * *

These words clearly contemplate that the arbitration proceedings shall be considered as a proceeding in the suit. In the Second Schedule to the Civil P. C., Cl. (2) of para 3 runs:

"Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit."

These words clearly mean that to the extent provided in the schedule the arbitration proceedings form an integral part of the suit. Indeed, the whole scheme

(1) A. I. R. 1924 Lah. 425.

of the schedule is that all references to arbitration shall be treated as suits, for we find that when any party wishes to enforce an agreement to refer to arbitration, he may apply to the Court for the filing of that agreement and his application shall be numbered and registered as a suit (para. 19). A similar provision is made in para. 20 that after an award has been made without the intervention of the Court any person interested may apply to the Court to have the award filed in Court. In the two latter cases there is no suit apart from the proceedings in arbitration, and it is significant that in those cases an appeal against the order is allowed by S. 104. It is otherwise when the reference is made to arbitration in a suit already pending before a Court. In such a case for an obvious reason no appeal against an order is allowed, and it can never have been contemplated by the Legislature that the refusal of this right could be made good by an application in revision.

For the foregoing reasons, I have no hesitation in holding that arbitration proceedings in a suit instituted in a Court are not proceedings independent of the suit, but are merely proceedings in the case and do not in themselves constitute a separate case. This case, therefore, in which the Senior Subordinate Judge has set aside the award and directed that the suit shall proceed before him is an undecided case and not open to revision. I uphold the preliminary objection and dismiss the petition with costs.

Petition dismissed.

A. I. R. 1926 Lahore 192

MARTINEAU AND FFORDE, JJ.

Kamir—Defendant—Appellant.

v.

Newas and *others*—Plaintiffs & Defendants—Respondents.

First Appeal No. 275 of 1921, Decided on 10th November 1925, from the decree of the Senior Sub.-J., Jhang, D/- 15th November 1920.

Custom—(Punjab)—Mortgage by widow—Widow having one daughter—Mortgage can be avoided by reversioners.

Where the self-acquired property of the deceased was mortgaged by his widow and the deceased had left one daughter, and where the parties were governed by the general custom of agriculturists.

Held : that the reversioners of the deceased were entitled to contest the mortgage in spite of the deceased having left a daughter surviving him; 103 *P. R.* 1907 and 149 *P. R.* 1908, *Rel. on.*

[P 192 C 2]

Umar Baksh—for Appellant.

Ghulam Mohi-ud-din—for Respondents,

Fforde, J.—This is a suit brought by the collaterals of one Ghulam to contest a mortgage made by his widow Mt. Jawai and his mother Raushnai in favour of the defendant Kamir.

It has been held by the trial Court that the parties are governed by the general custom of agriculturists, and with this finding we entirely agree. It appeare that Ghulam left him surviving one issue only, namely, a daughter, now aged soms three years. It is contended by Mr. Umar Bakhsh, who appears for the mortgagee, that the alienation is valid as the property in question was admittedly the self-acquired property of Ghulam and is not ancestral qua the plaintiffs. Mr. Ghulam Mohi-ud-Din, who appears for the plaintiffs-respondents has referred to two cases; one, *Muhammad Umar* v. *Abdul Karim* (1) in which it was held that the existence of a daughter does not preclude the near reversioner from contesting the alienation made by a widow, and that it is immaterial whether the property alienated by the widow is self-acquired or ancestral property. In the other case cited by Mr. Ghulam Mohi-ud-Din namely, *Yapuria* v. *Mangal* (2) it was held that where a widow's daughter has herself no male issue a distant reversioner may contest an alienation made by such widow. No case has been cited to the contrary and accordingly we must hold it to be clearly established that the plaintiffs under the circumstances of the present case have the right to bring this suit in spite of the fact that there is a daughter of the alienor Mt. Jawai living.

We agree with the trial Court that necessity for the alienation has not been established. Accordingly the appeal must be dismissed with costs.

Appeal dismissed.

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(1) [1907] 103 P. R. 1907.
(2) [1908] 149 P. R. 1908.

A. I. R. 1926 Lahore 193

ADDISON, J.

Fitzmaurice—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1111 of 1925, Decided on 16th February 1926, from the order of the S. J., Peshawar, D/- 28th October 1925.

(a) *Criminal P. C., S.* 423 (2)—*S.* 423 (2) *does not narrow down S.* 418, *Criminal P. C.*

S. 423 (2) only applies if it becomes necessary to consider whether the verdict of the jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418 which allows an appeal in a jury trial on a question of law; 29 *Mad.* 569, *Dist.* [P. 194, C. 1, 2]

(b) *Criminal P. C., Ss.* 235 *and* 234—*Four distinct acts on different dates relating to different documents charged under S.* 477-*A, I. P. C.—Offences cannot be tried together.*

Where there were four distinct acts on different dates relating to four different documents charged under S. 477-A : *Held*: that as the offences did not come within a series of acts so combined together as to form the same transaction, they could not be tried together at one trial either under S. 235 or S. 234. [P. 194, C. 2]

(c) *Criminal Trial—Misjoinder of charges.*

Where there is a misjoinder of four charges the illegality of trial is not cured by the judge striking out one charge when the trial is practically over. [P. 194, C. 2]

L. Saunders and *B. R. Puri*—for Appellant.

C. Beven Petman and *B. Beven Petman*—for the Crown.

Judgment.—The appellant was tried by the Sessions Judge of Peshawar with a jury of five persons. He was found guilty of three separate offences under S. 477-A, Indian Penal Code, by a majority verdict of the jury of 3 to 2. The Judge seeing no reason to disagree with that verdict accepted it and convicted him of three offences under S. 477-A, Indian Penal Code. He sentenced him to nine months' rigorous imprisonment for each offence, the sentences to run concurrently.

Numerous grounds of appeal have been put forward, but only one need be considered as in my opinion it must prevail. It was to the effect that the trial was totally illegal as it proceeded on four charges till the stage that only one minor prosecution witness remained to be examined. Counsel for the prosecution then withdrew one charge on the ground of misjoinder and the position was at that time explained to the jury. In 25 *Mad.* 61 the Judicial Committee of the Privy Council held that the trial was illegal as it had proceeded on four charges and that this illegality was not cured by S. 537, Criminal Procedure Code. The trial was held by a judge of the Madras High Court with a jury. There was then an appeal to a Full Court on a certificate granted by the Advocate-General under S. 26 of the Letters Patent. It was held by the Full Court that it had power to strike out one charge and come to a conclusion as to whether there was sufficient evidence to support the three charges left. But their Lordships of the Privy Council held that this could not be done as there had been a disregard of an express provision of law as to the mode of trial and that the trial was illegal and could not stand. The effect of S. 423 (2), Criminal Procedure Code, was not considered by their Lordships. Before me it was argued on behalf of the Crown that under the provisions of S. 423 (2), Criminal Procedure Code, the appellate Court cannot alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, etc., and that it therefore did not matter that the trial had been illegal nearly up to its close unless there was a misdirection by the Judge on the three charges left, on which alone he asked the jury's verdict. Their Lordships in the case mentioned laid down that the illegal course pursued could not be amended by the appellate Courts arranging afterwards what might or might not have been submitted to the jury as the mischief sought to be avoided by the statute had been done. In the case before me, the jury heard practically all the prosecution evidence on all four charges, to which the appellant had pleaded at the beginning of the trial ; but it was explained to them at the time when one charge was withdrawn that this had been done, and the Judge's summing up was on the three charges left. It is also correct that the trial was illegal down to the stage that the fourth charge was withdrawn, that is, till it was nearly finished. Again, an appeal is given under S. 418, Criminal Procedure Code, on a matter of law when the trial has been by jury. The point raised is one of law. Can it be held that the provisions of S. 418, Criminal Procedure Code, are cut down by S. 423 (2), Criminal

Procedure Code ? That would mean that no question ef illegality can be taken in appeal, if the Judge, in his summing up, did not misdirect the jury ; and that the jury's mind may have been greatly prejudiced by an illegal trial, but that this cannot be rectified if at the end the judge did not misdirect them. S. 227, Criminal Procedure Code, enacts that any Court may alter or add to a charge before judgement is pronounced or in a jury trial before the verdict of the jury is returned. It was held, however, in 29 *Mad.* 569, that this did not permit a Magistrate to strike out a charge for the purpose of curing an illegality already committed. In that case also there were four charges. The prosecution evidence had been led, the charges framed, and the accused pleaded to them, and examined his defence witnesses. Before judgment, however, the Magistrate struck out one charge, purporting to act under S. 227. It was held that be could not do so as the mischief had been done which the law desired to prevent, and that all the section meant was to allow the alteration of a charge or charges upon which the trial had validly proceeded.

In the present case, the same mischief had been done, except that the defence witnesses had not been heard and the Judge had not summed up to the jury. There is no distinction in principle between this case and 29 *Mad.* 569 so far as S. 227, Criminal Procedure Code, is concerned. The Magistrate there had power under it to alter the charge up to judgment and the Sessions Judge here had power to do so till the verdict of the jury was returned. It was held that the Magistrate could not do it in the way mentioned so as to cure an illegality under which the trial took place. The question is whether the Sessions Judge had power to do so, because of the provisions of S. 423 (2), Criminal Procedure Code, as it must be held that he could not do so under S. 227, or, rather, whether in a jury trial this illegality can be committed if the Judge does not misdirect jury as regards the three charges left. It is of course the case that probably more mischief would be caused in a jury trial than when a when a trained Magistrate is the tribunal.

The answer in my judgment is beyond any doubt, namely, that S. 423 (2) Criminal Procedure Code, only applies if it becomes necessary to consider whether the verdict of the jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418, Criminal Procedure Code, which allows an appeal in a jury trial on a question of law. If there has been no trial in fact, because such trial was illegal, it must be set aside for that reason only and no question arises as regards any misdirection affecting the jury's verdict. This is the law in England and this view has been consistently followed in India. That this is the correct view follows from S. 537 (c), Criminal Procedure Code, which enacts that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of the omission to revise any list of jurors in accordance with S. 324 unless such omission has in fact occasioned a failure of justice. This means that the omission referred to must be treated as a mere irregularity. But suppose that the provisions of the law as to empanelling a jury are violated. That is not provided for in S. 537. This implies that such a breach of the law must be treated as an illegality vitiating the whole trial, which must be set aside for that reason alone. For example in 26 *All.* 211, a jury trial was set aside because seven jurors were empanelled instead of five as fixed by an order of the Local Government acting under S. 274, Criminal Procedure Code, on the ground that the trial was not before a tribunal constituted according to law. There was in that case an illegality as regards the number of jurors chosen and the appeal was allowed. Again, where the provisions of Ss. 276 to 279 and 326, Criminal Procedure Code, as regards selecting the Jurors were not followed, it was held in 7 *C. W. N.* 188 that such a grave irregularity was not rectified by S. 537. To a similar effect is 33 *All.* 385. Another case which may be quoted is 36. *All.* 481. In that trial one juror was discharged and another chosen in his place after two witnesses had been examined. The trial did not commence afresh, but the evidence given by the two witnesses was read over to and admitted by them. It was held that there was no valid trial and that it must be set aside. Another case in point is *Lyme* v. *Crown* (1), where an illegality in the statutory pro-

(1) A. I. R. 1924 Lah. 17.

cedure was held to vitiate the whole trial which was by jury. In all the above cases the trial was set aside on account of illegalities committed therein without reference to any misdirection of the jury by the Judge, obviously on the ground that there was no valid trial in which a verdict of the jury had been returned. This is how the law must be interpreted.

Although, as noted by the learned Sessions Judge, the fourth charge was withdrawn at the request of the prosecution on the ground of misjoinder of more than three charges, some attempt was made before me to argue that in fact, though four charges had been drawn up, there was only one charge within the meaning of S. 235, Criminal Procedure Code, as there was one series of acts so connected together as to form the same transaction. I am unable to hold this. There is no proof of any conspiracy covering the four charges framed under S. 477-A, Indian Penal Code, and it cannot be said that the transactions formed one series of acts. They were clearly independent acts. The success of one may have led to the next. The first charge was that on the 4th May 1921, he wilfully and with intent to defraud Government of which he was a servant, falsified etc., Exhibit B, an indent which belonged to the Government. The second was that on the 14th March 1921 he made the false indent, Exhibit E. The third was that on the 15th March 1921 he made the false supply order Exhibit N; while the fourth charge which was withdrawn, was the falsifying of indent Exhibit P. 1 on the 24th March 1921. It cannot be said in these circumstances as was argued, that in fact there was one offence of falsifying and forging supply orders and indents. This is not a case of making false entries in books of accounts but of falsifying different documents. It was held in 26 *Cal.*, 560 that each act of falsification amounts to a separate offence under S. 477-A, Indian Penal Code, that an accused person can only be charged with and tried at one trial for any number of offences of the same kind not exceeding three committed in the space of one year and that the explanation appended to S. 477-A, Indian Penal Code, does not purport to override S. 234, Criminal Procedure Code. Again, where a person was sent up for trial under S. 477-A, Indian Penal Code charged with having altered certain accounts between the years 1907 and 1909 and the evidence showed that the subject-matter of the charge was practically five series of entries in certain books, it was held in 32 *All.* 57 that the charge was bad for misjoinder. It is different, of course, if there is a series of alterations in accounts made to cover one defalcation as they are not distinct offences, but such false entries in any particular case can only relate to one defalcation and it is impossible to take a series of false entries relating to three different offences in the same trial (41 *Cal.* 722) Further it was held in 30 *Mad.* 328 that it was illegal to try a person on a charge which alleged three distinct acts of criminal breach of trust under S. 409 Indian Penal Code and three distinct acts of falsifying accounts under S. 477-A, Indian Penal Code as neither S. 234 nor S. 235 Criminal Procedure Code covered such a case. In the present case there were four distinct acts on different dates relating to four different documents charged under S. 477-A. It follows, therefore, that the trial on the four charges was illegal as the offences did not come within a series of acts so combined together as to form the same transaction, and that they could not be tried together at one trial either under S. 235 or S. 234, Criminal Procedure Code.

I hold that there was an illegal trial because of misjoinder of four charges, and that this was not cured by the Judge striking out one charge when the trial was practically over; and I, therefore, accept the appeal, set aside the conviction of the appellant and direct that a new trial be held. The appellant will execute a bond with one or two sureties for Rs. 10,000 to appear before the Sessions Judge, Peshawar, when called upon and in any case on the 1st March 1926, whether called upon or not.

Appeal accepted.

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* A. I. R. 1926 Lahore 195

MARTINEAU, J.

King-Emperor

v.

Raj Pal—Accused.

Criminal Revision No. 1063 of 1925, Decided on 13th November 1925, from the order of the 1st Class Mag., Lahore, D/- 13th November 1924.

* *Penal Code, S. 153-A—Intention is essential—Truth of statements charged is material to determine intention and for sentence.*

Intention is an element in the offence under S. 153-A and the Court must be satisfied that the accused had a conscious intention of promoting, causing or exciting enmity and hatred : 10 *P. R.* (*Cr.*) 1907, *Foll.* The question of the truth of the statements made by the accused is material so far as the accused's intention is concerned. Moreover evidence given to show that the statements made by the accused were true, or believed by him to be true, even if insufficient for the purpose of proving him to be innocent of intending to promote class hatred, would be relevant on the question of the sentence to be passed in the event of his conviction. [P 196 C 1, 2]

Zafarullah Khan—for the Crown.

Tek Chand—for the Accused.

Judgment.—The respondent is being prosecuted for an offence under S. 153-A of the Indian Penal Code in respect of a pamphlet called "Rangila Rasool," of which he is the author ; and the present application has been made on behalf of the Crown for revision of an order in which the Magistrate has held that the intention of the accused is relevant, and that evidence to prove that allegations contained in the pamphlet are based on facts is also relevant.

The Magistrate is, in my opinion, right on both points, and his view is supported by the very ruling, *Jaswant Rai* v. *King Emperor* (1), which has beeen cited on behalf of the etitioner. That was a judgment of a Division Bench, and one of the learned Judges, Sir William Clark, held that intention was an element in the offence, and said that unless he were satisfied that the accused had a conscious intention of promoting, causing, or exciting enmity and hatred he would not maintain the conviction. The question of the relevancy of the truth of the statements in the article published by the accused was also raised, and Reid, J., held that the question of their truth was material so far as the accused's intention was concerned, and the learned Judges made a point of the fact that the story which the accused had given out was based only on a flimsy rumour. Moreover, evidence given to show that the statements made in the respondent's pamphlet were true, or believed by him to be true, even if insufficient for the purpose of proving him to be innocent of intending to promote class hatred, would be relvant on the question of the sentence to be passed in the event of his conviction.

I accordingly dismiss the application.

Revision dismis sed

(1) [1907] 10 P.R. 1907 Cr.=14 P. W. R. 1907 Cr.

A. I. R. 1926 Lahore 196

ADDISON, J.

Nazar Muhammad Khan — Accused — Petitioner.

v.

Hara Singh Bedi—Complainant—Respondent.

Criminal Petition No. 22 of 1924, Decided on 9th May 1925, for restoration of the Case No. 788 of 1924 to file passed by Le Rossignol, J., on 12th December 1924.

(a) *Criminal P. C., S. 421—Rejection of appeal under S. 421—No formality nor reasons are necessary.*

An appeal can be rejected under S. 421 without any formality. There need be no recorded judgment or reason of any description. [P 197 C 2]

(b) *Criminal P. C., S. 561-A—Section is general and does not empower High Court to review its judgment.*

S. 561-A is of a very general nature and has no application to the question whether the High Court should review its judgment : 19 *B.* 732, *Rel. on.* [P 197 C 1]

Ram Lal for *Des Raj Sawhney*—for Petitioner.

Moti Sagar and *Anant Ram Khosla*—for Respondent.

Order.—On the 4th August 1924, the Sessions Judge, Montgomery, directed under S. 195, Criminal P. C., that a complaint under S. 211, Criminal P. C., should be filed in the Court of the District Magistrate, Montgomery, against Nazar Muhammad Khan. An appeal from this order was filed in this Court and it was summarily dismissed on the 12th December 1924, by a learned Judge of this Court, neither the appellant nor his counsel being present. On the 3rd January 1925 the appellant put in an application stating that his appeal had been dismissed because of the non-appearance of the appellant and his counsel, that his counsel had been misinformed about the date of the hearing and that the appeal should, therefore, be heard and decided on the merits as no judgment on the merits was given by the Hon'ble learned Judge in chambers. The application purported to be under S. 561-A, Criminal P. C. The question to be decided is whether the appeal can now be heard.

The appeal was obviously dismissed under the provisions of S. 421, Criminal P. C., in the absence of the appellant and his pleader who had a reasonable opportunity of being heard in support of the appeal. This must be taken to be the case as no affidavit has been filed. It is true that the order of the learned Judge of this Court does not state that he saw no sufficient ground for interfering but, in my opinion, it must be assumed that this was omitted inadvertently or because it was considered unnecessary to note everything in a summary order. An appeal can be rejected under S. 421, Criminal P. C., without any formality. There need be no recorded judgment or reason of any description. I have not the slightest doubt that this was why a full order was not recorded to the effect that there were no grounds for interference. For this reason alone this application must be rejected.

I am also of opinion that S. 561-A, Criminal P. C., which is of a very general nature has no application to the question now under consideration. The section applicable is S. 369, Criminal P. C., which is to the effect that no Court shall alter or review its judgment after it has been signed, save as otherwise provided by the Criminal P. C., etc. It has not even been argued that there is any special provision apart from S. 561-A, Criminal P. C., which deals with this subject. The Division Bench ruling of the Bombay High Court, *Queen-Empress* v. *Bhimappa* (1) is in point. A Sessions Judge dismissed an appeal without going into the merits on the ground that it was barred by limitation, he subsequently admitted the appeal and acquitted the appellant. The Bombay High Court held that the first order was under S. 421, Criminal P. C., though it was not upon the merits and was not open to review by the Sessions Judge. I, therefore, hold that the matter cannot be re-opened on this ground also, although it is not necessary for me to go into this question on my first finding.

There is no question of hardship in the present case as all that has been ordered is that a complaint under S. 211, Indian Penal Code, shall be filed against the petitioner. The result is that this application is rejected.

Application rejected.

(1) [1895] 19 Bom. 732.

A. I. R. 1926 Lahore 197

CAMPBELL, J.

Surain Singh—Defendant—Appellant.

v.

Babu and *others*—Plaintiffs—Respondents.

Second Appeal No. 1741 of 1924, Decided on 22nd January 1925, from a decree of the Dist. J., Amritsar, D/-11 June 1924

Hindu Law—Alienation by natural managing guardian for necessity or benefit of estate is valid.

The natural guardian of a Hindu minor has power, in the management of his estate, to mortgage or sell any part thereof in case of necessity or for the benefit of the estate. 45 *Cal.* 878 *Distinguished.* [P 198 C 1]

Nihal Chand Mehra—for Appellant.

Chiman Lal Gulati—for Respondents.

Judgment.—This second appeal arises out of a suit by a minor for possession of land which was sold by his mother acting as his guardian.

The first two issues framed by the trial Court were as follows :

(1) Whether the land was sold by the mother of the plaintiff for the benefit of the minor ?

(2) In case Issue No. 1 is proved, is the sale void ?

The trial Court held that out of the ostensible consideration for the sale Rs. 230 were set off by the vendee against the amount due on a previous mortgage which was for the benefit of the minor. The Court held that the mother had no right to convey any right or interest in the immovable property of the minor plaintiff and that the sale was void. Nevertheless the plaintiff was ordered to pay Rs. 230 before obtaining possession of the land.

Both parties appealed to the District Judge who declined to go into the question of necessity for the sale or of benefit to the minor, but on the strength of the Privy Council ruling in *Imambandi* v. *Mutsaddi* (1) accepted the plaintiff's appeal and decreed his claim for possession without payment of anything.

The rule laid down by their Lordships of the Privy Ceuncil was one to be applied solely to Muhammadans and was based upon a consideration of Muhammadan Law. The present minor is a

(1). [1919] 45 Cal. 878=45 I. A. 73=35 M. L. J 422=16 A. L. J. 800=24 M. L. T. 330=28 C. L. J. 409=23 C. W. N. 50=5 P. L. W. 276=20 B. L R. 1022=(1919) M. W. N. 91 =9 L, W. 518 (P. C.).

non-Muhammadan, and his learned counsel before me is unable to cite any authority for the proposition that the Muhammadan rule must be applied also to non-Muhammadans. The ordinary rule stated in para. 440 of Mulla's Hindu Law is that the natural guardian of a Hindu minor has power, in the management of his estate, to mortgage or sell any part thereof in case of necessity or for the benefit of the estate.

The decision of the learned District Judge must be set aside. I accept the appeal and return the case to him for re-decision. Costs will follow the event.

Appeal accepted.

A. I. R. 1926 Lahore 198

ABDUL RAOOF AND HARRISON, JJ.

Mt. Bhagwanti—Plaintiff—Appellant.

v.

Thakur Mal and *others*—Defendants—Respondents.

Second Appeal No. 22 of 1921, Decided on 6th December 1924, from a decree of the Dist. J., Hissar, D/- 31st August 1920.

Hindu Law—Maintenance—Widowed daughter-in-law has merely a moral right of maintenance against her father-in-law, as regards his self-acquired property—She cannot realize her maintenance from such property sold or willed away by the father-in-law.

A man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses. This being so, a widowed daughter-in-law has no sort of right or control over his alienations during his lifetime and she cannot possibly be allowed to realise her maintenance from the property which he has seen fit to sell or gift, although this doubtless has the effect of depriving the widow of her legal rights of maintenance before they are fully born, for during the father-in-law's lifetime her rights are merely in embryo, being nebulous moral rights which she cannot enforce.

[P. 198, C. 2, P. 199, C.1]

N. C. Mehra—for Appellant.

Kanshi Ram and *Balwant Rai*—for Respondents.

Judgment.—This is a suit by a widow claiming from her father-in-law and his three nephews to whom he had bequeathed by gift certain immovable property. She claimed that this was coparcenary property in which her husband held a share at the time of his death, and she was awarded a decree by the trial Court against all the defendants. The nephews alone appealed and their appeal succeeded, it being found by the learned District Judge as a fact that the whole of the property in suit was self-acquired property of the father-in-law, that he was fully entitled to do what he wished with his own and that he had gifted it free of all obligation or charge to his nephews, and that the widow could not pursue it in their hands.

On second appeal before us counsel contends that although there is a moral obligation on the father-in-law during his lifetime to maintain his son's widow after his death that moral obligation crystalizes into a legal charge against the self-acquired property left by him and inherited by his heirs. He relies on *Rangammal* v. *Echammal* (1), in which it was held that even where the father-in-law has made a Will the widow can after his death pursue the property in the hands of the devisee. He argues with some force that by analogy she should be allowed to pursue the property in the hands of the alienees or donees on the reasoning that it is ultimately the property from which she has to recover her maintenance and, although she has no legal right to recover it during the father-in-law's lifetime and while the property is in his hands, if he alienates the whole of his property during his lifetime and his title in the property disappears, she should be allowed on equitable grounds to realize her maintenance from that same property when in the hands of the donees.

Whatever may be said on widow's behalf on equitable grounds the fact remains that it is clearly established that, a man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses. This being so, as the widow has no sort of right or control over his alienations during his lifetime, she cannot possibly be allowed to realize her maintenance from the property which he has seen fit to sell or gift. This doubtless has the effect in this case of depriving the widow of her legal rights of maintenance before they are fully born; for during the father-in-law's lifetime her rights are merely in embryo, being

(1) [1899] 22 Mad. 305=9 M. L. J. 14.

nebulous moral rights which she cannot enforce. This is inevitable, as any other decision would be irreconcilable with the all-important proposition that a man may do what he wills with his own self-acquired property.

We dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 199

SHADI LAL, C. J.

Lakshmi Narain—Petitioner.

v.

Mt. Ratni—Complainant—Respondent

Criminal Misc. Appeal No. 208 of 1925

Decided on 20th February 1926, from the Court of the 1st Class Magistrate, Ambala, D/- 20th February 1926.

(a) *Legal Practitioners Act* (18 *of* 1879), *S.* 14 *Proceedings under S.* 14 *are neither civil nor criminal.*

A proceeding under the Act is not a civil proceeding and the provisions of the Civil P. C. are wholly inapplicable to a case of misconduct by pleader. Nor an enquiry into the conduct of a pleader can be treated as a criminal proceeding, though being penal in its nature it resembles in many respects a criminal case.

[P 199, C 1]

(b) *Government of India Act, S.* 107—*High Court can transfer proceedings under Legal Practitioners Act under S.* 107.

The High Court can, in the exercise of its powers of general superintendence under S. 107, direct a transfer of proceeding under the Legal Practitioners Act. [P 199, C 2]

M. L. Puri—for Petitioner.

Shamair Chand—for Respondent.

Order.—The appellant Lala Lakshmi Narain Varma, a pleader practising at Ambala, has been called upon to answer a charge of misconduct under S. 14 of the Legal Practitioners Act, XVIII, of 1879, and the question debated before me by the learned counsel for the parties is whether the High Court has jurisdiction to make an order of transfer with respect to a proceeding taken under the said Act. There can be no doubt that a proceeding under the Act is not a civil proceeding, and the provisions of the Civil P. C. are wholly inapplicable to a case of this description. Nor do I think that an enquiry into the conduct of a pleader can be treated as a criminal proceeding, though being penal in its nature it resembles in many respects a criminal case.

The learned counsel for the applicant however, invokes, S. 526 of the Criminal Procedure Code, and contends that, as Act XVIII of 1923 has now amended the section by omitting the word "criminal" which occurred in Cl. (11) of sub-S. (1) thereof, the present proceeding comes within the ambit of that section. There can be no doubt that under the old law there was a conflict of opinion as to whether a case under Chapter VIII or under S. 145 of the Code could be called a criminal case, but all doubt on this subject has now been set at rest by deleting the word "criminal" from S. 526. The scope of the section has now been considerably enlarged, and every case tried by a criminal Court comes within the purview of the amended section. There is, therefore, considerable force in the contention that the present enquiry under S. 14 of the Legal Practitioners Act which is being conducted by a Magistrate, constitutes a "case" within the meaning of the section.

Without pronouncing, however, a final opinion as to the applicablity of S. 526 of the Criminal Procedure Code, I consider, that the High Court can, in the exercise of its powers of general superintendence under S. 107, of the Government of India Act, direct a transfer of proceeding taken under the Legal Practitioners Act. It has been repeatedly held by the Allahabad High Court that those powers are extensive enough to authorize the High Court in the exercise of its discretion to send for the record of an enquiry conducted by a District Judge in order to publish a list of the persons proved to be touts in accordance with the provisions of S. 36 of the Act, and to examine such record and thereafter to issue such orders or instructions to the District Judge as might appear to be proper : vide inter alia *In the matter of the petition of Madho Ram* (1) and *In the matter of the petition of Kashi Nath* (2). The same view has been taken by the Calcutta High Court in *In re Siddeshwar Boral* (3). The only case bearing upon the question of the applicability of S. 107 to a proceeding of this character, to which the learned counsel for the respondent has invited my attention, is the judgment of the Patna High Court in *In the matter*

(1) [1899] 21 All. 181=(1899) A. W. N. 34.
(2) A. I. R. 1924 All. 69.
(3) [1899] 4 C. W. N. 36.

of Janak Kishore (4), but the report shows that, while the learned Judges discussed the scope of the said section, they refrained from expressing any opinion as to whether the right of general superintendence conferred by it would include the making of an order for the transfer of a proceeding taken under the Legal Practitioners Act.

I have examined the language of S. 107 of the Government of India Act and reached the conclusion that the general powers of superintendence conferred thereby upon the High Court are wide enough to enable this Court to send for the record of a proceeding under S. 14 of the Legal Practitioners Act against a pleader and to pass such orders as it thinks fit. At the same time I am of opinion that this jurisdiction should be exercised cautiously and sparingly. In the case before me there are very strong grounds for making an order of transfer. Not only is the Magistrate personally interested in the matter, but the misconduct complained of took place in relation to an application for transfer preferred to the Additional District Magistrate. There can be no doubt that when a misconduct is said to have taken place in, or in relation to, a proceeding in a Court, an enquiry into that misconduct should be conducted by the presiding officer of that Court.

For the aforesaid reasons I transfer the case from the Court of Lala Hukam Chand to that of the Additional District Magistrate.

Case transferred.

(4) [1917] 1 Pat. L.J. 576=(1917) P. H. C. C. 60.

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* A. I. R. 1926 Lahore 200

CAMPBELL, J.

Lakhmi Chand—Defendant — Appellant.

v.

Firm Chhajju Mal-Ratan Lal and *another*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 657 of 1925, Decided on 22nd October 1925, from a decree of the Dist. J., Delhi, D/- 16th December 1924.

* *Limitation Act, Art.* 89—*Suit by principal against agent—Date fixed for settling accounts—Time runs from such date and not from date of last transaction by agent on principal's behalf.*

In a suit for accounts by the principal against the agent when a date is fixed between them for settling of accounts, limitation begins to run from the date fixed and not from the date of the transaction last entered into by the agent on behalf of the principal. [P. 201, C. 1]

Sardha Ram—for Appellant.

Shamair Chand—for Respondents.

Judgment.—In this case the lower appellate Court has upheld a decree granted to the firm Chhajju Mal-Rattan Lal against Lakhmi Chand for Rs. 875 due to them on certain transactions in which the defendant acted as the plaintiff's commission agent.

In second appeal the only point raised is whether the suit was within limitation. Both parties agree that the article of the Limitation Act applicable is 89 and that the suit, which was instituted on the 31st May 1923 should be shown to have been brought within three years of the termination of the agency. The defendant-appellant's contention is that the agency terminated on the 29th May 1920 and that of the plaintiffs-respondents is that it terminated on 1st June 1920. The lower appellate Court upheld the plaintiffs' contention on the ground that the parties had agreed that the account should be settled on the 1st of June although all the transactions of purchase and sale into which the defendant entered on behalf of the plaintiffs might have been completed as alleged by the defendant on the 29th May 1920.

For the defendant-appellant it is argued that there is no proof of any agreement that accounts should be settled on the 1st of June, but there is the sworn testimony on the record of one of the plaintiffs to support the lower appellate Court's finding on this point. The lower appellate Court has further accepted the plaintiffs' accounts as correct and has believed the statements of the witnesses produced by them to depose to the nature of the transactions. According to this evidence what took place on the 29th May 1920 was that by that date the purchases and sales made by the defendant on the plaintiffs' behalf were equalized in quantity, that is to say, on that date the defendant had purchased for the plaintiffs 2,700 maunds of gram and had sold the same quantity. The

1st of June, however, was the appointed settling day and until that day was over it could not be said that the defendant had ceased to represent the plaintiffs as their agent and to do acts in that capacity. In view of the lower appellate Court's finding that the nature of the transactions was as alleged by the plaintiffs, there can be no other conclusion but that the agency did not terminate until the 1st of June.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

** A. I. R. 1926 Lahore 201

LEROSSIGNOL AND MARTINEAU, JJ.

Kesari Dass and *Sons*—Petitioners.

v.

Income-Tax Commissioner, Punjab and *N. W. F. Province, Lahore*—Respondent.

Civil Misc. No. 408 of 1924, Decided on 19th January 1926.

** *Income-Tax Act* (1922), *S.* 13, *proviso—Proviso does not apply where genuineness of accounts is doubted—S.* 23 (2) *applies in such a case.*

Proviso to S. 13 applies only when no method of accounting has been regularly employed or when the method employed is such that in the opinion of the Income-Tax Officer the income, profits, and gains cannot properly be deduced therefrom and not to a case where the Income-Tax Officer has a doubt as to the genuineness of accounts. The section applicable in such cases is S. 23 (2). [P. 201, C. 2]

C. H. Oertel—for Petitioners.

Des Raj Sawhney—for Respondent.

Order.—The petitioners manufacture and sell aerated waters and carry on a grocery business. They furnished a return of their income for the year 1922-23 and produced their accounts. The Income-Tax Offieer in an order of the 20th October 1923, said that no regular accounts were produced and that it was doubtful whether those seen by the Inspector were genuine, and remarking that the business was prosperous and profitable he proceeded to give an estimate, not based on any evidence, of the sales and profits, as well as of the income derived from the rent of the petitioners' house property, considerably in excess of the figures stated in the petitioners' return; he assessed the total income at Rs. 22,000. On appeal the Assistant Commissioner allowed an additional Rs. 2,000 for the costs of the petitioners' establishment, but otherwise upheld the order of the Income-Tax Officer. The petitioners then applied to the Commissioner to refer certain questions of law to this Court. The application was rejected, but this Court on being moved by the assessees under S. 66 (3) of the Income-Tax Act directed the Commissioner to state the case and a reference has now been made by him in accordance with that direction.

The learned Commissioner has dealt at considerable length with the various points eight in number mentioned by the petitioners in their application to him. We think it is unnecessary to enumerate them or to discuss them in detail. The only real question for decision is whether after the petitioners had furnished a return of their income and had produced their accounts in compliance with a notice under S. 22 (4) of the Act, the Income-Tax Officer, when not satisfied that the accounts were correct, was justified in computing the income in such a manner as he thought fair. In support of the Income-Tax Officer's order the learned Commissioner relies upon the proviso to S. 13, but that proviso applies only when no method of accounting has been regularly employed or when the method employed is such that in the opinion of the Income-Tax Officer the income, profits, and gains cannot properly be deduced therefrom. The Income-Tax Officer in his order assessing the petitioners said nothing about the method of accounting employed by them, but expressed a doubt, for which he gave no reasons, as to the genuineness of their accounts. S. 13, therefore, has no application at all, but the section applicable is S. 23 (2) which requires the Income-Tax Officer, if he has reason to believe that the return made is incorrect or incomplete, to serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-Tax Officer's office or to produce or to be caused to be produced any evidence on which such person may rely in support of the return. In this case the Income-Tax Officer did not serve such a notice on the petitioners, nor does he appear to have pointed out to them any defects or irregularities in

the accounts, so that they might be able to explain them, but he made a purely arbitrary assessment without having given them an opportunity of supporting the return which they had furnished.

Such an assessment was in our opinion illegal and we answer the question of law above stated in the negative and direct that the petitioners be paid their costs by the Crown.

✻ A. I. R. 1926 Lahore 202

ADDISON, J.

Baij Nath—Plaintiff—Appellant.

v.

Uggar Sain and *others*—Defendants—Respondents.

Second Appeal No. 2524 of 1925, Decided on 12th February 1926, from the decree of the Dist J., Hissar, D/- 18th April 1925.

✻ *Civil P. C., S. 47—Improper party against whom no relief was claimed when discharged ceases to be defendant—Civil P. C., O. 1, R. 10.*

Where no relief was claimed against defendants and they were also not proper parties to the suit and where the Court discharged them but did not strike out their names from the record.

Held; that the order amounted to striking out the defendants from the record. 41 *Mad.* 418; 40 *Mad.* 964, *Expl.* 20 C. *W. N.* 1279, *Ref.* The mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party. 17 *M. L. J.* 416, *Foll.* [P 202, C 2, P 203, C 1]

Nanak Chand—for Appellant.

Shamair Chand—for Respondents.

Judgment.—One Baij Nath sued Mt. Mari for Rs. 750 and asked that this amount should be declared to be a charge on a shop orally mortgaged by her as security, which fact was entered in his books. Two persons, Uggar Sain and Sher Singh, put in an application to the effect that the shop was theirs and that they should be made parties to the suit. Although Mt. Mari admitted judgment the Court ordered that Uggar Sain and and Sher Singh should be made parties and this was done, but the plaint was never amended so as to claim any relief as regards them. On the next hearing Baij Nath, plaintiff stated that he gave up his claim to a lien on the shop, whereupon Uggar Sain and Sher Singh stated that they did not wish to defend the suit. The Court then ordered that as the security had been abandoned and Uggar Sain and his brother did not wish to defend the suit, a money decree should be passed against Mt. Mari for Rs. 750, and Uggar Sain and Sher Singh were discharged (bari which is equivalent to 'acquitted' in a criminal case).

In execution of the decree the plaintiff attached the shop in question. Uggar Sain and Sher Singh objected that it was not liable to attachment and sale in execution of the decree against Mt. Mari, and their objection succeeded. Baij Nath thereupon filed the present suit for a declaration that the shop in dispute was liable to attachment and sale in execution of his decree. Both the Courts below have dismissed the suit on the ground that it was barred by S. 47 of the Civil Procedure Code as Uggar Sain and Sher Singh were parties to the original suit which so far as they were concerned had been dismissed. Vide the explanation to S. 47, Civil Procedure Code. Against this decision this second appeal has been filed.

The question involved is a very difficult one. There are only two rulings, both of the Madras High Court, which throw any light on the question. The first of these is 40 *Mad.* 964. *A* mortgaged his property to *B*. He then sold his equity of redemption to *C*. *C* sued *B* for redemption of the mortgage and also joined *D* who claimed to be owner of the property as a defendant in the suit. At the hearing the suit was dismissed as against *D* on the ground of misjoinder, i. e., on the ground that he was not a proper party to the suit. It was held that *D* was not a defendant against whom a suit had been dismissed within the meaning of the explanation to S. 47, Civil Procedure Code. In the case before me it is admitted that Uggar Sain and Sher Singh were not proper parties to the suit. In the Privy Council decision, 20 *C. W. N.* 1279, it was held that the joinder in a mortgage suit of a party who set up a claim adverse both to the mortgagor and mortgagee was irregular and would only lead to confusion. Baij Nath did not sue Uggar Sain and Sher Singh and the Court should not have made them parties. They were, therefore, not proper parties to the suit. Besides no relief was ever asked

against them and when Baij Nath said that he abandoned his lien on the shop they stated that they did not wish to defend the suit. When that happened the Court should have struck out their names. If that had been done it follows from the Full Bench decision, 23 *Mad.* 361, that Uggar Sain and his brother would not have been considered parties to the suit. What the Court did instead of striking the names out was to pass a money decree against Mt. Mari, adding that Uggar Sain and Sher Singh were discharged or acquitted. In effect this order was to strike their names out and it has been held in 17 *M. L. J.* 416 that the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party. I would, therefore, hold that what was meant to be done was to strike out the names of Uggar Sain and Sher Singh who were not proper parties to the suit and who even on the original claim were not proper parties.

This view is not against the later view of the Madras High Court reported as 41 *Mad.* 418. It was held there that when a party had been properly impleaded as one of the defendants and the case as against him would have proceeded to judgment, but for the fact that the plaintiff elected to abandon a part of his case and the suit was in consequence dismissed as against such defendant, he was a defendant against whom a suit had been dismissed within the meaning of the explanation to S. 47. That case, therefore, is not on all fours with the case before me as Uggar Sain and his brother were not properly impleaded as parties. The learned Chief Justice then went on to add that the case, *I. L. R.* 40 *Mad.* 964. might possibly stand on a different footing, as, to hold that a cause of action which the Court was prohibited from trying might be gone into in execution by virtue of S. 47, went far to defeat the prohibition of joinder, and such a construction of S. 47 should, therefore, be avoided if it was possible to do so. As that question was not before the Judges they expressed no opinion upon it but they went on to say that the proper course in such cases was for the coart to exercise its powers of striking out the names of the improper parties, as the effect of that course as held in 23 *Mad.* 361 (*F. B.*) would be to take the parties so struck out, out of the operation of S. 47 which ought not to apply to them seeing that they had no real concern with the suit. It is obvious, therefore, that 40, *Mad.* 964, was not disapproved in the later ruling and the question was still left open.

On the whole I am of opinion that what the original Court meant to do by stating that it acquitted or discharged Uggar Sain and Sher Singh was that the names of Uggar Sain and Sher Singh should be struck out, and the mere fact that this was not formally done is of no importance. These two persons should not have been impleaded in the first instance. I, therefore, hold that they cannot be considered to have been defendants against whom a suit was dismissed within the meaning of the explanation to S. 47, Code of Civil Procedure. I accordingly accept the appeal and remand the suit to the Court of first instance to be tried on the merits. As the question is one of great difficulty I leave the parties to bear their own costs here except that the Court-fee will be refunded. Other costs will abide the event.

A. I. R. 1926 Lahore 203

SHADI LAL, C. J., AND LEROSSIGNOL, J

Din Mohammad and *another*—Defendants—Appellants.

v.

Mt. Matab Bibi — Plaintiff—Respondent.

Letters Patent Appeal No. 38 of 1924, Decided on 21st January 1925, against the judgment of Martineau, J., D/-9th January 1924 in Second Appeal No. 952 of 1920.

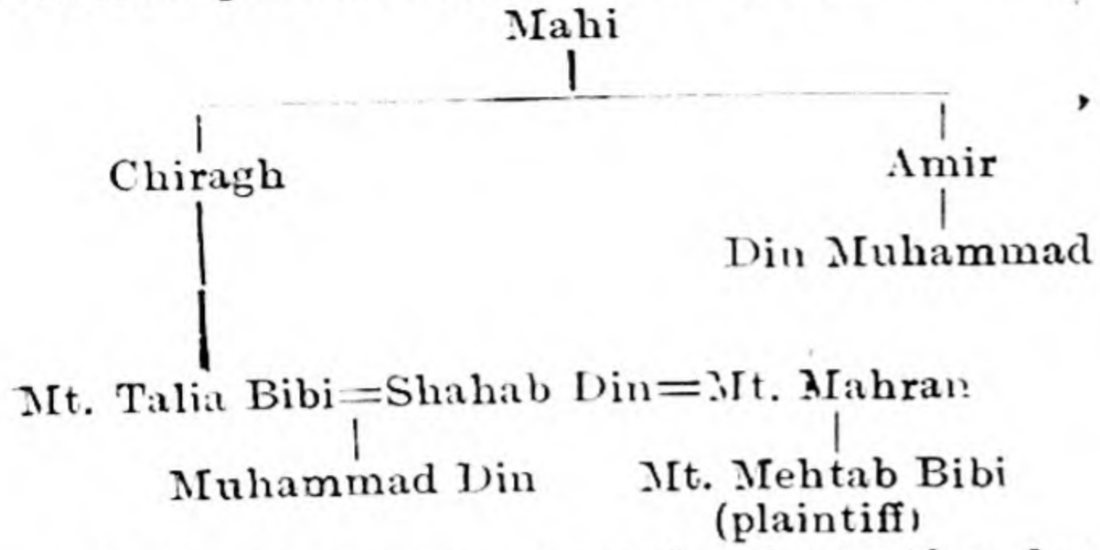
Custom (Punjab)—Succession—Diversion of property—Extinction of lineal descendants — Land reverts to the heirs of last owner before diversion.

On the lineal descendants of the person in whose favour a diversion of ancestral property had been made dying out, the land reverts to the male heirs of the last owner before the diversion and not to those of the person who received the land from him. [P. 204, C. 1]

Shaukat Rai—for Appellants.

Niaz Ali and *M. Obedullah*—for Respondent.

Judgment. — The following pedigree table explains the relationship of the various persons concerned in this case :



It is common ground that the land which is the subject-matter of controversy in this suit, was the ancestral property of Chiragh, an Arain of Mauza Nawankot in the Lahore District and that on his death his daughter Mt. Talia Bibi succeeded to the estate in preference to his brother Amir. On Mt. Talia Bibi's death the property was inherited by her son Muhammad Din. Muhammad Din has died, and the question for determination is whether his half-sister Mt. Mehtab Bibi is entitled to succeed to the property as against Amir, the brother of Chiragh who was the original owner thereof.

It will be observed that neither of the parents of Mt. Mehtab Bibi had any connexion with the land. The question is not whether among the Arain there is a custom allowing a half-sister to succeed to the estate of her half-brother, but whether the property, which has been allowed to pass out of the possession of the male heirs of the original proprietor into the possession of a daughter's son, should not revert to the heirs of the last owner before the diversion. The rule enunciated by the Full Bench in *Sita Ram* v. *Raja Ram* (1) is to the effect that on the lineal descendants of the person in whose favour a diversion had been made dying out, the land reverts to the male heirs of the last owner before the diversion and not to those of the person who received the land from him. In view of this ruling, which has been repeatedly affirmed in subsequent judgments, we have no hesitation in holding that Mt. Mehtab Bibi has absolutely no title to the property.

We accordingly accept the appeal and setting aside the judgment of the Single Bench, dismiss the suit with costs throughout.

Appeal accepted.

(1) [1892] 12 P. R. 1892 (F. B.).

A. I. R. 1926 Lahore 204

MOTI SAGAR, J.

Nanak Chand and *others*—Appellants.

v.

Mt. Jamna Devi— *Decree-holder* and *another*—Respondents.

Misc. Second Appeal No. 1543 of 1923, Decided on 23rd January 1924, from an order of the Dist. J., Hoshiarpur, D/- 20th March 1923.

Civil P. C., S. 104—*No second appeal lies against an order under O.* 21, *R.* 92.

No second appeal lies against an order of an appellate Court, confirming a sale or refusing to set aside a sale under O. 21, R. 92. [P. 204, C. 2]

N. C. Pandit—for Appellants.

Rup Ram and *Fakir Chand*—for Respondents.

Judgment.—This is a second appeal from an order passed by the District Judge, Hoshiarpur, confirming an order passed by the Court of first instance, refusing to set aside a sale in executing a decree.

A preliminary objection is taken that no second appeal lies against an order of an appellate Court, confirming a sale or refusing to set aside a sale under O. 21, R. 92 of the Civil P. C. and *Nana Kumar Roy* v. *Golam Chunder Dey* (1) and *Tung Nath* v. *Kandhaiya Lal* (2) are relied on in support of this contention. This contention, in my opinion, is well founded and must prevail. The order is one which falls within the category indicated by Cl. (1) of S. 104, sub-S. (1) of the Civil P. C., and sub-Cl. (2) of this section clearly forbids a second appeal from an order passed on appeal under this section. The preliminary objection prevails and the appeal is accordingly dismissed with costs.

I am not prepared to accede to the prayer that this Court should interfere on the revision side, in view of the fact that the objections now urged as to the sale being invalid under O. 21, R. 90, Civil P. C., were never taken in the grounds of appeal to the lower appellate Court.

Appeal dismissed.

1) [1891] 18 Cal. 422.
2) [1917] 4 O.L. J. 372.

A. I. R. 1926 Lahore 205

FFORDE, J.

Atma Singh—Petitioner.

v.

Harnam Singh and *others*—Opposite Parties.

Criminal Revision No. 1894 of 1925. Decided on 8th January 1926, from the order of the 1st Class Mag., Gujranwala, D/- 5th November 1925.

Criminal P. C., S. 145—*Power of Magistrate to attach disputed land is limited.*

The jurisdiction of a Magistrate to deal with disputes concerning land is strictly limited. A very exceptional jurisdiction in that regard has been conferred upon him by S. 145. Power under S. 145 is given to the Magistrate for the purpose of preserving the peace and it is only for that purpose that he may, where a breach of the peace is imminent, attach disputed property. [P 205 C 2]

Muhammad Shafi—for Petitioner.

Sheo Narain, Michael and *M. S. Bhagat*—for Opposite Parties.

Judgment.—This is an application for revision of two orders purporting to have been made under the provisions of S. 145 of the Code of Criminal Procedure.

Sir Muhammad Shafi for the petitioner contends that the initial order, passed under the 1st sub-S. 145, is bad inasmuch as that order does not show the grounds upon which the learned Magistrate has based his conclusion that there is existing a dispute likely to cause a breach of peace between the parties. Sir Muhammad Shafi contends that as the Magistrate's jurisdiction to take action under S. 145 is based upon this order, the whole proceedings are void for want of jurisdiction if the order has not been made in strict conformity with the provisions of sub-S. 1.

On examining that order, however, I find that it substantially complies with the statutory provisions. The evidence upon which the Magistrate has satisfied himself as to the existence of a dispute likely to cause a breach of peace appears in the order. He refers to letters between the parties and to certain police reports; and these documents are part of the record. There is no doubt that upon this evidence the Magistrate had sufficient ground for coming to his conclusion and making the consequent order. I am, therefore, of opinion that this order shows no want of jurisdiction on its face and that there is no cause shown for setting it aside.

A second order, however, which purports to have been passed under the provisions of sub-S. 4 of S. 145, is attacked. The contention in respect of this order is that it also is void for want of jurisdiction. The order in question is dated the 5th November 1925 and its material part is as follows:

The executors and their lessee now press for attachment to avoid future litigation about the actual amount of the produce of the present harvest that is being now collected by Sardar Atma Singh on its valuation. There is force in this contention, and I think it is a case of emergency under Cl. (4) of S. 145, Criminal P. C. So I attach the land in dispute. There is no necessity at present to pass any such order about the other immovable property in Kishan Garh. The Tahsildar, Hafizabad, will now take over charge of the land and arrange for the collection of the produce. Necessary expenses will be paid out of its price when sold."

The provision in the statute enabling the Magistrate to take the drastic and exceptional course of attaching land is worded as follows:

"Provided also that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute pending his decision under this section." This means that if the Magistrate thinks that the likelihood of the breach of peace is so imminent as to call for immediate action to prevent it, he may at any time attach the property in respect of which the dispute is subsisting. The jurisdiction of a Magistrate to deal with disputes concerning land is strictly limited. A very exceptional jurisdiction in that regard has been conferred upon him by this section. Such powers are exercised with great caution even by the civil Courts. Where a Magistrate who otherwise has no jurisdiction in such a matter acts in pursuance of special powers conferred by the statute, he can only do so in strict accordance with statutory provisions. Power under S. 145 is given to the Magistrate for the purpose of preserving the peace and it is only for that purpose that he may, where a breach of the peace is imminent, attach disputed property.

In the present case it is clear that the order attaching the property was passed for the purpose of avoiding future litiga-

tion in respect of the right to the present produce of the land in dispute. This is a matter entirely outside the jurisdiction of the Magistrate. The learned Sessions Judge, in dealing with this matter, when it came before him in revision, has expressed himself as follows :

It has been urged that the order of attachment should not have been passed merely with the object of preventing future litigation. In the present case, I am inclined to think that the learned Magistrate, when passing the order of attachment was not merely influenced by a desire to prevent future litigation but considered the order to be justified on other grounds. The property in question is of very large value and the question of possession is being hotly contested. Each party claims to be in possession. It is admitted that Sardar Atma Singh is taking away the produce of the kharif crop. The contention of the other side is that if he is not stopped from doing so, serious disturbance of the peace is likely to be caused.

The learned Sessions Judge has read into the order of the Magistrate certain reasons which are not there expressed. He is of the opinion that the learned Magistrate considered the order justified on grounds other than a desire to prevent future litigation, and he assumes that these other grounds are the likelihood of a serious disturbance of the peace in the future if the petitioner is not prevented from removing certain produce of the land. This conclusion of the learned Sessions Judge may or may not be correct, but the fact remains that the order itself is expressed to be made for reasons which find no justification in the provisions of the statute.

It is clear that the learned Magistrate in passing the order of 5th November 1925 has acted in excess of the powers conferred upon him by the statute, and the order is, therefore, void. I must accordingly accept the petition, set aside the order of the 5th November 1925 and direct that the land be released from attachment.

Petition accepted.

✻ A. I. R. 1926 Lahore 206

SHADI LAL, C. J.

Tara Singh—Accused—Petitioner.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 849 of 1925, Decided on 20th November 1925, from the order of the S. J., Lahore, D/- 16th February 1925.

✻ *Penal Code, S. 216-B—Giving false information to police about proclaimed offender or warning him of approach of police in order to enable him to escape is offence.*

When a person gives false information to the police with respect to a proclaimed offender, or warns him of the approach of the police, in order that the said offender may make good his escape, he is guilty of the offence of harbouring him: 25 *All.* 261, *Dissented*; 21 *C. W. N.* 1062, and 72 *I. C.* 949, *Foll.* [*P.* 206, C 2]

I. C. Chopra—for Petitioner.

Ram Lal—for Respondent.

Shadi Lal, C. J.—The petitioner Tara Singh has been convicted under S. 216, I. P. C. of having harboured an absconder, Dhara Singh ; and has been sentenced to rigorous imprisonment for six months.

The evidence on the record shows that Tara Singh was found sleeping at his threshing floor on the same charpoy with Dhara Singh, and that, when questioned by the Head Constable as to who his companion was, he replied that he was his guest and nephew. The question is whether these facts amount to 'harbouring' within the meaning of S. 216-B.

Now, it has been held by the Allahabad High Court in the case of *Emperor* v. *Husain Bakhsh* (1), that the words "or assisting a person in any way to evade apprehension," as used in that section, must be taken to indicate some method ejusdem generis with those that have been specified in the section, and that giving false information to the police does not amount to harbouring within the meaning of the section. This view has, however, been dissented from by the Calcutta High Court and other Courts, vide, inter alia, *Muchi Mian* v. *Emperor* (2) and *Akbar Ali* v. *Emperor* (3). I consider that when a person gives false information to the police with respect to a proclaimed offender, or warns him of the approach of the police, in order that the said offender may make good his escape, he is guilty of the offence of harbouring him.

For the aforesaid reasons I hold that the petitioner has been rightly convicted. He has, however, been released on bail, and I accordingly accept the application for revision so far as to reduce the period of imprisonment to that already undergone.

Revision accepted in part.

(1) [1903] 25 All. 261=(1903) A. W. N. 29.
(2) [1917] 21 C. W. N. 1062=26 C. L. J. 141.
(3) [1923] 72 I. C. 949=24 Cr. L. J. 485.

A. I. R. 1926 Lahore 207

CAMPBELL AND ZAFAR ALI, JJ.

Shitab Singh and others—Plaintiffs—Appellants.

v.

Hazari Singh and *others*—Defendants—Respondents.

First Appeal No. 2616 of 1921, Decided on 8th January 1926, from the decree of the Senior Sub-J., Gurgaon, D/- 17th August 1921.

(a) *Custom (Punjab)—Agricultural Rajputs.*

Persons who are agricultural Rajputs for many generations past are ordinarily governed by custom and not by Hindu Law. [P. 207, C. 1]

(b) *Custom (Punjab)—Adoption of distant collateral younger than the deceased husband but in a higher generation is sanctioned by custom.*

Adoption of a distant collateral younger than the deceased husband but still in a higher generation is one sanctioned by custom, and the provision in the riwaj-i-am to the effect that the adopted person should be of a lower generation than the person adopting, means no more than that when it is a question of adopting a distant male relative it is fitting that endeavour be made to select one in a lower generation than that of the adopter.

[P 207, C. 2, P. 208, C. 1]

Shamair Chand, *Sagar Chand* and *Parkash Chand*—for Appellants.

C. H. Oertel and *G. S. Salariya*—for Respondents,

Campbell, J.—This appeal has abated so far as three appellants and six respondents are concerned but admittedly this fact does not necessitate the dismissal of the whole appeal and its effect does not require consideration since the appeal must fail on its merits.

The suit was by the collaterals of one Ganga Sahai, a Chauhan Rajput of the village Bahora Kalan in the Gurgaon District for the possession of his landed estate, part of which is in the hands of another collateral Hazari Singh and part in the hands of alienees from Hazari Singh and from Mt. Anar Kaur the widow of Ganga Sahai.

The defence was that Hazari Singh was the validly adopted son of Mt. Anar Kaur and as such the sole and right heir of Ganga Sahai. The lower Court has upheld this contention and the plaintiffs appeal.

There can be no doubt that the lower Court was correct in holding that the parties being agricultural Rajputs for many generations past, are ordinarily governed by custom and not by Hindu Law. We agree also with the lower Court that the factum of adoption of Hazari Singh by Mt. Anar Kaur in the manner laid down by the riwaj-i-am as requisite has been proved. The riwaj-i-am is clear that among Rajputs of the Gurgaon District a widow can, without any permission, adopt one of her husband's male relatives as her husband's heir. The statement to this effect in the riwaj-i-am is supported by instances and also by the results of an elaborate enquiry made by the Settlement Officer in 1875.

The only point which helps the appellants in any way is a passage in the riwaj-i-am dealing with the question of 'who may be adopted'.' It is there set forth that the adopted son ought to be a member of the family of the adopter. If the adopter be a widow he ought to be a member of her husband's family. The son of the husband's elder brother has a preferential right over the younger brother's son. Failing them preference goes to the more distant male relatives related through males. *The adopted person should be* (*hone chahiye*) *of a lower generation than the person adopting* whether one or two generations lower): (Wilson's Tribal Custom of the Gurgaon District, page 28.

Hazari Singh was a distant collateral in the 10th degree of Ganga Sahai as were the plaintiffs and it does not appear that Ganga Sahai left any nearer male relative. The common ancestor is Tulsi Das, and Ganga Sahai is in the 9th generation from Tulsi Das, while Hazari Singh is in the 8th. The adoptee therefore is in a higher generation than that of the adopter. It is not clear from its actual words whether the sentence italicised above regarding the generation in which the adopted person should be is mandatory or merely indicatory. There are no instances which solve the question, but in this particular case there is proof that Hazari Singh's adoption by Mt. Anar Kaur took place many years ago and that Hazari Singh has since been continuously recognized as her adopted son by the community, including at least some of the plaintiffs. We take this fact to be evidence that the adoption of a distant collateral younger than the deceased husband but still in a higher generation was one sanctioned by custom, and, we deduce that the provision in the riwaj-i-am, referred to above means no more than that when it is a question of

adopting a distant male relative it is fitting that endeavour be made to select one in a lower generation than that of the adopter. Our view that failure to do so does not invalidate the adoption is supported by the comphehensive language in which, in a separate passage, a widow is empowered to adopt "any one she pleases of her husband's male relatives related through males." There are also two other passages which are at least consistent with it, one permitting the adoptee to be a married man with children and of any age whatsoever, and the other permitting him to be the son of a woman whom the adopter could not have married.

There is thus no ground for interference with the lower Court's dismissal of the suit on the ground that Hazari Singh was the legal heir of Ganga Sahai. We dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 208

HARRISON, J.

Rur Singh—Defendant—Appellant.

v,

Nazar Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1147 of 1924, Decided on the 18th December 1924, from a decree of the Dist. J., Amritsar, D/- 16th January 1924.

Hindu Law—Widow—To satisfy decree against widow for husband's debt ancestral land cannot be alienated by her—Burden of proving necessity is on mortgagee.

A mortgage of ancestral land by a widow to satisfy a decree for a debt contracted by her deceased husband is not binding on the reversioners unless it is shown that she had no other means to satisfy the decree. The burden of proving the necessity lies heavily on the mortgagee. 39 *P. R.* 1915, *Dist.* [P 208, C 2]

Bakhshi Ram for *Din Dayal*—for Appellant.

Lal Chand Mehra—for Respondents.

Judgment.—In a suit brought by the reversioners of one Wardha Singh for the usual declaration regarding a mortgage the District Judge has given a full decree to the effect that the mortgage will not affect in any way the reversionary rights of the plaintiff. The mortgagee appeals, relying chiefly on *Bhambul Devi* v. *Narain Singh* (1).

The mortgage is made up of several items. Counsel has confined himself to the largest—a sum of Rs. 1,400, the payment of which, he contends, was a necessity, inasmuch as it represented a sum decreed against the widow, the decree showing that she was sued on account of a debt alleged to have been contracted by her late husband. No judgment has been put in and we know nothing more except that a decree was passed and that it was not ex parte or by consent. Counsel contends that under the circumstances *Bhambul Devi* v. *Narain Singh* (1) establishes his case.

There are, however, two distinguishing features in this case.

(1) that the decree was not passed against the husband in his lifetime; and

(2) that there is a finding of fact in the judgment of the learned District Judge that the widow had a considerable area of land and should have arranged to meet certain expenses out of the income.

This I take to mean that she had a considerable area over and above the land which she mortgaged. Counsel states that there is no evidence in support of this finding. The evidence on this point is meagre and is certainly not the best, which could have been produced, but there is some oral evidence to the effect that the husband owned some 50 to 60 bighas of land, that he wasted some of it and the balance went to his widow. The area charged is 15 bighas. The evidence in rebuttal which shows that Wadhawa Singh disposed of the whole of his 50 or 60 bighas is obviously incorrect. I think this must be treated as the finding of fact and based on evidence meagre though it be. The position, therefore is that far from its being shown that the widow had not other means to satisfy this decree except by charging the land, it has been shown that she had and that she had not sufficient necessity to create this charge. The burden lay heavily on the mortgagee and I think that it has rightly been held that he has failed to discharge it.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

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(1) [1915] 39 P. R. 1915=103 P. W. R. 1915 =8 P. L. R. 1915.

A. I. R. 1926 Lahore 209

SCOTT-SMITH AND MARTINEAU, JJ.

Ahmad—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 894 of 1914, Decided on 8th December 1924, from an order of the S. J., Rawalpindi, D/- 10th September 1924.

Penal Code, S. 201—*Applicability.*

The section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself : 22 *Cal.* 638, *Foll.* [P 209 C 2]

D. R. Sawhney—Respondent.

Judgment.—Ahmad, appellant, Dadu his 16 years' old son, Mt. Gabo his wife and Mt. Nazar Jan, his daughter, have been convicted by the Sessions Judge of Rawalpindi of the murder of Bahadur and have been sentenced to transportation for life. They have also been convicted of an offence under S. 201, Indian Penal Code, and for that offence they have been sentenced separately to seven years' rigorous imprisonment ; the sentences to run concurrently. They have filed separate appeals through the Superintendent of Jail. The facts, which are given fully in the judgment of the learned Sessions Judge, are very clear and in brief they are that Mt. Nazar Jan was the wife of Bahadur, but did not as a rule live with him. Her father wanted Bahadur to divorce her and to marry her to Muhammad Shah, who is said to have joined the other offenders in committing the murder and to have been absconding at the time of the trial. On the 5th April last Dadu went to Rawalpindi and told Bahadur that Nazar Jan was dying of plague at Saidpur a village, some five miles distant, and if he wished to see her alive he should come at once.

Bahadur and Jamal Din, witness, went forth to Saidpur, and Bahadur there found that his wife was not ill at all. He demanded the return of the ornaments which he had given to his wife and also told Ahmad that his wife was to be sent back with him, but Ahmad refused to give up either the ornaments or the woman. Bahadur was never seen alive after the night of 5th April, and on the 11th April his dead body was found buried in the house of Ahmad upon a clue being given by Dadu. Subsequently Ahmad pointed out a cave on a hill-side from which certain clothes, identified as those of Bahadur, were found.

We agree fully with the learned Sessions Judge that Bahadur was murdered in the house of Ahmad, in which all the four appellants were living at the time. From these facts the learned Sessions Judge has concluded that all the four appellants must have joined in the murder and must also have cut up and buried the body after the murder. It must be remembered that Muhammad Shah, absconder, is also alleged to have taken part in the murder. Under the circumstances we do not think that it can be held with any certainty that the two women and the boy Dadu must necessarily have joined in the conspiracy to commit the murder. It is quite possible that Dadu was ignorant of the object with which Bahadur was summoned to Saidpur. It is also possible that when he was summoned Ahmad may not have formed the intention of murdering him, and that he may have been murdered on the spur of the moment during the night between the 5th and 6th April. If Muhammad Shah joined in the murder it is quite possible that he and Ahmad committed the offence without the other appellants having taken any part in it or even without their having abetted it. With reference to offence under S 201, I. P. C. the same difficulty arises. The body may very well have been dismembered and buried by Ahmad and some other person without any assistance from Dadu and the two women. We, therefor e, do not think it safe to convict these persons of any offence.

The words of S. 201, Indian Penal Code, lead us to the conclusion that it was meant for persons other than the principal offenders, and this was the view taken in the case reported as *Torap Ali* v. *Queen-Empress* 22 Cal. 638 where it was held that this section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself. We, therefore, accept the appeals of Dadu, Mt. Gabo and Mt. Nazar Jan and setting aside their convictions and sentences acquit them and direct that they be released from custody. We also accept the appeal of Ahmad so far as to set aside the conviction and sentence under S. 201, Indian Penal Code. So far

his conviction under S. 302, Indian Penal Code, is concerned we dismiss his appeal.

Appeal partly accepted.

A. I. R. 1926 Lahore 210

LEROSSIGNOL AND FFORDE, JJ.

Sham Das and *another*—Defendants—Appellants.

v.

Mt. Moolo Bai and *others*—Plaintiffs—Defendants—Respondents.

First Appeal No. 2487 of 1921, Decided on 23rd December 1925, from the decree of the 1st Class Sub-J., Muzaffargarh, D/- 19th August 1921.

(a) *Custom — Evidence — Uncontested cases are very good proof of custom.*

Uncontested cases are very good proof of any alleged custom: for the greater the strength of the custom the less probability is there of anybody attempting to controvert it. [P. 211, C. 1]

(b) *Riwaj-i-am — Though no distinction is drawn, entry as to succession refers to ancestral property.*

Although in the riwaj-i-am no distinction is drawn between ancestral and acquired property, it is a well recognized rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property. [P 211, C. 2]

(c) *Custom (Punjab)—Succession — Aroras of Muzaffargarh town—Daughters of sonless man are excluded by collaterals.*

Among Aroras of Muzaffargarh town the succession to the property of a sonless man is in favour of his collaterals to the exclusion of his daughters in the absence of some instrument demising the property to them. [P. 210, C. 1 ; P. 211, C. 2]

Jagan Nath Aggarwal and *Hargopal*—for Appellants.

Sheo Narain and *Bal Kishen Mehra* —for Respondents.

LeRossignol, J.—The parties to this litigation are Aroras of Muzaffargarh town, and the only question for decision in this appeal is whether they are governed by their personal law or by a custom, by which the succession to the property of a sonless man is in favour of his collaterals to the exclusion of his daughters. The property now in suit consists of three houses, three shops and some agricultural land, of which the three shops and the agricultural land are admittedly ancestral property. The suit was brought by the daughters of Gopal Das who died in March 1912, and the defendants are brother, brother's widow and brother's daughter's son of Gopal Das. The Court below has decreed for the plaintiffs holding that there is an initial presumption that the parties are governed by their personal law; that the parties are not agriculturists but are shopkeepers, although they do own agricultural land; that they are not members of a compact village community; that their main occupation is not agriculture; and that although the riwaj-i-am of the district is in favour of the contention of the defendants, the riwaj-i-am is not reliable and is not supported by instances. A large number of instances were proved by each side, and the Court below finds on scrutiny that the defendants have not been able to prove any case in which a daughter had unsuccessfully asserted her rights against collaterals.

Now, it is true that the parties are not exclusively agriculturists, but the land in litigation has been in the family for some generations, and the kanango's evidence shows that a portion of it has been cultivated by the proprietors themselves. With regard to the objection that the parties are not members of a compact village community, it is a sufficient reply that in Muzaffargarh where this property is situate the compact village community, as met with in the more central parts of the Punjab is non-existent. Muzaffargarh lies in the extreme south-west of the Punjab and is a wilder and rougher country than the more central districts. Consequently in such a country the difficulties experienced by women in possessing and retaining and managing immovable property would be very considerable and on this ground alone their exclusion from succession would excite no surprise as being dictated by local circumstances. The riwaj-i-am of the district is distinctly in favour of the defendants and the relevant excerpt is printed at page 115 of the printed book. The first riwaj-i-am was prepared in 1880 and in that, Hindus of all castes are recorded as denying the right of daughters to succession in the presence of a collateral of any degree. That riwaj-i-am was revised in 1903 and the reply of all Hindus again was to the same effect except that the rights of collateral heirs beyond the 7th degree were postponed to those of daughters and their descendants. The value of this riwaj-i-am has been challenged on the ground that the replies of the different castes of Hindus were not

separately recorded and that a consolidated answer referring to all the castes of Hindus cannot be an accurate representation of the customs of such a diversity of castes. It is quite sufficient to say in this connexion that the riwaj-i-am does not inspire as much confidence as it would have done had it been prepared with greater attention to detail, but after hearing connsel on both sides and making a careful scrutiny of the instances of the exclusion and admission of daughter's claims to succession, we hold that the custom recorded in the riwaj-i-am is borne out by practice. In the supplementary paper-book will be found printed in a tabular form a list of the instances of the exclusion of daughters by collaterals, proved by the defendants. They number 95, but before us no reliance was placed on instances Nos. 83 to 95 inclusive. Of these instances, in 19 the daughters raised no contest and acquiesced in the succession of the collaterals, and the learned Judge of the Court below appears to think that uncontested cases of succession of collaterals in preference to daughters have little value as proof of the custom. But it must be obvious that uncontested cases are very good proof of any alleged custom ; for the greater the strength of the custom the less probability is there of anybody attempting to controvert it. In short, the defendants have proved a very large number of instances in which among Aroras daughters were excluded by collaterals. On the other hand, the plaintiffs, whose list of instances is printed at page 70 and following of the paper-book, have succeeded in proving less than half a dozen instances in which daughters succeeded to the prejudice of the collaterals. In their tabular list starting from page 70, the first instance, that of Bahawal Bai, is a case of succession by a daughter, but what derogates from the value of this case is the circumstance that collateral Jesa Ram was a sonless person who himself had made a gift in favour of his daughter's sons. Instance No. 4 was a case in which the daughters succeeded after a judicial contest, but the judgment in the case, which is printed at page 5 of the paper-book, shows that the daughters succeeded because the collaterals failed to support the riwaj-i-am by instances of the succession of collaterals. In the case printed at page 19, Hindu Law was followed ; for the same reason the riwaj-i-am was supported by no instances. The case printed at page 40 was a case of gift, not of succession. Similarly, in the case at page 43 no instances were cited in support of the riwaj-i-am and the daughters succeeded on the strength of a Will ; in that at page 67 the riwaj-i-am was again discredited. Moreover, this case was determined by a compromise, and any remarks on custom found therein are obiter.

From the foregoing it will be seen that the balance of the weight of evidence is very much in favour of the defendants' collaterals. In addition, we have the admission of the many of plaintiffs' witnesses (cf. P. Ws. 5, 6, 7 and 9) that daughters do not succeed in the absence of some instrument demising the property to them. For these reasons we hold that the defendants have proved the substantial accuracy of the custom recorded in the riwaj-i-am. All the property now in appeal, with the exception of the three houses, is ancestral property. It is true that in the riwaj-i-am no distinction is drawn between ancestral and acquired property, but it is a well-recognized rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property. In this case the main contest centres round the ancestral land and shops, and the defendants are willing to forego in favour of the plaintiffs the houses which were the self-acquired property of their father.

For these reasons we accept the appeal and dismiss the plaintiffs' suit except in respect of the three houses. In view of the relationship existing between the parties we also direct that they shall bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 211

LEROSSIGNOL, J.

Hakim Din—Plaintiff—Appellant.

v.

Qutab Din—Defendant—Respondent.

Second Appeal No. 1433 of 1924, Decided on 23rd December 1924, from the decree of the Senior Sub-J., Sialkot, D/- 26th February 1924.

Muhammadan Law—Gift—Delivery of possession—Gift is irrevocable if conditions have not been broken.

When once delivery has been made, a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken. [P 212, C, 1]

Mool Chand—for Appellant.

Abdul Rashid—for Respondent.

Judgment.—This second appeal arises out of a suit for a declaration that a gift by the plaintiff is null and void and should be revoked. The gift consisted of the plaintiff's fourth share in a house which was under mortgage with possession, and in the Courts below several reasons were alleged why the gift should be set aside, as for instance, undue influence, breach of the conditions of the gift, invalidity of the gift of plaintiff's undivided share. On all these points the plaintiff has been unsuccessful and before me the appellant's counsel has narrowed down his contentions to this only: that under Muhammadan Law a gift is always revocable even after seisin has been delivered, except in certain cases into none of which the present case falls. This contention is that a gift under Muhammadan Law is always revocable by the donor even after delivery of the property gifted although none of the conditions of the gift have been broken. I am not able to accept this proposition and hold that when once delivery has been made a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken and I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 212

ZAFAR ALI, J.

Imam Ali—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 897 of 1924, Decided on 17th December 1924, from an order of the Mag., 1st Class, Jhelum, D/- 28th July 1924.

Criminal P. C., S. 35—Abduction with intent to rape—Rape committed—Separate sentences are not necessary.

If a person abducts a woman with intent to rape her and does rape her, he cannot be awarded separate sentences under Ss. 363 and 376 I. P. C. *Cr. A.* 101 of 1914, *Appl.* [P 212, C, 2]

Dhan Raj Shah—for Appellant.

C. H. Carden Noad—for the Crown.

Judgment.—The appellant Imam Ali aged about 20 has been convicted under Ss. 366, 376 and 326 of the Indian Penal Code and sentenced to three years' rigorous imprisonment for each offence, the sentences to run consecutively. The story of his victim Mt. Bassan, who was a spinster, 16 years of age, was briefly as follows:

She was coming with other girls of her village with a pitcher full of water on her head. As she approached the door of the accused the latter who was already standing there came out and caught hold of her. He threw down her pitcher from her head, and dragged her away into a room inside his house. There he asked her to elope with him which she refused to do. He then raped her and after that again asked her to run away with him. She refused again. He then cut off her nose and upper lip with a knife. The learned counsel who has appeared for the appellant expresses his inability to urge that it was not the accused who cut off the girl's nose and lip or that the girl's main story is unworthy of credit. According to the evidence of a lady doctor, her hymen had been recently ruptured and so there can be no manner of doubt that the accused dragged her away into the house and there raped her and then cut off her nose and upper lip.

The girl had once been engaged to him but the engagement had been broken off, and the accused had married another girl. Later on his wife died and he wanted to marry the complainant but her parent did not agree. This was the motive for the most dastardly act done by him.

His counsel, however, urges that separate sentences under Ss. 366 and 376 could not be awarded and in support of this contention he cites the unpublished Division Bench judgment of the Punjab Chief Court in Criminal Appeal No. 101 of 1924, dated the 13th August 1914. In that case the learned Judges held by a reference to the illustration to S. 35 of the Criminal P. C., that if a person abducts a woman with intent to rape her and does rape her he cannot be awarded separate sentences under Ss. 363 and 376, of the Indian Penal Code. In view of that ruling I set aside the sentence under

S. 366 and maintain the sentences under Ss. 376 and 326, Indian Penal Code.

Mr. Noad on behalf of the Crown states that the punishment thus reduced is inadequate and that he will in due course file an application for enhancement of sentences. This will he considered when he will make the application. At present the result is that the appeal is accepted to the extent stated above.

Appeal partly accepted.

A. I. R. 1926 Lahore 213

HARRISON, J.

Harkishan Lal—Accused—Petitioner.

v.

Khushabi Ram — Complainant—Respondent.

Criminal Revision No. 1242 of 1925, Decided on 9th January 1926, against the order of the S. J., Lyallpur, D/- 26th June 1925.

Penal Code, S. 408—Complainant cannot be allowed to resurrect a case dropped long ago on the ground of his private retaliation for his feelings —Criminal trial.

A complainant who allows a long period to elapse before resurrecting a case under S. 408, I. P. C., cannot possibly be allowed to re-agitate the matter on the ground that his feelings have been outraged by the action taken by the accused, and that as a sort of retaliation he should be so allowed. [P 213 C 2]

Ram Chand Manchanda — for Petitioner.

C. L. Gulati—for Respondent.

Judgment.—The facts of this litigation are that in the year 1921 a partnership suit was instituted by one Khushabi Ram against Harkishan Lal, and while it was pending, Khushabi Ram brought a criminal complaint under Ss. 408, 409 against Harkishan Lal regarding a certain transaction over a consignment of coal. That complaint was dismissed by the trial Magistrate on the ground that the dispute was of a civil nature and that, as a civil suit was already pending between the parties, the matter in dispute would more correctly be decided in that civil Court. From this order a revision application was accepted by the Sessions Judge who ordered further enquiry.

The case was dismissed for the second time on the 5th September 1921 neither party having put in an appearance. The partnership suit proceeded on its way, and on 22nd April 1922 was finally decided, and from this decision no appeal was lodged.

In 1924 Harkishan Lal brought a suit for damages against Khushabi Ram on a matter connected with the late partnership and obtained a decree and sought execution in October 1924.

On the 1st of November 1924 Khushabi Ram instituted a fresh complaint on the same facts as had formed the subject-matter of the complaint of 1921. The trial Magistrate discharged the accused Harkishan Lal and ordered compensation to be paid under S. 250, Criminal P. C. This order was set aside by the learned Sessions Judge on the ground that the Magistrate had not understood the case.

I consider it wholly unnecessary to go on further into the facts ; for it appears to me that a complainant who allows 2 & 1/2 years to elapse before resurrecting a case of this sort cannot possibly be allowed to re-agitate the matter. The only ground on which he claims before me to be allowed to do so is that his feelings have been outraged by the action taken by his late partner, and as a sort of retaliation he should be allowed to resurrect this case which died a natural death in 1921. This appears to me the worst possible reason that could have been adduced, and it is obviously not in the interest of anybody concerned nor the administration of justice that criminal cases of this sort should be buried for two years or more and then brought to life again either in order to extract blackmail from the other side or to satisfy private feelings of revenge.

I accept the application for revision and quash the proceedings. This has the effect of restoring the order of the trial Magistrate in its entirety.

Revision accepted.

A. I. R. 1926 Lahore 214

BROADWAY, J.

Narain Singh—Plaintiff—Appellant.

v.

Mohan Singh and *others*—Defendants—Respondents.

Second Appeal No. 3020 of 1924, Decided on 4th January 1926, from the decree of the Dist. J., Jhelum, D/- 13th August 1924.

Hindu Law—Debts—Onus of proving that a debt by member of joint family is for the family's benefit is on the creditor especially when he deals not with the natural head of the family.

The onus of proving that a debt incurred by a member of a joint Hindu family was for the benefit of the family must by placed on the creditor, more especially when he is dealing, not with the natural head of the family, namely, the father, but with the son who is living in another village and when he contracts the debt, signs his name only and makes no reference whatever to any business or joint family business for which the loan is being taken. [P 215 C 1]

Amar Nath Chona—for Appellant.

Nand Lal—for Respondent.

Broadway, J.—The action giving rise to this appeal was brought by one Narain Singh to recover a sum of Rs. 1,000 from Malik Singh and his father Mohan Singh. It was alleged that the two defendants were members of a joint Hindu family, that they carried on a joint business and that the sum of Rs. 1,000 had been advanced to Malik Singh, the son (not the father) for the benefit of the joint Hindu family. Malik Singh, who appears to have actually taken the money, failed to defend the suit and proceedings were taken against him ex parte. Mohan Singh, the father, however, contested the claim. He denied that he was joint with his son or carried on any business with him definitely pleading separation and claimed to be exempt from any liability.

The trial Court settled three issues of which the first two were: (1) Whether the defendants formed a joint Hindu family. Onus on the plaintiff.

(2) Whether the debt in question was borrowed by Malik Singh for the benefit of the joint Hindu family. Onus on the plaintiff.

No exception was taken to the onus being placed on the plaintiff at the time. The trial Court came to the conclusion, having regard to the presumption of jointness in the case of a Hindu family taken together with the evidence led by the plaintiff, that the father and son were members of a joint Hindu family. The evidence led by Mohan Singh in rebuttal was regarded as insufficient to rebut the finding arrived at. Further, it was held in regard to Issue No. 2 that the money had been advanced to Malik Singh for the benefit of the family. Mohan Singh alone appealed to the District Judge seeking to be relieved from the liability imposed upon him by the decree. The learned District Judge came to the conclusion that it had not been proved that Mohan Singh was joint with his son Malik Singh; and secondly that it had not been proved that the debt in question was contracted for the benefit of the family. On these findings Mohan Singh was relieved from the liability imposed upon him under the decree. Against this decision Narain Singh has come up to this Court in second appeal and on his behalf I have heard Mr. Amar Nath Chona.

It has been contended that the judgment of the learned District Judge is vitiated by the fact that he omitted to recognize the presumption of jointness attaching to a Hindu family. It was urged, therefore, that the onus had been wrongly placed by him on the plaintiff-appellant to prove jointness. A similar line of attack was made against the finding on the second issue in regard to the purpose for which the debt had been contracted. On the other hand, Dr. Nand Lal for Mohan Singh urged that there was no justification to interfere in second appeal. It was contended that inasmuch as no objection had been taken to the onus as placed at the time of settlement of issues and that no objection whatever was taken during the proceedings in the lower appellate Court, the question of onus could not be agitated here.

There seems to be every reason to think that the question of onus was never agitated in the Courts below and that it was not agitated because the parties decided to lead whatever evidence they had to produce in support of their respective cases. No doubt the presumption contended for by Mr. Chona is one that is recognized, but even if I were to hold that the learned District Judge acted wrongly in not referring to this question of presumption, it seems to me that his conclusion on the second point ends the

case. The onus of proving that a debt incurred by a member of a joint Hindu family was for the benefit of the family must, in my judgment, be placed on the creditor, more especially when we find that he is dealing not with the natural head of the family, namely, the father, but with the son who is living in another village, and when he contracts the debt, signs his name only and makes no reference whatever to any business or joint family business for which the loan is being taken. The finding by the learned District Jndge that this debt had not been shown to be for the benefit of the joint Hindu family is one of fact behind which it is impossible for me to go. Having regard to this I say no more on the first point and dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 215

MARTINEAU, J.

Diwan Singh—Defendant—Appellant.

v.

Jiram and *another* (Plaintiffs) and *Suraj Bhan* and *another* (pro-forma Defendants)—Respondents.

Misc. Second Appeal No. 2270 of 1924, Decided on 17th March 1925, from an order of the Dist. J., Hissar, D/- 28th June 1924.

Bengal Land Redemption and Foreclosure Regulation (17 *of* 1806), *Ss.* 8 *and* 7—*Requirements of S.* 8 *are fulfilled if notice to mortgagor gives full purport of S.* 7.

Under S. 8 the mortgagor is to be notified that if he does not redeem the property mortgaged in the manner provided for by S. 7 within one year from the date of the notification the mortgage will be finally foreclosed. The requirements of S. 8 are fulfilled if the notice to the mortgagor gives full purport of S. 7, even though S. 7 is not expressly mentioned in the notice: 21 *P. R.* 1903; 28 *P. R.* 1908 and 57 *P. R.* 1914, *Dist.* [P 215 C 2]

R. C. Soni—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The plaintiffs sued for the redemption of property mortgaged by their father in 1917. The defendant pleaded that they had lost their right of redemption in consequence of foreclosure proceedings taken by him in 1921. The first Court upheld that plea and dismissed the suit, but the District Judge following *Ram Chand* v. *Sandal Khan* (1); *Balwant Singh* v. *Ram Das* (2) and *Bulanda* v. *Fateh Din* (3) held that the foreclosure proceedings were invalid because no mention was made of S. 7 of Regulation XVII of 1806 in the notice of foreclosure, and he, therefore, remanded the case to the first Court for decision on the remaining issues. The defendant has appealed to this Court from the order of remand.

In *Ram Chand* v. *Sandal Khan* (1), the notice of foreclosure was headed: "Application for issue of a notice of foreclosure under Ss. 7 and 8 of Regulation XVII of 1806," but in the body of the notice the mortgagor was only informed that the mortgage would be foreclosed if he did not pay the mortgage-money and redeem the property in the manner provided for in the foregoing section, without it being stated which of the two sections, mentioned in the heading was referred to, and it was, therefore, held that the omission to specify S. 7 in the body of the notice was a fatal defect. That case is not similar to the present one.

In the other two cases followed by the learned District Judge, in which the omission in the notice of a reference to S. 7 of the Regulation was held to be fatal, it is not stated how the notices were worded.

Now, in the present case, although the notice of foreclosure issued under S. 8 of Regulation made no mention of S. 7, it contained all the particulars set forth in S. 7 as to the manner in which the property was to be redeemed, and this was all that was necessary. Under S. 8 the mortgagor is to be notified that if he does not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification the mortgage will be finally foreclosed. That requirement is fulfilled if the notice to the mortgagor gives the full purport of S. 7 even though S. 7 is not expressly mentioned in the notice. Therefore the notice of foreclosure, which was issued at the instance of the defendant in 1821, was not defective by reason of the omission to mention S. 7 of the Regulation therein.

I accordingly accept the appeal set aside the order of the lower appellate

(1) [1903] 21 P. R. 1903=83 P. L. R. 1903.
(2) [1908] 28 P. R. 1908=41 P. W. R. 1908=141 P. L. R. 1908.
(3) [1914] 57 P. R. 1914=256 P. L. R. 1914.

Court and remand the case under O. 41, R. 23, Civil P. C. for a fresh decision after it has been determined whether the foreclosure proceedings were in other respects regular. The Court-fee paid on the appeal in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

✻ A. I. R. 1926 Lahore 216

MARTINEAU AND ZAFAR ALI, JJ.

Rikhi Ram and *others* — Plaintiffs—Appellants.

v.

Durga Das and *others*—Defendants—Respondents.

Second Appeal No. 952 of 1921, Decided on 5th June 1924, from a decree of the Dist. J., Hoshiarpur, D/- 17th January 1921.

✻ *Civil P. C. O., 22, R. 4—All parties jointly interested in suit as joint proprietors—Permission under O. 1, R. 8, was given—One of the proprietors for whom permission was given died—Appeal abates if his legal representatives are not brought on record.*

'Where all the proprietors were necessary parties because they were all joint owners of shamilat and were equally interested therein and the suit involved a question affecting the rights of all of them as a body, but permission was given to some only to conduct the second appeal under O. 1, R. 8 and one of the respondents for whom sudh permission was given was dead, the appeal abates if his legal representatives are not brought on record: 46 P. *R.* 1919, *Dist.*

[P. 216, C. 2, P. 217, C. 1.]

Jai Gopal Sethi—for Appellants.

Faqir Chand—for Respondents.

Judgment—Counsel for the respondents raises a preliminary objection that the appeal has abated in consequence of appellants' failure to make an application to bring on the record the legal representatives of the defendants-respondents who have died, though the statutory period for doing the same has expired. The suit was by the non-proprietors of a village in the Hoshiarpur District for a declaration to the effect that the shamilat land specified in the plaint measuring 5,244 kanals 8 marlas, was a grazing ground for the cattle of all the inhabitants of the village and was not liable to partition among the proprietors. The trial Court allotted an area of 1,344 kanals to be reserved as a grazing ground, but the plaintiffs were not satisfied with that and appealed to the District Judge. That offiicer confirmed the decree of the first Court with a slight modification. The plaintiffs lodged a second appeal in this Court which was admitted, and then they appelied under O. 1, R. 8 of the Civvil P. C., for permission "to sue only 4 out of the 147 defendants-respondents on behalf of and for the benefit of all". This application was granted. The reply of the learned counsel for the appellants to the objection, therefore, is that the appeal has not abated in view of the permission granted to sue four of the respondents only and he cites *Ram Dayal* v. *Muhammad Raju Shah*(1) and O.22, R.2 of the Civil. P.C., and contends that the right of appeal survives against the surviving respondents alone. This very contention was raised in *Wali Muhammad* v. *Mahlu*(2) but was overruled by a Division Bench of this Court in its judgment dated the 8th of May 1924. *Ram Dayal* v. *Muhammad Raju Shah* (1) is not in point because in that case only one man had with the permission of the Court instituted the suit on behalf of himself and 29 others, and it was from among the latter that two died during the pendency of appeal. As these two men had never applied to the Court under sub-Cl. (2) of R. 8, O. 1, of the Civil. P. C., to be mades parties, it was held that: "It was not necessary to make them respondents in the defendants' appeal, and the fact that they died during the pendency of the appeal, and their legal representatives had not been brought on the record, did not, therefore, cause the appeal to abate." In the present case all the defendants were parties to the suit in the first Court as well as in the lower appellate Court and it cannot be said that all of them with the exception of the four mentioned in the application under O. 1, R. 8, Civil. P. C., ceased to be necessary parties to this second appeal by virtue of the order granting that application. All the proprietors were necessary parties because they were all joint owners of the shamilat and were equally interested therein and the suit involved a question affecting the rights of all of them as a body. It could not, therefore, be said that the right of appeal survived against

(1) [1919] 46 P. R. 1919
(2) A. I. R. 1925 Lah. 124.

the surviving respondents alone. As the question affected the rights of all the proprietors in a body it could not be decided without having all of them before us. The appeal, therefore, abates and will be struck off the list of pending cases. The appellants will pay the respondents costs in this Court.

Appeal dismissed.

A. I. R. 1926 Lahore 217

SCOTT-SMITH, J.

Firm Gauri Mal-Narain Das—Plaintiffs—Appellants.

v.

Secretary of State and *another*—Defendants—Respondents.

Second Appeal No. 717 of 1924, Decided on 23rd December 1924, from a decree of the Dist. J., Amritsar, D/- 18th January 1924.

Contract Act, Ss. 151, 152 and 161—Goods entrusted to Railway for carriage—Burden of proving that loss of such goods is not due to negligence of Railway lies on the Railway—Railways Act, S. 72.

When any one has entrusted goods to a Railway Company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the Railway Company, the fact of the loss damage, or destruction is enough to cast upon the Company the burden of proving that loss was not due to any negligence on its part : 22 *Mad.* 524 and 39 *Bom.* 191, *Foll.*

[P 218 C 1

Badri Das—for Appellants.
Dalip Singh—for Respondents.

Judgment.—In the suit out of which the present second appeal arises the plaintiff firm sued the Secretary of State, Defendant No. 1, and N. S. Bilimoria, Defendant No. 2, for Rs. 654-10-9 on account of damages due to the loss by theft of a bale of cloth from the railway station godown at Amritsar. On the 2nd October 1920 the plaintiff purchased ten bales of cloth from Defendant No. 2 for delivery at Amritsar. They were to be brought by Defendant No. 2 and sent from Badnera. Nine bales were actually delivered and paid for at Amritsar. The dispute is about the 10th which is said to have been sent from Badnera on the 15th December 1920 and to have arrived at Amritsar on the 7th January 1921. It was consigned by the Berar Manufacturing Company to the mselves and the railwav receipt was endorsed in favour of the Chartered Bank of India. It was stolen from the goods shed at Amritsar on the 10th January 1921. On the 13th January 1921 the plaintiff paid Rs. 580-9-9 to the Chartered Bank and got the railway receipt from it. This was arranged through Defendant No. 2. When the plaintiff applied to the railway for the goods it was found that they had been stolen, but before he was informed of this he had paid Rs. 14-13-0 to the Railway on account of demurrage. Adding to this Rs. 59-4-0 on account of interest and the sum paid to the Bank he claimed the sum mentioned above. The suit against the Railway was dismissed on the ground that they had taken all reasonable care of the goods and were not to blame for the loss. The suit against Defendant No. 2 was dismissed on the ground that the vendor's risk ended as soon as the goods left the Mill's premises at Badnera.

In second appeal it is urged that the learned District Judge treated the case as if the onus of proving negligence on the part of the Railway lay upon the plaintiff. Counsel has cited *Trustees of the Habour, Madras* v. *Best and Co.* (1) and *Hirji Khetsey & Co.* v. *B. B. and C. I. Ry. Co.* (2) on the question of onus. Having regard to S. 72 of the Indian Railways Act it is clear that the responsibility of a Railway administration for the loss of goods delivered thereto to be carried by railway is subject to the other provisions of the Act, that of a bailee under Ss. 151, 152 and 161 of the Indian Contract Act, 1872. Section 151 of the Contract Act lays down that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. In *Trustees of the Harbour, Madras* v. *Best and Co.* (1) it was held that.

"When goods which have been entrusted to bailies for hire are lost it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstaeces have taken of his own goods of a similar kind. and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for tbe loss."

The same rule was laid down

(1) [1899] 22 Mad. 524.
(2) [1915] 39 Bom 191=16 Bom. L. R. 467.

in *Hirji Khetsey and Co.* v. *B. B. and C. I. Ry. Co.* (.) as follows:

"When any one has entrusted goods to a Railway Company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the Railway Company, the fact of the loss, damage, or destruction is enough to cast upon the Company the burden of proving that that loss was not due to any negligence on its part."

The authorities are sufficient in support of the proposition that in this case the onus lay upon the Railway Company to prove that they took as much care of the bale of cloth as a man of ordinary prudence would have taken of his own property. The onus of the first issue which dealt with liability was put upon Defendant No. 1. The trial Court, in disposing of this issue, said that goods were stolen by thieves and that chaukidars had been appointed to watch the shed but that the thieves mannaged to get in some how without notice of the chaukidars and that Defendant No. 1 took as much care as was possible under the circumstances. The learned District Judge, in disposing of this point. said: "It has not been proved that Chand Singh's dismissal had anything to do with the theft of the plaintiff's goods. And there is nothing to show that the Railway as bailee did not take all reasonable care of the goods as required by S. 151 and S. 152 of the Contract Act. I hold, then, that the plaintiff has no case aginst the Defendant No. 1." It certainly appears from this that the learned District Judge viewed the case as if the onus lay upon upon the plaintiff. Counsel for both sides are willing that this point should be decided upon the evidence on the record. They do not ask that any futher evidence should be taken.

The contention of the counsel for the appellant as against Defendant No. 2 is that the property in the bale of cloth did not pass to the plaintiff until an appropriation thereof was made in his favour on the 13th January. It would, however, be inconvenient to decide the appeal as against him first and then to remand the case and thereafter to decide the appeal so far as Defendant No. 1 was concerned. I, therefore, consider that the cases must be remanded to the lower appellate Court for re-decision on the question of liability of Defendant No. 1 before any decision is given by this Court in regard to Defendant No. 2. The issue to be decided by the lower appellate Court is as follows:

Whether Defendant No. 1 took as much care of the bale of the cloth in question as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed?

It will be necessary for the Court in deciding this issue to take into consideration the extent of the premises and the number af chaukidars who were appointed to guard them and also the manner in which the chaukidars were posted on different sides of the building. The remand is under O. 41, R. 25 of the Civil, P. C, and return should be made in three month's time.

Case Remanded.

A. I. R. 1926 Lahore 218

MARTINEAU, J.

Feroze Din—Defendant—Appellant.

v.

Mt. Wazir Begam—Plaintiff—Respondent.

Second Appeal No. 3139 of 1924, Decided on 31st March 1925, from a decree of the Dist. J., Jullundur, D/- 28th November 1924.

Muhammadan Law — Marriage — Decree for dissolution—Impotency at time of marriage must be proved.

Under Muhammadan Law a wife cannot obtain a decree for dissolution of marriage on the ground of her husband's impotency unless he is proved to be impotent at the time of marriage. [P 219 C 1]

Din Dial Kapur for *Anant Ram*—for Appellant.

Judgment.—The plaintiff, who is the defendant's wife, sued for a dissolution of the marriage on grounds that her husband was impotent and ill-treated her. Ill-treatment was not proved and the trial Court also found that the defendant was not proved to be impotent and it dismissed the suit; but the District Judge on appeal has found on the evidence of the Civil Surgeon, who examined the defendant, that the latter is impotent and he has passed a decree in the plaintiff's favour. The defendant has filed a second appeal.

Under the Muhammadan Law the plaintiff cannot be given a decree unless she proves that the defendant was impotent at the time of the marriage. On this point there is no evidence whatever on the record. All that is shown is that the defendant is impotent at the present time. The suit must, therefore, fail.

I accept the appeal, reverse the lower appellate Court's decree and restore the decree of the trial Court dismissing the suit. The respondent will pay the appellant's costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 219

SHADI LAL, C. J., AND ADDISON, J.

Karam Singh and *another*—Convicts—Appellants.

v.

The Crown—Opposite Party.

Criminal Appeal No. 896 of 1925, Decided on 29th January 1926, from the order of the Addl. S. J., Lahore, D/- 31st August 1925.

(a) *Penal Code, S. 300, Excep. 4—Exception 4 applies to cases where subsequent conduct of both parties put them on same footing.*

Exception 4 to S. 300 is meant to apply to cases wherein, in whatsoever way the quarrel originated, the subsequent conduct of both the parties put them upon an equal footing. [P 220 C 1]

(b) *Penal Code, S. 304—Accused using pistol in sudden fight—Offence is culpable homicide not amounting to murder.*

Where the accused had a pistol upon him but he did not come with the intention of using it out, and he used it in the course of a sudden fight:

Held: that he is guilty only of culpable homicide not amounting to murder under the first part of S. 304. [P 220 C 2]

Moti Sagar and *Shamair Chand*—for Appellants.

Des Raj Sawhney—for the Crown.

Addison, J.—Two brothers, Karam Singh and Ranga Singh of Mari Kamboke, Tahsil Kasur, have been convicted under S. 302, Indian Penal Code, for the murder of Ujagar Singh of the same village. Ranga Singh has been sentenced to death and Karam Singh to transportation for life. They have appealed and the proceedings are also before us for confirmation of the death sentence passed upon Ranga Singh.

The case for the prosecution may be summarized as follows: According to the statement of the deceased made at the police station at 1 P.M., on the 30th December 1924, a few hours after the assault, the two appellants came to where he was sitting near the house of Kaku, Teli. They commenced to shout and he told them to go away.

Karam Singh then struck him on the head with a dang while Ranga Singh fired at him with a pistol. Ujagar Singh and his brother Kesar Singh caught hold of Ranga Singh and snatched the pistol from him, but Karam Singh struck Kesar Singh on the back with his dang and in this way they had to let go their hold of Ranga Singh. Both the appellants then escaped. This happened in the presence of numerous witnesses. The motive given by the deceased was that his nephew Sohan Singh had kidnapped a certain woman and the appellants gave information which led to the arrest of the woman and the nephew. This caused ill-feeling between them. He repeated the same statement he had made at the police station to an Honorary Magistrate when he was on his way to the Mayo Hospital, Lahore. He died there on the night of the 1st January 1925.

The prosecution witnesses are two brothers of the deceased, namely, Kesar Singh and Ishar Singh. Kaku Teli, Sham Singh and Mangal Singh, and an outsider Ujagar Singh. Pal Singh, lambardar, came to the spot later. The two brothers of the deceased have denied that the attack was made for the reason given by the deceased. It is obvious that they have done this because it would have been the deceased and his brothers who would have resented the fact that the appellants gave information against their nephew and not the appellants. The two brothers have given other reasons as to why there was ill-feeling between the parties, but it cannot be held that these reasons have been established. They were obviously put forward in order to show that the ill-feeling was principally on the part of the appellants.

Ranga Singh, appellant, who undoubtedly shot the deceased with a pistol, absconded and was not arrested till the 31st January 1925. The persons who arrested him gave him a severe beating, but this has nothing to do with the present case. The other appellant, Karam Singh, went to the police station at 4 P.M. on the day of the occurence, i.e., the 30th

December 1924. It is in evidence that he made a complaint there that he had been assaulted by the two brothers of the deceased and by Mangal Singh, witness. While he was in a half-conscious state he heard the sound of shots being fired but he did not know how this happened. It is undoubtedly the case that Karam Singh received a severe beating. He had 15 contusions on his body, 14 of them being caused by lathis, while one had been caused by a sharp weapon. Neither the deceased nor any of the witnesses explained how this happened. For this reason the learned Sessions Judge mentioned in his judgment that it could not be definitely ascertained when Ranga Singh fired at Ujagar Singh ; whether it was before or after Karam Singh had been beaten.

The argument advanced on behalf of the appellants was that the appellants must have been passing where the deceased, his brothers, and friends were, and that a sudden fight took place because the appellants had given information against Sohan Singh, the nephew of the deceased. There is not sufficient reliable evidence to come to a conclusion as to how this fight commenced, but there is no doubt that there was a fight between the parties. As the prosecution has kept back the exact state of affairs it was argued that the view most favourable to the appellants must be taken. This must be conceded. We therefore hold that a sudden fight took place between them and that Karam Singh, one of the appellants, in the course of that fight, got a severe beating though no grievous injury was inflicted upon him. It cannot be said whether Ranga Singh was also beaten as he absconded. During the fight Ranga Singh took out a pistol he had with him and fired at the deceased. Probably three shots were fired, one of which missed, while one struck him on the thigh and one in the abdomen. Death was due to the injury to the abdomen. Now exception 4 to S. 300, Indian Penal Code, is meant to apply to cases wherein in whatsoever way the quarrel originated, the subsequent conduct of both the parties put them upon an equal footing. The prosecution evidence, which has kept back part of what occurred, cannot be accepted as regards the allegation that Ranga Singh and his brother came with the deliberate intention of shooting Ujagar Singh. In fact there was no reason why they should have singled out Ujagar Singh. It must be held that though Ranga Singh had the pistol upon him he did not come with the intention of using it out, that he did use it in the course of this sudden fight. We, therefore, hold that Ranga Singh is guilty only of culpable homicide not amounting to murder under the first part of S. 304, Indian Penal Code. We accept his appeal, alter his conviction to one under S. 304, Part I, Indian Penal Code, and sentence him to ten years' rigorous imprisonment.

As regards Kasam Singh, he did nothing but inflict simple hurt. It cannot be held that he knew that Ranga Singh meant to shoot the deceased. We accept his appeal and alter his conviction to one under S. 323, Indian Penal Code. As he has already been long in jail we order that he be released forthwith.

Appeal partly accepted.

✻ A. I. R. 1926 Lahore 220

JAI LAL, J.

Ranpat Singh and *others*—Plaintiffs—Appellants.

v.

Mangal—Defendant—Respondent.

Second Appeal No. 1533 of 1925, Decided on 3rd February 1926, from the decree of the Dist. J., Karnal, D/- 24th March 1925.

✻ *Registration Act, S. 17—Terms of mortgage orally settled—Report to patwari stating terms of mortgage—Payment to mortgagor before patwari—Receipt by mortgagor stating terms of mortgage does not require registration.*

Where there was an oral settlement of terms between the parties and then they went to the patwari and made a report to him stating the terms of the mortgage, and the money was paid to the mortgagor, and thereafter a receipt was written by the mortgagor :

Held : that the mortgage having been a completed one before the document reciting the payment of consideration and conditions of the mortgage was written, the document did not require registration : *C. A.* 221 *of* 1924, *Foll.*[P 221 C 2]

Shamair Chand—for Appellants.

Prakash Chandra for *Sagar Chand*—for Respondent.

Jai Lal, J.—Appellants instituted a suit against the respondent for possession of the land in suit alleging that it had been mortgaged to them by the latter for

Rs 2,400. The defendant denied the mortgage.

The allegation of the plaintiffs was that at first there was an oral settlement of terms between the parties, that then they went to the patwari and made a a report to him stating the terms of the mortgage and the money was paid to the mortgagor, and thereafter a receipt, Ex. P. 3, was written by the mortgagor. The defendant objected to the admissibility of the receipt, Ex, P. 3, for want of registration. The trial Court held that the mortgage had been effected independently of Ex. P. 3 and, therefore, decreed the plaintiffs' suit. On appeal the learned District Judge held that the receipt, Ex. P. 3, was really a mortgage-deed as it recited all the terms of the mortgage, and, therefore, it was compulsorily registrable. He also held that no oral evidence could be given of the terms of the mortgage. He, therefore, dismissed the plaintiffs' suit.

On behalf of the appellants it is contended that Ex. P. 3 was really a receipt evidencing payment of Rs. 2,400 by the mortgagees to the mortgagor and that the mortgage had really been effected independently of this document as is apparent from the fact that the terms were settled between the parties first and recorded in the diary of the patwari in whose presence the consideration was paid. The receipt having been written afterwards was a record of the transaction that had otherwise been completed before. On behalf of the respondent, on the other hand, it is contended that every document is necessarily preceded by an oral settlement of terms and that when parties reduce the terms of a transaction into writing the writing alone should be deemed to be the evidence of such transaction, and if writing is not admissible in evidence no other evidence can be allowed to be produced to prove the transaction. A number of rulings were cited on behalf of the respondent, but it is not necessary to discuss them here because the general proposition propounded by the respondents is perfectly correct. The real question is whether the document, Ex. P. 3, was intended to create a mortgage. The facts of the case before me are identical with those of Case No. 221 of 1924, *Ram Dat* v. *Rup Chand*, decided on the 22nd December 1924 in this Court. It was held in that case that the mortgage having been a completed one before the document, reciting the payment of consideration and the conditions of the mortgage, was written the document did not require registration, and that it was intended as a receipt for the money paid after the patwari had made the entry in the mutation register and that the terms of the mortgage were unnecessarily entered in it.

I have examined the evidence in the case before me and find that the facts are as alleged by the appellants. My conclusion therefore is that the mortgage had been effected before Ex. P. 3 was written by the parties. It is no doubt a detailed document containing all the terms of the mortgage and, on the face of it, it is not a receipt alone, but it was intended by the parties as a receipt of the money paid by the mortgagees to the mortgagor. I, therefore, hold that the mortgage has been proved in this case by the mutation register and the oral evidence of the plaintiffs and that Ex. P. 3, which was written after the completion of the mortgage, did not require registration.

The result is that, accepting the appeal, I decree the plaintiffs' suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 221

SHADI LAL, C. J., AND CAMPBELL, JJ.

Madat Khan and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 774 of 1925, Decided on 24th October 1925, from an order of the S. J., Attock, D/- 24th July 1925.

Penal Code, S. 99—No question of self-defence arises in a pre-arranged fight.

Where a fight was pre-arranged between two parties armed with exactly similar deadly weapons, no question of self-defence arises.

[P 222 C 2]

Mohammad Shafi and *Abdul Azis*—for Appellants.

Dalip Singh—for Respondent.

Shdai Lal, C. J.—On the afternoon of the 21st April 1925, a fight took place outside the village of Dhok Baz Gul in the Attock district, between the members

of two rival factions known respectively as Ashraf's party and Madat's party. The learned Sessions Judge finds, and his finding has not been seriously contested before us, that three men on each side participated in the fight. Taj Muhammad and Nur Muhammad, sons of Ashraf, and Nur Khan, his brother-in-law, were the members of Ashraf's faction who participated in this affair ; while on the opposite side the combatants were Madat and his two brothers, Faqir and Ghazan.

It is beyond dispute that all the six persons mentioned above were wounded, and that two of them, namely Ghazan and Nur Muhammad succumbed to their injuries. Taj Muhammad and Nur Khan have been found guilty of the murder of Ghazan, and their adversaries Madat and Faqir have been convicted of the murder of Nur Muhammad, and the convicts have all been sentenced to suffer the penalty of death.

Now, the medical evidence makes it perfectly clear that two men on each side received bullet wounds, and that the combatants belonging to each of the rival parties received also wounds inflicted with spears and knives. There can, therefore, be little doubt that the members of each party were armed with a pistol, a spear and a knife ; and I cannot accept the contention that neither Madat nor his companions attacked their adversaries with a pistol. It must be remembered that not only the deceased Nur Muhammad, but also his brother Taj Muhammad received bullet wounds, and it is most unlikely that these wounds were the result of misjudged firing by their own relative Nur Khan.

The rival versions have been put forward before the Court, and each party has tried to minimize their own part in the transaction. These versions are set out in the judgment of the learned Sessions Judge, and after examining the arguments advanced by the learned counsel, on both sides I have no hesitation in endorsing the conclusion of the learned Judge that the evidence produced in support of the rival stories is wholly unreliable and that both parties have suppressed important facts concerning the transaction.

It is common ground that a bitter enmity extending over nearly 12 years existed between the two families, and there is evidence to the effect that only a day or two before the incident in question shots were fired by one or more members of each party at their adversaries. Now, the witness Inayat deposes that on the morning of the 21st April he went to Ashraf to seek the latter's assistance in reaping his harvest, but that Ashraf expressed his inability to accede to the request because he had made an appointment to fight Madat. That the fight was a pre-arranged affair receives support, not only from the circumstances that the number of the combatants on each side was exactly the same, but also from the fact that they were armed with exactly similar weapons namely, a pistol, a spear and a knife on each side. In view of this important circumstantial evidence corroborating the testimony of Inayat it is futile to contend that the learned Sessions Judge has invented a theory which is not supported by any evidence on the record. Indeed, the story of a pre-arranged fight between the two factions is the only rational version which is compatible with all the known circumstances of the case and satisfactorily accounts for the injuries sustained by the combatants.

No question of self-defence arises in a case of this character, and the prisoners upon whom the onus rested, have failed to show that they were entitled to exercise the right of private defence. The convicts are clearly of an offence under S. 302, Indion Penal Code, and there is no adequate ground which would jutify interference with the discretion of the trial Judge in the matter of the punishment imposed by him. Confirming, therefore, the sentences of death I dismiss both the appeals.

Campbell, J.—I agree that the appeals are dismissed and the sentences of death confirmed.

Appeals dismissed.

* A. I. R. 1926 Lahore 223

DALIP SINGH, J.

Allah Bakhsh and *another*—Plaintiffs—Appellants.

v.

Municipal Committee of Rohtak—Defendant—Respondent.

Second Appeal No. 23 of 1925, Decided on 23rd November 1925, from the decree of the Dist. J., Karnal, D/-27th March 1925.

(a) *Limitation Act, S. 12 — Appeal — Time allowable for copies is up to their despatch.*

The time to be allowed for copies should be calculated from the date of application up to the date when the copies were despatched. [P 223, C 1]

(b) *Civil P. C., O. 3, R. 2 — Person on whose behalf appeal is filed, ratifying the action of person filing is sufficient authority to file the appeal.*

When the person on whose behalf an appeal is filed, has accepted or ratified the action of the person who filed the appeal on his behalf, the person filing the appeal has authority to file the appeal · *A. I. R.* 1924 *Lah.* 296, *Expl.* [P 224, C 1)

(c) *Practice — Discretion not exercised by lower Court, can be exercised by appellate Court.*

If a lower Court does not exercise a discretion which it might have exercised, it is open to the appellate Court to exercise that discretion. [P 224, C 1]

Shamair Chand—for Appellants.

Jagan Nath Aggarwal—for Respondent.

Dalip Singh, J. — In this appeal Mr. Shamair Chand for the appellants has, first of all, contended that the appeal before the learned District Judge was barred by time, because the time to be allowed for copies should be calculated from the date of application up to the date when the copies were ready for delivery and not up to the date when the copies were despatched. There is however, one ruling of this Court *Ghula Singh* v. *Sohan Singh* (1), which holds the contrary. There are also two division Bench rulings, *Gurdit Singh* v. *Charan Singh* (2) and *Municipal Committee, Chiniot* v. *Bashi Ram* (3) in which it was held that time should be reckoned up to the date of despatch. There is, therefore, no force in this contention.

The next point argued by Mr. Shamair Chand is that the appeal was not properly presented, because the vakalatnama of the pleader representing the appeal was signed by the Secretary of the Municipal Committee and the Secretary had no power to institute an appeal. It seems that on the 26th of February 1925, the point was noticed by the learned District Judge and at that time the pleader for the respondent stated that there was a resolution of the Committee authorizing the Secretary to file the appeal. The case was adjourned and on the same day counsel re-appeared and stated that there was no such resolution but that there was an endorsement on a paper by the President to the effect that the copy of the judgment may be sent to Lala Nanak Chand to file the appeal etc., The case was again adjourned to the 26th of March 1925, as the pleader for the respondent asked for time to produce law on the subject. On the 26th of March 1925 a power-of attorney signed by the president was put in. The learned District Judge held, however, that as the suit had been defended by the Municipal Committee and the vakalatnama in the suit was signed by the Secretary and no objection had been taken to the vakalatnama by the plaintiff and as further a new power-of-attorney signed by the resident had been put in, therefore, on the authority of *Gopal Singh* v. *Bhaga* (4) and of *Khaira* v. *Nathu* (5) the appeal was properly filed. But Mr. Shamair Chand argues that *Gopal Singh* v. *Bhaga* (4) is not an authority for the proposition that the vakalatnama not objected to in the suit would be good for purposes of appeal and that *Khaira* v. *Nathu* (5) does not apply to the facts of the case, as there was no question of oversight, though there might have been a misapprehension of law. I think that *Gopal Singh* v. *Bhaga* (4) does not lay down that once a vakalatnama has not been objected to it is thenceforward good for all purposes and that an appeal filed with that defective vakalatnama is properly filed. Mr. Shamair Chand further contends on the authority of *Sri Chandan Bhuya* v. *Haroo Sethi* (6) a Division Bench ruling of the Calcutta High Court that a new power of-attorney does not validate an appeal so far as the time for filing an appeal is concerned ; in other words, that it has no retrospective effect, and he has also cited *Muhammad Ali Khan* v. *Jas Ram* (7) in support of his contention. Mr.

(1) A. I. R. 1922 Lah. 219.
(2) A. I. R. 1922 Lah. 415.
(3) A. I. R. 1922 Lah. 170.
(4) A. I. R. 1924 Lah. 296.
(5) [1920] 55 I. C. 990.
(6) [1911] 13 C. L. J. 544.
(7) [1914] 36 All. 46=11 A. L. J. 1015.

Jagan Nath in reply has relied on *Banwari Rai* v. *Chethru Lal Rai* (8) and on *Chhayemannessa Bibi* v. *Basirar Rahman* (9). There is no doubt that *Sri Chandan Bhuya* v. *Haroo Sethi* (6) is the ruling most in point so far as the facts of the case are concerned, but it seems to me that the general principles of the other rulings lay down that in these matters a Court should not be too meticulous, especially when the person, on whose behalf the appeal was filed, has accepted or ratified the action of the person who filed the appeal on his behalf. I think our own Court in *Khaira* v. *Nathu* (5) also seems to lean to the view that in these matters the more lenient view should be taken and as the Municipal Committee or its President has undoubtedly endorsed the action of the Secretary and as the plaintiff did not object to the vakalatnama originally filed in the suit, I think it should be held that the Secretary was empowered by the Municipal Committee or by its President to instruct the pleader and therefore had authority to sign the vakalatnama of the pleader on behalf of the Municipal Committee. Further, having regard to all the circumstances of the case I should be inclined to extend the time under the provisions of S. 5 of the Indian Limitation Act if I considered it necessary to do so. No doubt, there was a delay of a month before the vakalatnama signed by the President was put in and this delay has not been successfully explained, but in view of the conflict of rulings on the point it is possible that the legal adviser of the Municipal Committee did not consider that it was necessary to have a vakalatnama signed by the President. Mr. Shamair Chand has quite rightly laid stress on this delay and I have been pressed by the argument on this point. However, as I have stated above in all the circumstances of the case I would exercise my discretion in the matter and if necessary extend the time for filing the appeal. It is clear law and not contested before me that if a Court below does not exercise a discretion which it might have exercised, it is open to the appellate Court to exercise that discretion. This point, therefore, is also repelled.

Lastly, Mr. Shamair Chand has raised a curious contention. He argues that this suit arose because the Municipal Committee refused the plaintiff permission to build on the land under the proviso to S. 193 which empowers a Municipal Committee to refuse permission to build on the ground that there is a dispute about the ownership of the site between the applicant and the Municipal Committee. Mr. Shamair Chand contends that therefore it is necessary in a case of this kind to decide not only whether the plaintiff is entitled to the property but also to decide whether the Municipal Committee is entitled to the property because in either event a decision by the Court would put an end to the dispute between the applicant and the Municipal Committee and then the terms of the proviso to S. 193 would not empower the Municipal Committee to refuse permission to build. I am, however, of opinion that the legislature did not mean to confer any such right on an applicant to put a Municipal Committee to proof of its title to land in dispute. On the contrary, by not directing that a suit should be brought by an applicant when permission was refused by the Municipal Committee on this ground it by implication left the parties to their ordinary remedies at law. The plaintiff therefore, could only ask for a declaration that the site was his. He could not ask for a declaration that the site was not the Municipal Committee's. Further, this point was not put into issue and does not seem to have been argued in this light before the learned District Judge or before the trial Court. Mr. Shamair Chand relies on the words of the plaint which do state that the site does not belong to the Municipal Committee, as well as assert that it belongs to the plaintiffs, but having regard to the course of the suit I think that this was nothing more than the usual tautology of the plaint, and I do not think that the point should be allowed to be raised for the first time in second appeal, especially as it would necessitate remand to enable the Municipal Committee to prove its title.

I, therefore, dismiss the appeal but in the peculiar circumstances of the case I leave the parties to bear their own costs throughout.

Appeal dismissed.

(8) A. I. R. 1924 Patna 114.
(9) [1910] 37 Cal. 399=11 C. L. J. 285.

A. I. R. 1926 Lahore 225

HARRISON AND ZAFAR ALI, JJ.

Ziada and *others*—Defendants—Appellants.

v.

Gurdas Ram — Plaintiff — Respondent.

First Appeal No. 2304 of 1921, Decided on 23rd December 1924, from a decree of the Senior Sub-J., Shahpur, D/- 31st May 1921.

Limitation Act, Art. 132—*Mortgagor being allowed to redeem at any time so also mortgagee being allowed to foreclose at any time — Limitation begins at once.*

Where the mortgagor is at liberty to pay the mortgage-money at any time and the mortgagee is also equally at liberty to foreclose at any time, his limitation under Art. 132 begins to run at once. [P 226 C 1]

Zafrulla Khan—for Appellants.

Nanak Chand and *C. L. Mathur* — for Respondent,

Judgment.—The ancestor of the defendants in this case charged the land in suit by several mortgage-deeds. The defendants made an application under the Redemption of Mortgages Act and obtained an order for possession on payment of Rs. 700 only, this being the principal sum charged by the first mortgage. The plaintiff-mortgagee thereupon brought this suit for a declaration that the amount payable under the various deeds was Rs. 13,620 and the land could only be redeemed on payment of this amount. The decree given by the Sub-Judge was that the total charges amounted to Rs. 12,235, two small items having been disallowed on account of improvements to a well and a third so-called mortgage.

The defendants appeal, urging that the whole of the suit, except so far as it relates to the first mortgage, is barred by time. The first mortgage is usufructuary, or almost entirely usufructuary, that is to say, the amount secured was Rs. 700; out of this interest was payable on Rs. 50, and the rent and profits of the land were to be taken as equivalent to the interest on the balance of Rs. 650. Counsel for the appellant now admits that the whole of the interest claimed, as well as the principal, is due on this mortgage, or a total of Rs. 1,873, and urges that nothing should have been allowed on the second mortgage, the date of which was the 11th of August 1894, the first mortgage having been executed in May 1892 and the period therein fixed being 10 years, that is to say, up till 1902.

On the first mortgage limitation has been saved at regular intervals by the appropriation of the profits and rents towards the greater part of the interest, and the contention of counsel for the respondent is that the words "all the conditions laid down in the previous mortgage-deed shall also apply to the present mortgage-deed"—saved limitation in the second also. The clause in the second mortgage runs as follows: "All the conditions laid down in the previous mortgage-deed shall also apply to the present mortgage-deed. The mortgaged property shall be redeemed only when I pay up to the mortgagees the present mortgage-money with interest along with the mortgage charges due under the previous deed as stipulated therein. I shall have no authority whatsoever to redeem the mortgaged property or to alienate it in any way without paying up the mortgage-deed along with those of the previous ones. I shall be at liberty to pay at any time the money due under the present mortgage-deed. I shall have no authority to transfer in any way the mortgaged property to any other person unless the money due under the present mortgage-deed is paid. The mortgagees shall also be competent to realize the mortgage money under the present deed along with those of the previous ones recited therein, from the mortgaged property, other property of mine and from my person."

Had the deed concluded with the first sentence of this clause, or even with the first three sentences, there would have been great force in the respondent's contention. This portion of the deed, however, is wholly negatived by what follows: "I shall be at liberty to pay at any time the money due under the present mortgage-deed." But counsel contends, the concluding portion which runs: "The mortgagees shall also be competent to realize the mortgage-money due under the present mortgage-deed along with those of the previous ones recited therein from the mortgaged property, etc.," restores the status quo ante and makes the first portion of the clause operative and conclusive. In our opinion, the words "along with those of the previous ones" are only used to indicate that the money

realizble on the second mortgage is a charge on the property just as much as the money secured by the first mortgage, and the words do not mean that the mortgagee is debarred from realizing his money on the second mortgage unless he sues at the same time to realize on the first.

The all-important words are to the effect that the mortgagor is at liberty to pay at any time. The mortgagee was also, therefore, equally at liberty to foreclose and his limitation under Art. 132 began to run at once. Counsel's argument that inasmuch as he was forced to bring this suit by the proceedings before the Revenue Officer he should be treated as a defendant while he is a plaintiff has no force in our opinion.

The total charge, therefore, amounts to Rs. 1,873, and we accept the appeal in so far as to give the plaintiff a decree to the effect that the mortgage charges on the land in suit amount to this sum. Under the circumstances of the case we leave the parties to bear their own costs.

The cross-objections have not been pressed, and are dismissed.

Appeal partly accepted.

A. I. R. 1926 Lahore 226

HARRISON, J.

Sukh Ram—Plaintiff—Appellant.

v.

Daya Singh and *another*—Defendants—Respondents.

Second Appeal No. 1796 of 1924, Decided on 22nd December 1924, from the decree of the Dist. J., Ludhiana, D/- 23rd April 1924.

Custom—Punjab — Mortgage by widow for paying off husband's debts—Justification—Same principle applies as to sale.

The same principle must govern a suit relating to either a sale or a mortgage by a widow. But as ancestral land in the hands of a widow can be attached in payment of her husband's debt, if she mortgages the land for paying off the husband's debts all that is to be seen is whether the circumstances of the widow render it possible for her to pay the debts without mortgaging the land. [P. 226, C. 2]

C. L. Gulati—for Appellant.

Gurdial Singh Salariya—for Respondents.

Harrison, J.—A reversioner of one Harnam Singh brought this suit for the usual declaration regarding a mortgage of part of his ancestral land made by his widow Mt. Mehtabo, for Rs. 429. The decision of the District Judge was that Rs. 320 out of this amount were for necessity, and he gave a decree to this effect.

The plaintiff reversioner appeals and the contention of the counsel is that the District Judge has misunderstood *Habibul Rahman* v. *Altaf Ali* (1) and has drawn a distinction, which is not justified in that he has treated a mortgage as on a different footing from a sale by a widow. He contends, quite correctly in my opinion, that the same principle must govern a suit relating to either. At the same time *Mt. Bhambul Devi* v. *Narain Singh* (2) is a clear authority to the effect that the ancestral land in the hands of a widow can be attached in payment of her husband's debts, and this being so all that we have to see is whether the circumstances of widow render it possible for her to pay the debts without mortgaging the land. The debts are established by a decree against herself made payable out of the property of her deceased husband and passed after a contest. The mutation entry shows that the estate of Harnam Singh consisted of four pacca bighas or two acres, out of which the widow has charged the half. It is in evidence that Harnam Singh also left certain livestock, but the witnesses, who testify to this effect, were not even asked whether any of that livestock was still in existence and was available for the widow to dispose of and so raise money for her needs, including the payments of the debts. The burden of proving necessity no doubt lies heavily on the alienee, but I am of opinion that under these circumstances he has discharged it, and I, therefore, dismiss tho appeal with costs.

Appeel dismissed.

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(1) [1919] 46 Cal. 259=23 C. W. N. 1=29 C. L. J. 601.

(2) [1915] 39 P. R. 1915=103 P. W. R. 1915 =8 P. L. R. 1916.

A. I. R. 1926 Lahore 227 (1)

ZAFAR ALI, J.

Firm Gobind Prasad-Wazir Singh—Defendants—Petitioners.

v.

Firm Mangal Sain-Duli Chand—Plaintiffs—Respondents.

Civil Misc. Case No. 386 of 1925, Decided on 11th November 1925, against an order of Scott-Smith and Zafar Ali, JJ., D/- 16th March 1925, in Civil Appeal No. 338 of 1925.

Punjab Courts Act (6 *of* 1918), *S.* 41—*Certificate under S.* 41 *is necessary for an appeal to contest a question of mercantile usage.*

An appeal to contest a decision on a question of mercantile usage does not lie without furnishing a certificate in accordance with the provisions of S. 41. [P 227 C 1]

Sardha Ram Kapur—for Petitioners.

Shamair Chand—for Respondents.

Order.—The lower appellate Court arrived at the conclusion that according to the mercantile usage prevailing in Delhi cross contracts between the same parties for the sale and purchase of identical goods are settled by payment of difference in prices. The defendants, who denied the existence of the said usage, preferred an appeal against the judgment and decree of the Court below which came up in kacha peshi before a Bench consisting of Sir Henry Scott-Smith, J., and myself. The only point that the appellants' counsel, Mr. Sardha Ram urged before us was that the finding of the District Judge with regard to the existence of the alleged usage was erroneous. We pointed out to the learned counsel that an appeal to contest a decision on a question of usage did not lie without furnishing a certificate in accordance with the provisions of S. 41 of the Punjab Courts Act. He argued that no certificate was necessary but could cite no authority in support of his contention. We dismissed the appeal, holding that according to the express terms of S. 41 a certificate was necessary. Subsequently he filed an application to obtain a review of the above order which came up before me as Sir Henry Scott-Smith had retired since from service. I admitted the application, but after hearing arguments of counsel for both parties I can see no reason for changing my opinion.

The main contention of Mr. Sardha Ram is that the alleged usage could not be said to have the force of law and was, therefore, not the usage contemplated by S. 41 ; but the qualifying phrase " having the force of law " in S. 41 applies to custom as well as to usage, and it is clear that no custom or usage can be operative unless it has the force of law. Ss. 5 and 7 of the Punjab Laws Act make local customs and usages the rule of decision in certain specified cases, and thus a local custom or usage to which Ss. 5 and 7 apply acquires the force of law. S. 7 runs as below :

All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience or have, before the passing of this Act, been declared to be void by any competent authority.

In the present case the usage in question is not contrary to justice, equity or good conscience and is, therefore, valid. Mr. Sardha Ram contends that the usage could not supersede the rule of law which required each contracting party to perform his part of the contract as agreed upon, but in the case of a commercial contract the mode of performance may be regulated or modified by the local mercantile usage and that is what has happened in the present case. I, therefore, dismiss this application. No order as to costs.

Application dismissed.

A. I. R. 1926 Lahore 227 (2)

ABDUL RAOOF, J.

Diwan Chand and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1535 of 1924, Decided on 7th January 1925, from an order of the Dist. Mag., Gujrat, D/- 13th October 1924.

Legal Practitioners Act, S. 36—*Full opportunity should be given to aggrieved party to produce evidence.*

As S. 36 is somewhat exceptional and of a drastic nature, a great deal of care and caution is necessary before action is taken against anybody and full opportunity should be given to the aggrieved party to meet the case for the prosecution. [P 228 C 1]

Anant Ram—for Petitioners.

Govt. Advocate—for the Crown.

Judgment.—On the complaint of the Bar Association, Gujrat, the petitioners were called upon to show cause why their names should not be included in the list of touts. The petitioners filed written statements, and in support of their defence they applied to the Court to summon a large number of witnesses out of whom only some were examined by the Court and the rest were not. Twenty-six witnesses were put down in the list of Abdul Hak, petitioner, out of whom only two were summoned and examined. Out of eighteen witnesses of Diwan Chand, petitioner, four only were summoned and examined. Seventeen witnesses were common to both the petitioners out of whom only seven were summoned and examined. As to the rest the Court probably acting under S. 257 of the Criminal P. C. held that as the petitioners intended to cause delay and vexation the summoning of all the witnesses was not necessary. After considering the case on the materials before it the Court declared the petitioners to be touts.

The provisions of S. 36 of the Legal Practitioners Act are somewhat exceptional and of a drastic nature, and a great deal of care and caution is necessary before action is taken against anybody. The petititioners complain that full opportunity was not given to them to meet the case for the prosecution. In my opinion there is force in this contention. I, therefore, accept this petition for revision and send the case back to the learned District Magistrate with the direction that it may be placed upon its original number, that the petitioners be given full opportunity to produce evidence and that the case should be decided after the consideration of their full defence.

Petition accepted.

A. I. R. 1926 Lahore 228

MARTINEAU, J.

Nihal Singh and *another*—Defendants—Appellants.

v.

Secretary, Gurdwara Guru Tegh Bahadur—Plaintiff—Respondent.

Appeal No. 2170 of 1924, Decided on 27th January 1925, from an order of the Dist. J., Hoshiarpur, D/- 10th July 1924.

(*a*) *Civil P. C., S.* 102—*Suit for recovery of offerings to a shrine from their wrongful appropriators is not a small cause, as it falls under Provincial Small Cause Court Act, Sch.* 2, *Art.* 18.

A suit to recover offerings for a shrine from a person wrongfully appropriating them falls under Art. 18 of the Second Schedule, as it relates to a trust, and also probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies. [P. 228, C. 1]

(*b*) *Limitation Act, Art.* 62—*Applicability.*

A suit to recover offerings of a shrine from their wrongful appropriator is governed by *Art.* 62 : 41 *Mad.* 923 ; *A. I. R.* 1923 *All.* 532 *and* *A. I. R.* 1922 *Cal.* 157, *Appl.* [P. 229, C. 1]

Fakir Chand—for Appellants.

Niaz Mahammad—for Respondent.

Judgment.—The plaintiff in this case, who is the Secretary of the Gurdwara Guru Tegh Bahadur at Anandpur, sues to recover the sum of Rs. 299-2-3 said to have been received by the 2nd defendant as an agent of the 1st defendant from the Nabha State as an offering for the shrine during the period from the 12th April 1913 to the 12th April 1918. The trial Court dismissed the suit as barred by limitation under Art. 62 of the First Schedule to the Limitation Act, but the Additional Judge, on appeal, has held that the case is governed by Art. 89 and has remanded it for decision on the merits. The defendants have filed a second appeal.

Counsel for the respondent has taken a preliminary objection that the suit is a small cause of less than Rs. 500 in value and, therefore, no second appeal lies. The suit, however, falls under Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act as it relates to a trust, and also probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies.

The lower appellate Court is wrong in applying to the case Art. 89 of the First Schedule to the Limitation Act, as there is no allegation by the plaintiff that either of the defendants was his agent. The question remains whether Art. 62 applies.

For the respondent, *Ramasami Naidu* v. *Muthusami Pillai* (1) is cited in which it was held that in an action for money had and received there must be privity of a legal recognizable nature between the plaintiff and the defendant.

(1) [1918] 41 Mad. 923=(1918) M. W. N. 796=35 M. L. J. 581.

It appears that there is such privity existing in this case, as the defendants, according to the plaintiff, held the money in trust for the shrine. In *Mahabir Prasad* v. *Parsandi* (2) where rent of property was recovered by a person not entitled in law to recover it, it was held that he must be deemed to have realized the money for the real owner's use; and in *Biman Chandra* v. *Promotho Nath* (3) it was held that the form of suit indicated by Art. 62 was applicable where the defendant had received money which in justice and equity belonged to the plaintiff under such circumstances as in law rendered the receipt of it a receipt by the defendant to the use of the plaintiff.

I agree, therefore, with the view of the Sub-Judge, that the suit is governed by Art. 62 and is consequently barred by limitation. I accept the appeal, reverse the decree of the Additional Judge, and restore that of the Sub-Judge dismissing the suit. The respondent will pay the appellant's costs throughout.

Appeal accepted.

(2) A. I. R. 1923 All. 532.
(3) A. I. R. 1922 Cal. 157.

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* A. I. R. 1926 Lahore 229

MARTINEAU, J.

Kala Khan—Plaintiff—Appellant.

v.

Nathu Khan and *others*—Defendants—Respondents.

Second Appeal No. 1332 of 1925, Decided on 2nd January 1926, from the decree of the Dist. J., Rawalpindi, D/- 31st January 1925.

* *Stamp Act* (2 *of* 1899), *S.* 2 (21)—*Letter empowering to sell land is not power-of-attorney unless it empowers to sell in the executant's name.*

A letter by one empowering another to sell land does not fall within the definition of "power-of-attorney" contained in S. 2 (21) unless it empowers him to sell the land in the name of the executant. [P. 229, C. 2]

Gobind Ram Khanna—for Appellant.

Shamair Chand—for Respondents.

Martineau, J.—The plaintiff Kala Khan and his brother Nathu Khan, Defendant 1, jointly owned Khasra No. 1258-1. On the 9th February 1918 Nathu Khan sold a portion of that khasra number to Dalbir Chand and Sundar Das, and on the 13th February he sold the remainder to Ishar Das and Harnam Das, Defendants 2 and 3. Defendants 4, 6, 8 and 10 brought separate suits for pre-emption in respect of the latter sale and obtained decrees, and afterwards transferred their shares to Defendants 5, 7 and 9. The plaintiff sues for possession of his half-share of the land sold by his brother to Defendants 2 and 3, contending that his brother had no right to sell it, and he also claims the other half by right of pre-emption.

The suit has been dismissed, the Courts below having agreed in finding that it has been brought in collusion with Ishar Das, Defendant 2, and that the plaintiff had, by a letter written from Basra on the 29th September 1917, authorized Nathu Khan to sell the former's half share in the land. The plaintiff has preferred a second appeal, contending that his consent to the sale is not legally proved.

The letter from the plaintiff authorizing Nathu Khan to sell the land, though not forthcoming, is referred to in the two sale-deeds executed by the latter, and Sundar Das proves its existence at the time when Nathu Khan executed the sale-deed in favour of Dalbir Chand and himself. Hira Nand, through whom the sales by Nathu Khan were effected, also proves the existence of the letter, and says that he made it over to some of the vendees, though he cannot say to which. As the letter is now suppressed by the vendees, into whose possession it came, and the suit has been found to have been brought in collusion with them, I think that it is fair to presume that it was the plaintiff who wrote the letter.

It is argued for the plaintiff that the letter was a power-of-attorney as defined in S. 2 (21) of the Stamp Act, and that as it was unstamped it would have been inadmissible in evidence, and, therefore, secondary evidence of its contents is also inadmissible. There is, however, nothing to show that Nathu Khan was empowered by the letter to sell the land in "the plaintiff's name," and if no such power was given to him the letter, though it gave Nathu Khan authority to sell the land, would not fall within the definition of "power-of-attorney" contained in the Stamp Act. Another point taken is that the letter would not debar the plaintiff from repudiating the sale when

it is not shown that he agreed to any particular price, but there is no force in this argument, as in giving a general authority to Nathu Khan to sell his share he must be taken to have left it to Nathu Khan to settle the price, and it may be observed that there has been no allegation that the price for which the land was sold was not a fair price.

I agree, therefore, with the Courts below that the plaintiff is precluded from suing to recover his share of the land by the fact of his having authorized his brother to sell it.

As regards the claim for pre-emption, the fact appears to be that the plaintiff acquiesced in the sale of Nathu Khan's share, besides authorizing the sale of his own share. Hira Nand has stated that he suggested to Nathu Khan that he should obtain the plaintiff's written consent to the sale of his (plaintiff's) share, as without it no one would be willing to buy the land; evidently Nathu Khan must have written to his brother telling him that he proposed to sell the land and asking for his authority to sell his (plaintiff's) share, and it was in reply to such a letter that the plaintiff wrote the letter which has been referred to above. It does not stand to reason that the plaintiff, while consenting to the sale of his own half-share, reserved his right to pre-empt his brother's half.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 230

CAMPBELL, J.

Noor Din—Plaintiff-Appellant.

v.

Sulakhan Mal—Defendant—Respondent.

Misc. Appeal No. 1566 of 1924, Decided on 8th January 1925, from a decree of the Senior Sub-J., Lahore, D/- 28th May 1924.

* (a) *Civil P. C., S. 60 (c)—House of an agriculturist in a city is exempt from attachment even when he owns two other houses on his land.*

Even though an agriculturist has two other houses on his land expressey meant to be used for agricultural purposes, his house, in a city where he spends his nights and where he brings his cattle every night from his agricultural lands is exempt from attachment under S. 60. [P 230 C 2]

(b) *Civil P. C., S. 60 (c)—"Occupied by"*

The words "occupied by" mean "lived in by" or "used for agricultural purposes by". [P 280 C 2]

Nihal Chand Mehra—for Appellant.

Tirath Ram—for Respondent.

Judgment.—This is a case where a judgment-debtor Nur Din objected to the attachment in execution of a decree of his house in Lahore city on the ground that it was exempt under S. 60 (c) of the Civil P. C.

The objector proved that agriculture was his chief occupation, that he cultivated land a mile or 1&1/2 miles from the house in question and that every night he took his cattle home to this house and spent the night in it. It was, however, elicited in evidence that the objector owns two other houses in the vicinity of his agricultural land, but it was stated that one of them was in the possession of mortgagees.

The lower Court has rejected the petition on the grounds that the objector was bound to prove that the city house was occupied by him bona fide for the purpose of agriculture and that the bare fact that after doing his day's work in the villages he brings his cattle with him to the city house because the village is becheragh is not sufficient to show that the city house is occupied by him as an agriculturist, especially when he has got houses on his lands expressly meant to be occupied and used for agricultural purposes.

There is nothing in S. 60 to justify such an interpretation of its terms and of the ruling quoted by the learned Senior Subordinate Judge in support of his finding: *Radhakisan Hakumji* v. *Balwant Ramji* (1) and *Jivan Bhaya* v. *Hira Bhaiji* (2) are not in point at all, and *Attar Singh* v. *Bhagwan Das* (3) is in favour of S. 60 (c) being taken to mean what it says.

Mr. Justice Johnstone laid down that the words "occupied by" mean "lived in by" or "used for agricultural purposes by."

The present house is the permanent residence of the judgment-debtor who is an agriculturist and, therefore, even if the words of S. 60 (c) should be read as meaning "belonging to an agriculturist and occupied by him as such," the house

(1) [1883] 7 Bom. 530.
(2) [1888] 12 Bom. 363.
(3) [1909] 65 P. R. 1909=141 P. L. R. 1909=104 P. W. R. 1909

in question undoubtedly is occupied by an agriculturist as such, for agriculturists like other people must have some place to lay their heads at night, and if an agriculturist has a house in a city a mile from his land there is no reason on earth why he should not use it as his ordinary residence.

I accept the appeal and order that the house be exempted from attachment. The appellant will have his costs in both Courts.

Appeal accepted.

A. I. R. 1926 Lahore 231

SHADI LAI, C. J., AND LEROSSIGNOL, J.

Moti Mal Ram Sarup—Appellant.

v.

Daulat Ram and *others*—Respondents.

Letters patent Appeal No. 199 of 1923, Decided on 12th January 1925, against the judgment of Moti Sagar, J., in Civil Appeal No.1396 of 1922,D/-28th May1923.

Provincial Insolvency Act (5 *of* 1920), *S.* 54—*Debtor's intention is the dominant factor in deciding fate of the transaction.*

S. 54 does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor the dominant factor in deciding the fate of the transaction.

Where the debtor unable to meet his liabilities and in need of further accommodation, approached the creditor and asked him to make a loan, intending thereby to benefit himself and not the creditor:

Held : that the transaction was not effected with a view of giving the creditor a preference over other creditors. [P. 231. C. 2.]

Shamair Chand—for Appellant.

Manohar Lal—for Respondents.

Judgment.—On the 10th February 1921, one Sondha mortgaged the property in dispute in favour of his creditor Daulat Ram for a sum of Rs. 5,000. On the 18th April he presented an application for insolvency, and this application was granted on the 6th December. The creditors seek to impeach the transfer on the ground that it was made with a view of giving Daulat Ram a preference over other creditors, and the determination of the question depends upon the motive which inspired the debtor in making the transfer.

Now, the deed of mortgage shows that Sondha was already indebted to Daulat Ram to the extent of Rs. 3,200, and that he obtained a fresh loan of Rs. 1,800 and hypotheated his property for Rs. 5,000. There can be no doubt that Sondha was, at the time of the transfer, unable to pay his debts, and that he applied for insolvency within three months after the date of the transfer. It is further clear that the effect of the transfer was to give preference to one creditor over others, but S. 54 of the Provincial Insolvency Act does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor the dominant factor in deciding the fate of the transaction.

It appears to us that the debtor, who was unable to meet his liabilities, stood in need of further accommodation and it was for this reason that he approached the creditor and asked him to make a loan. In entering into this transaction he intended to benefit himself and not the creditor and we cannot, therefore, accept the contention of the learned counsel for the appellant that the transaction was effected with a view of giving Daulat Ram a preference over other creditors.

The learned counsel for the appellant argues that Daulat Ram has not succeeded in establishing the whole of the debt of Rs. 3,200, and that in support of five hundis of Rs. 1,800 he has not produced any documentary evidence beyond the hundis themselves to prove the payment of consideration. It is to be observed that the learned District Judge recorded a finding on this point in favour of Daulat Ram and registered him as a creditor for the whole of Rs. 5,000 and interest thereon. No appeal was preferred against this decision so far as the amount of the debt was concerned, and the appellant is now precluded from impeaching it.

The appeal is accordingly dismissed. Parties to bear their own costs in this Court.

Appeal dismissed.

A. I. R. 1926 Lahore 232

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Sheru and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 865 of 1923, Decided on 20th December 1923, from the order of the S. J., Lyallpur, D/- 22nd June 1923.

Penal Code, S. 85—Evidence merely establishing that the accused was a drunkard is not sufficient.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act: 28 *P. R. Cr.* 1917, *Dist.*; *Director of Public Prosecutions* v. *Beard*, (1920) *A. C.* 479, *Foll.*

Where the accused proceeded to the scene of the incident, declared their intention of assaulting the deceased, and walked about a mile, pursued their victim, and inflicted upon him a large number of blows, but were careful enough not to deal a deadly blow on the head or any other vital part of the body.

Held: that the attack was a premeditated one and that the mere fact that they had taken some liquor should not be regarded as a sufficient reason for not imposing the penalty of death.

[P. 233, C. 1]

Ghulam Mohy-ud-Din—for Appellants.

Ram Lal—for the Crown.

Shadi Lal, C. J.—On the afternoon of the 9th March 1923, one Sazawar, an Arain of the vilage Nawan Kot in the district of Sheikhupura, was subjected to a merciless assault, in the course of which he sustained no less than 34 injuries. To these injuries the victim succumbed within three or four hours. Two persons, namely, Sheru and Gama, have been found guilty of the murder of Sazawar; and have been sentenced under S. 302, I. P C., to the penalty of transportation for life each. The prisoners have preferred a joint appeal against their conviction, and we have also before us an application by the Local Government praying for an enhancement of the sentences imposed upon them.

The evidence for the prosecution leaves no doubt that one Mt. Rakhi, the widow of Maula, a relative of the prisoners, contracted a liaison with Shahab Din, the sister's son of the deceased Sazawar. This intrigue caused resentment to Gama and Sheru, with the result that the lovers left the village and migrated to Malakpur where they began to live as husband and wife. The convicts did not, however, like the marriage and were seeking an opportunity to cause injury to Shahab Din and his wife. It is beyond dispute that on the 27th February 1923, Mt. Rakhi made an application under S. 107, Criminal P. C., to a Magistrate, alleging that Gama, Sheru and seven other persons named therein were inimically disposed towards her and her husband and intended to assault them, and praying that they should be called upon to furnish security to keep the peace. It is alleged on behalf of the prosecution that the convicts could not find any opportunity to cause harm to Shahab Din or his wife, and that they accordingly decided to assault Sazawar who was not only the maternal uncle of Shahab Din, but had also adopted him as his son. On the day in question a fair was held at a well situate outside the village Nawan Kot, and was attended by a party of pilgrims and the inhabitants of the village including the prisoners Sheru and Gama. It appears that these two persons had taken liquor and that, in a sprit of bravado, they declared that they were going to the deceased's field in order to kill him. The witness Labh Singh, who overheard them, galloped off on a mare to Sazawar's field, and warned him of the danger. Thereupon Sazawar left the field and ran off towards the west, while his companion Ranjha, who was working with him in the field, went off in another direction.

Shortly afterwards, the culprits arrived and, finding Sazawar absent, they followed him to another field where he had concealed himself, attacked him with a dang and a hatchet, and inflicted upon him a large number of injuries. Upon hearing the outcry of the victim his cousin Alyas, who was cultivating his land at a short distance, hastened to the spot, and saw both the prisoners beating his relative. He tried to intervene, but was himself threatened and was rescued by Labh Singh. This, in brief, is the story for the prosecution and it is fully established by the evidence of a large number of witnesses. (The judgment then narrated the prosecution evidence and that of defence and proceeded.) The assessors and the learned Sessions Judge have concurred in declaring the

accused to be guilty, and, after examining the entire material placed before us, we have no hesitation in endorsing tha conclusion.

As regards the application for enhancement, we find that the learned Sessions Judge holds that the culprits went to the field of the deceased with " the deliberate purpose of striking down Sazawar," but he has refrained from inflicting the death penalty on the sole ground that the offenders were, at the time of the assault, under the influence of drink. It may be conceded that both the prisoners had taken liquor, but there is no evidence to show that they were in a state of intoxication. Indeed, the evidence leaves no doubt that before they proceeded to the scene of the incident, they had declared their intention of assaulting the deceased, and that they then walked about a mile, pursued their victim, and inflicted upon him a large number of blows, but were careful enough not to deal a deadly blow on the head or any other vital part of the body. The attack was a premeditated one, and we are not prepared to hold that the mere fact that they had taken some liquor should be regarded as a sufficient reason for not imposing the penalty of death. As held by the House of Lords in *Director of Public Prosecutions* v. *Beard* (1) evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. The learned Sessions Judge has relied upon the judgment in *Pal Singh* v. *Crown* (2), but we find that there were peculiar circumstances in that case which led the Court to commute the sentence of death to one of the transportation for life. It appears that the convict had no motive to cause the death of his victim and that the attack was a sudden one. These and other circumstances influenced the Court in holding that there was no adequate ground for making a distinction in the matter of punishment between the accused who had been sentenced to death and his comrade who had been sentenced only to transportation for life.

In the case before us we are clearly of opinion that both the prisoners primed themselves with arms in order to wreak their vengeance upon their enemy and beat him mercilessly, and we consider that they deserve the maximum punishment provided by law. We accordingly enhance the sentence in the case of each of the convicts to one of death.

Sentence enhanced to death.

(1) [1920] A. C. 479.
(2) [1917] 28 P. R. Cr. 1917=35 P. W. R. (1917) Cr.

✻ A. I. R. 1926 Lahore 233

LEROSSIGNOL AND MARTINEAU, JJ.

Brij Nath—Petitioner.

v.

Commissioner of Income-Tax, Lahore—Respondent.

Civil Misc. No. 549 of 1924, Decided on 19th January 1926.

✻ *Income-Tax Act* 1922, *S.* 13—*Proviso*—*Income-Tax Officer's procedure must be governed by judicial considerations—Hearsay evidence is no basis for proper assessment—Income-Tax Act, S.* 23.

The Income-Tax Officer should be governed in his procedure by judicial considerations. He should base assessment on legal and not mere hearsay evidence which may be the evidence of his officers or of members of the public, but without evidence to the effect that those items which do not appear in an account should find a place therein, he is not entitled to assume on mere general hearsay that those items should appear in the account. Should he however find on good evidence that even one substantial item is missing, he would be entitled to treat the whole account as unreliable.

[P. 233, C. 2, P. 234, C. 1]

Jagan Nath Agarwal—for Petitioner.

C. H. Carden Noad—for Respondent.

Order.—This is a reference by the Commissioner of Income-Tax made under S. 66 of the Income-Tax Act of 1922.

The assessee was originally assessed on an income of Rs. 12,000 which on appeal was reduced to Rs. 7 220 and on review by the Commissioner to Rs. 4,500

We agree with the petitioner that the Income-Tax Officer should be governed in his procedure by judicial considerations. He should base assessment on legal and not mere hearsay evidence which may be the evidence of his officers or of members of the public but without evidence that items which do not appear in an account should find a place therein, he is not

entitled to assume on mere general hearsay that those items should appear in the account.

Should he, however, find on good evidence that even one substantial item is missing, he would be entitled to treat the whole account as unreliable.

In this case we find it unnecessary to express our views more specifically; for we see that the final assessment was made on the admission of the assessee and also that the Commissioner holds as a fact that the assessee refused a notice under S. 23 (2) to appear and meet the criticisms levelled against his accounts.

Petitioners shall pay the costs of this hearing.

Petition dismissed.

✻ A. I. R. 1926 Lahore 234

HARRISON AND CAMPBELL, JJ.

Qaim—Defendant—Petitioner.

v.

Nura and *others*—Plaintiffs—Respondents.

Civil Misc. Case No. 224 of 1925, in Civil Appeal No. 533 of 1921, Decided on 30th October 1925.

✻ *Civil P. C., O. 22, R. 9—Abatement is automatic after 90 days and appeal or suit is dead unless abatement is set aside on application within 60 days or extended time under Limitation Act, S. 5.*

Abatement is automatic after the 90 days have expired and unless that abatement be set aside on an application presented within 60 days or a period further extended in virtue of S. 5 of the Limitation Act the suit or appeal is dead. *A. I. R. 1922 Cal. 335, Foll.; A. I. R. 1922 All. 209, not Foll.* [P 235, C, 1]

M. S. Bhagat—for Petitioner.

Mehr Chand—for Respondents.

Harrison, J.—The facts of the case are as follows: The suit of Samail and others was decreed on 21st December 1920. An appeal was lodged by the defendant and admitted on 10th March 1921. Samail, plaintiff-respondent, died on 22nd January 1924 and on the 24th of April 1924 the appellant applied to have his representatives brought on the record, alleging that Samail had died two months previous to the date of the application. This application was granted "subject to all just exceptions" and at the hearing of the appeal on the 11th of February 1925 it came to light that Samail d actually died on the 22nd of January and that the application had therefore been made more than 90 days after that date. The order passed was that the appeal was shown to have abated as against one of the respondents and this being so it had abated against all and was dismissed with costs.

On the 2nd of April 1925 a petition was presented purporting to be under O. 22, R. 9, S. 151 and O. 1, R. 10, Civil Procedure Code, applying that the abatement and dismissal be set aside and that the representatives be brought on the record; and as an alternative, that the representatives be impleaded under S. 151 and O. 1, R. 10. Counsel relied on *Mt. Gujrati* v. *Sitai Misir* (1). While respondent has urged that *Sarat Chandra* v. *Maihar Stone and Lime Co. Ltd.* (2) took a precisely contrary view and that that view had been generally followed by this Court. He quoted *Raghbir Saran* v. *Mt. Sohan Devi* (3) and *Ram Gopal* v. *Har Kishen* (4). The views taken by the Allahabad and Calcutta High Courts are diametrically opposed to each other, the latter being that after 90 days have expired from the date of a man's death, no application having been made in the interval, the appeal automatically abates or dies; from that moment time begins to run and unless within 60 days an application be made under O. 22. R. 9, the matter ends. On the other hand, the view of the Allahabad Court is that before there can be an abatement, there must be an order and it is from the date of the order that limitation begins to run and that 60 days are allowed to have that order set aside. In *Ram Gopal* v. *Har Kishan* (4) the lower appellate Court had followed the view taken by Allahabad; on appeal a Division Bench of this Court took the same view as Calcutta and this has indeed always been the view of this Court where applications made beyond time are treated as equivalent to applications under O. 22, R. 9. Counsel for the petitioner urges that in *Raghbir Saran* v. *Mt. Sohan* (3) that matter was not fully argued but it must have been so argued in *Ram Gopal* v. *Hari Kishan* (4) and anyhow we are of opinion that the view of the Calcutta High Court is

(1) A. I. R. 1922 All. 209.
(2) A. I. R. 1922 Cal. 335.
(3) A. I. R. 1925 Lah. 381.
(4) A. I. R. 1925 Lah. 598.

correct and must prevail. The Code speaks nowhere of an order of abatement; O. 22, R. 4 has not been dealt with in so many words in *Mt. Gujrati* v. *Sitai Misir* (1), and the only contention which impresses us at all is that in ordinary English a fact is not "set aside" but an order is. Where O. 22, R. 9 speaks of setting aside an abatement or dismissal, it would possibly be more correct to use some other word and to reserve the use of the words "set aside" for the cancellation of an order as opposed to the ignoring of an event. We are, however, of opinion that as soon as 90 days have expired the appeal abates. No reference to that abatement gives a fresh starting point and such reference is merely the recital of an event. Where, therefore, the appeal is dismissed with costs as in this case as having abated in toto, it would no doubt be more correct to say:

the appeal has abated against one of the respondents. It cannot therefore proceed against the remaining respondents and is dismissed against them with costs.

It is unnecessary to dismiss it against the respondent against whom it has already abated. Where O. 22, R. 9, speaks of an abatement or dismissal, the word "dismissal" refers back to the only form of dismissal falling under O. 22, namely, the dismissal of a suit on the ground of a plaintiff's insolvency. Where the suit or appeal is dismissed against certain defendants or respondents as a consequence of a previous abatement, it is dismissed in exactly the same way as if the plaintiff or the appellant had failed to implead an essential party and that failure necessitated such dismissal. We find, therefore, that abatement is automatic after the 90 days have expired and unless that abatement be set aside on an application presented within 60 days or a period further extended in virtue of S. 5 of the Limitation Act, the suit or appeal is dead. No reason has been shown in this case why there should be any extension of time and in fact counsel has not even addressed us on this point.

We dismiss the application with costs.

Application dismissed.

A. I. R. 1926 Lahore 235

DALIP SINGH, J.

Ghulam Haidar and *another*—Judgment-debtors—Appellants.

v.

F. Mangal Sen-Des Raj and *others*—Creditors—Respondents.

Civil Appeal No. 1997 of 1925, Decided on 11th January 1926, from an order of the Dist. J., Jhelum, D/- 2nd January 1925.

Provincial Insolvency Act (5 *of* 1920), *S.* 10 (*a*)—*Judgment-debtors jointly and severally liable under a decree for Rs.* 500—*Each is competent to file an insolvency petition.*

Where the debtors are jointly and severally liable under a decree for Rs. 500 each can rely on the decree as showing that his debts are Rs. 500. [P. 235, C. 2]

Sagar Chand for *Muhammad Azam Khan*—for Appellants.

Amolak Ram Kapur—for Respondents.

Dalip Singh, J.—Mr. Sagar Chand for the appellants in this case has cited *Abdul Ahad* v. *Mahtab Bibi* (1) in support of the proposition that the debtors being jointly and severally liable for the decree it is incorrect in law to hold that the debts of the two appellants do not amount to Rs. 500 each. On principle also it seems clear to me that both appellants can rely on the decree as showing that their debts exceed Rs. 500; though the decree is the same against both. Mr. Amolak Ram for the respondents urges that there should have been separate applications on behalf of each of the judgment-debtors, the present applicants, and has referred to *Hardhian Singh* v. *Sham Sundar* (2). Mr. Sagar Chand says he has no objection to putting in a separate application for each judgment-debtor, applicant, in insolvency. I accordingly dismiss the appeal leaving it to the applicant if so advised, to put in separate applications to be disposed of in due course of law. There will be no order as to costs.

Appeal dismissed.

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(1) 1913] 35 All. 378=11 A.L.J. 477.
(2) [1888] 69 P. R. 1888.

A. I. R. 1926 Lahore 236 (1)

SHADI LAL, C. J. AND LEROSSIGNOAL J.

Firm Bhagwan Das-Pars Ram—Decree-holder—Petitioner.

v.

Jado Nath and *others*—Judgment-debtors—Respondents.

Civil Misc. Case No. 244 of 1925 and Letters Patent Appeal No. 244 of 1923, Decided on 25th November 1925, against the order of the High Court, D/- 21st January 1925.

Civil P. C., O. 47, R. 1—Judgment not clear as to liability as judgment debtors may be reviewed.

Where a judgment does not conclude the question whether the decree may be executed against the partners individually and when the decree as it stands can be executed only against the property of the firm the judgment may be reviewed and that circumstance does not preclude the execution of the decree even prior to review against the individual partners as soon as any or all of the conditions set forth in Order 21, R. 50 are established.

Shamiar Chand and *Jagan Nath*—for petitioners.

Nana Chand Pandit—for Respondents.

LeRossignol, J.—The sole object of this review is to have it made clear that our judgment of the 21st January 1925 does not conclude the question whether the decree may be executed against the judgment-debtors individually. Before the learned Judge in chambers the only matters decided was whether the order of the executing Court passed in review was competent. The other issues in the case were not decided by him inasmuch as his decision on the first point rendered their adjudication unnecessay.

There can be no doubt that the decree as it stands can be executed only against the property of the firm but that circumstance does not preclude the eventual execution of the decree against the individual partners as soon as any or all of the conditions set forth in O. 21, R. 50 are established.

We accordingly review our judgment of the 21st of January 1925 so far as to make it clear that that judgment in no way debars the executing Court from trying the other issues in the case relative to the liability of the individual members of the firm to satisfy out of their own property the decree issued against the firm.

In this hearing the parties shall bear their own costs.

Order accordingly.

✻ A. I. R. 1926 Lahore 236 (2)

FFORDE, J.

Mughees-ud-din—Accused—Petitioner.

v.

Crown—Opposite Party.

Criminal Petition No. 205 of 1925, Decided on 18th December 1925, for transfer of the case from the Court of the 2nd Class Mag., Jagadhri.

✻ *Criminal P. C., S. 526—Trying Magistrate inquiring as to the grounds for transfer—Procedure is improper and the case must be transferred.*

When an application is made for postponement of the case in order to enalde the petitioner to apply for transfer, it is highly improper for the trying Magistrate to make a preliminary enquiry into the grounds for transfer and decide himself the merits of the grounds. This ciscumstance is sufficient to order a transfer of the case.

Bishen Nath—for Petitioner.

Shamair Chand—for Opposite Party.

Fforde, J.—Proceedings were taken against the petitioner upon a complaint made under the provisions of S. 352/504, Indian Penal Code. In the course of these proceedings the petitioner applied to the Court for postponement of the case to enable him to apply for a transfer of the matter from the Court of this Magistrate to some other Magistrate. The Magistrate hearing the complaint thereupon requested the petitioner to make a statement as to the grounds of his transfer and then proceeded to make a preliminary inquiry to ascertain whether these grounds were well founded. Having come to the conclusion that the grounds were false the Magistrate then made a report to the District Magistrate for the purpose of having the petitioner tried under S. 193, Indian Penal Code, for perjury. The learned Magistrate, in paragraph 6 of this report, makes a frank statement of these circumstances. It is obvious that the procedure adopted by the learned Magistrate was highly improper and would naturally cause apprehension in the mind of the petitioner that the tribunal trying his case was not likely to give him an impartial and unbiased hearing. Under these circumstances I have no option but to transfer the case to the Court of such other competent Magistrate as the District Magistrate might direct.

Transfer ordered.

A. I. R. 1926 Lahore 237

BROADWAY AND FFORDE, JJ.

Md. Razwan Ullah and *others* — Plaintiffs—Appellants.

v.

Chaman Lal—Respondent.

Second Appeal No. 18 of 1922, Decided on 1-2-1926.

T. P. Act, S. 58 — Mortgage by conditional sale —Property to be deemed sold at the end of certain period—Sale not taking effect—Original terms as to interest and repayment should prevail.

Where in the case of a mortgage by a conditional sale the property was to be considered sold at the end of a certain period:

Held: that it is only equitable, that in the event of the sale not taking effect owing to the waiver of the mortgagee or any laches on his part, the original terms should continue; that is to say, the rate of interest and the method of repayment would be the same as that entered in the original contract. [P 237 C 2]

Ghulam Rasul—for Appellant.

Shamair Chand—for Respondent.

Broadway, J.—On the 23rd March 1873, a prostitute of the name of Mt. Tohfa mortgaged a house with possession to one Dwarka Das. The mortgagor and the mortgagee are now dead and in 1919 the legal representative of the mortgagor brought a suit against the successor in title of the mortgagee seeking to redeem the house and regain possession thereof free of payment. The suit was contested and the Courts below have granted the plaintiff a decree for redemption on payment of a sum of Rs. 1,182. Against this decree the plaintiff has come up to this Court in second appeal through Mr. Ghulam Rasul who has contended that the learned District Judge has misinterpreted the terms of the mortgage and that his clients were entitled to obtain possession of the house without any payment. Further, that they were entitled to recover from the defendant a large sum of money due as rent for which they were prepared to pay Court-fees. The question is as to the interpretation to be placed on the mortgage-deed. The relevant clause in this deed runs as follows:

I have mortgaged the aforesaid haveli with possession for Rs. 355 to L. Dwarka Das on condition of redemption in two years. I have realized the money in. It is agreed that if I redeem in 6 months then I shall pay Rs. 276-4 deducting the balance of Rs. 78-12, and if I redeem within ay ear then I shall pay Rs. 302-8, deducting Rs. 52-8; and if I pay in two years then I shall redeem by payment of the full amount of Rs. 355. As to rent, whatever the aforesaid Lala shall realize from the tenants shall be deducted from the principal sum. I shall be liable for repairs of the house; if I do not redeem in two years then this mortgage-deed shall be regarded as a sale.

Now it will be seen that this mortgage contained the usual clause for conditional sale. It is clear that the intention of the parties was that the house was to be considered sold at the end of the term of two years if it had not been previously redeemed. The period fixed for redemption was two years, the amount payable then being Rs. 355. That amount was arrived at, according to Mr. Shamair Chand, by charging 21 per cent. interest on a sum of Rs. 250. According to this clause, if the mortgagor redeemed within six months, the amount payable was Rs. 276-4-0, a rebate of Rs. 78-12-0 being allowed. A similar agreement was arrived at for a rebate of Rs. 52-8 if the redemption took place at the end of a year, the amount then payable being Rs. 302-8-0. A further condition in this clause is that at the time when the payment for redemption was to be made the mortgagor was to receive credit for the rents realized up to that date by the mortgagee who was in possession. In each case the rent realized was to be set off against the various amounts due at the times referred to in the deed. Now, it is clear that the intention of the parties was that in the event of redemption not taking place the house was to be considered sold. In these circumstances it would be only equitable to hold that in the event of the sale not taking effect owing to the waiver of the mortgagee or any laches on his part the original terms should continue; that is to say, the rate of interest and the method of repayment would be the same as that entered in the original contract. The rent would also be deducted in the manner provided by the said clause. In the light of this interpretation it is clear that the mortgagor has benefited greatly through the calculation arrived at by the lower appellate Court. The mortgagor has been charged interest at the rate of 12 per cent. instead of 21 per cent.; but as the respondents have filed no cross-objections or cross-appeal we cannot afford them any relief. In our view the mortgagor has been granted all the relief he can really hope to get.

We therefore dismiss his appeal with costs.

✻ A. I. R. 1926 Lahore 238

MARTINEAU, J.

Narain Das—Defendant—Appellant.

v.

Saraj Din and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1089 of 1925, Decided on 4th January 1926, against the decree of the Addl. Dist. J., Lahore, D/- 26th January 1925.

(a) *Limitation Act, Art.* 148—*Co-mortgagor redeeming whole.*

Co-mortgagor who redeems the whole mortgage does not become a mortgagee of the shares of the co-owners, but merely has a charge on the property : 26 *Bom.* 500 and 55 *I. C.* 450, *Foll.* [P. 238, C 2]

✻ (b) *Cosharer—Adverse possession enures in favour of cosharer who refuses possession until payment of charge defrayed by him.*

The rule that ordinarily one cosharer cannot hold adversely against another proceeds upon a rebuttable presumption that the cosharer in exclusive possession is holding on behalf of the other cosharers and this presumption is rebutted when it is shown that the co sharer in possession denies the right of the other cosharers to enter into joint possession until they have paid to him their share of a charge upon the property which he bas defrayed : *A. I. R.* 1923 *Lah.* 311, *Foll.*: *A. I. R.* 1923 *Patna* 98, *not Foll.* [P. 238, C. 2]

(c) *Punjab Land Revenue Act, S.* 117—*Title only can be determined and decree for possession of property of disputed title cannot be given by revenue officer.*

The only power which S. 117 of the Land Revenue Act gives to a revenue officer acting as a Court is to determine the question of title arising in the partition proceedings, and he has no power under that section to pass a decree for possession of the land of which the title is in dispute : 100 *P. R.* 1913, *Foll.* [*P.* 239, C. 1]

Shamair Chand—for Appellant.

Ganga Ram—for Respondents.

Judgment.—The land in suit belonged to Gurdit Singh, who mortgaged it to Nithal Singh. After Gurdit Singh's death, one of his four sons, Baghel Singh, sold his one-fourth share to Musa, and the remaining three sold their ¾ths to Narain Dass, Defendant 1. The latter redeemed the whole land from the mortgagee in 1900. In 1923 Musa's son, Siraj Din, applied for partition of his share. His title being disputed by Narain Das he was referred by the Assistant Collector to a suit, and he then brought the present suit in the Assistant Collector's Court, asking for joint possession. He was given a decree subject to the payment of one-fourth of the amount due on the mortgage, and the decree was affirmed by the Additional District Judge on appeal. Narain Dass has preferred a second appeal to this Court.

Two points have been argued, one being the question of limitation and the other that of the jurisdiction of the Assistant Collector to try the suit. The case is governed by Art. 144 of the 1st Schedule to the Limitation Act, and not by Art. 148, as a co-mortgagor who redeems the whole mortgage does not become a mortgagee of the shares of the co-owners, but merely has a charge on the property : see *I. L. R.* 26 *Bom.* 500 and 55 *I. C.* 450. The lower appellate Court has held that the possession of a co-mortgagor who redeems the entire property does not become adverse to the other mortgagor until he openly asserts an exclusive title, and that as there was no such assertion in the present case the suit is within time. This decision is no doubt supported by *All India Reporter* 1923 *Patna* 98 ; but a different view has been taken in other High Courts and their rulings have been referred to and followed in *Wazir* v. *Girdhari* (1) by Campbell, J., who has observed that the rule that ordinarily one cosharer cannot hold adversely against an other proceeds upon a rebuttable presumption that the cosharer in exclusive possession is holding on behalf of the other cosharers, and that this presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. The view taken in *Wazir* v. *Girdhari* (1) is, in my opinion, the correct one. The appellant was not holding on behalf of the plaintiff when he was denying the plaintiff's right to enter into possession without payment of his share of the charge on the property. His possession was consequently adverse, and if it has continued for twelve years the suit is barred by limitation. It is contended for the plaintiff that, notwithstandlng the redemption by the appellant in 1900. the

(1) A. I. R. 1923 Lah. 311.

mortgagee remained in possession of the land and that the appellant's possession has not lasted for 12 years. The lower appellate Court has given no finding on this point, but it is unnecessary to remand the case as the appeal must succeed on the ground that the Assistant Collector had no jurisdiction.

The only power which S. 117 of the Land Revenue Act gives to a revenue officer acting as a Court is to determine the question of title arising in the partition proceedings, and he has no power under that section to pass a decree for possession of the land of which the title is in dispute: See on this point 100 *P. R.* 1913.

I accordingly accept the appeal, reverse the decree, and dismiss the suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 239 (1)

MARTINEAU, J.

Ghulam Nabi—Plaintiff—Appellant.

v.

Thakar Singh and *others*—Defendants—Respondents.

Second Appeal No. 2346 of 1923, Decided on 22nd February 1924, from a decree of the Dist. J., Amritsar, D/- 26th July 1923.

Punjab Pre-emption Act (1 *of* 1913), *S.* 15 (*a*)—*Near collateral only can succeed to the house of village non-proprietor; so distant collateral cannot pre-empt.*

In the absence of a custom to the contrary it is only a near collateral who can succeed to the house of a non-proprietor (71 *P. R.* 1889, *Appl.*) and so where no custom is proved a collateral in the seventh degree has no right to pre-emption undes S. 15 (a).

Ghulam Rasul—for Appellant.

Har Dayal—for Respondents.

Judgment.—The plaintiff sues to pre-empt a house sold by Defendant Nos. 2 to 4, who are weavers and non-proprietors of the village in which the house is situate, to Defendant No. 1, who is a proprietor in the village. The plaintiff is a collateral of the vendors in the seventh degree. The Courts below have agreed in holding that the suit fails, though on different grounds, the Munsif holding that no custom has been proved by which a kamin is entitled to pre-emption as against a village proprietor, and the District Judge holding that the plaintiff, not being a near collateral of the vendors, would not have been entitled to inherit the house, and, therefore, has no right of pre-emption under S. 15 (a), of the Pre-emption Act. The plaintiff has filed a second appeal.

The lower appellate Court's decision is correct. There is no doubt that in the absence of a custom to the contrary it is only a near collateral who can succeed to the house of a non proprietor: see *Karam Chand* v. *Hakam Singh* (1), and para. 238 (a), of Rattigan's Digest of Customary law. No custom to the contrary has been proved in the present case, and, moreover, as the lower appellate Court's finding that the plaintiff would have no right of inheritance is a finding on a point of custom, the appeal cannot be entertained without a certificate under S. 41 (3), of the Punjab Courts Act. The objection that the question of plaintiff's right to inherit the property was not put in issue has no force as the first issue covers the point. It is contended that the vendors are governed by their personal law and not by custom, but this contention was not advanced in the Courts below, nor is it put forward in the grounds of appeal in this Court, and I think it can hardly be doubted that the question of succession to the house of a non-proprietor in a village is regulated by custom.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) [1889 71 P. R. 1889.

A. I. R. 1926 Lahore 239 (2)

CAMPBELL, J.

Harnam Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1541 of 1924, Decided on 9th January 1925, from an order of the Addl. Dist. Mag., Amritsar, D/- 15th October 1924.

Criminal trial—Sentence—Court imposing maximum sentence must record reasons.

When Court inflicts the maximum sentence provided by the law for an offence, it should record its reasons for doing so. [P. 240, C. 1]

Judgment.—In this case notice issued on the question of sentence. Neither in the Magistrate's judgment nor in that of the Court of appeal is any reason given for the imposition of the maximum sentence of imprisonment provided by the law and there is no appearance on behalf of the Crown to support the order. It is possible that the offence is a very serious one, but the Courts below do not expressly say so and it is not difficult to imagine worse cases than that of the petitioner. He has already undergone more than three months' rigorous imprisonment and a substantial fine has been imposed.

I accept the petition to the extent of reducing the substantive sentence to the amount of imprisonment already undergone. The ssntence of fine and imprisonment in default will stand.

Petition accepted.

A. I. R. 1926 Lahore 240 (1)

SHADI LAL, C. J.

Ram Bhaj—Plaintiff—Petitioner.

v.

Duni Chand—Defendant — Respondant.

Civil Revision Petition No. 502 of 1924, Decided on 23rd December 1924, against the decree of the Sub-J., 4th Class, Jhang, D/- 19th July 1924.

Oaths Act (10 *of* 1873), *Ss.* 9, 10. *and* 11—*Retraction of oath at discretion of Court is allowed if good grounds are shown.*

There is nothing in Ss. 9, 10 and 11 which allows a party, who has agreed to the administration of an oath by his opponent, to revoke his offer after it has been accepted by the latter, but the Court has discretion to allow retraction if good grounds are shown therefor : 22 *Mad.* 234, *Foll.*

Where the application to the Court was made after the oath had been administered it was too late for the Court to pass an order disallowing the taking of the oath by the party.

Devi Dayal—for Petitioner.

Parkash Chand for *Sagar Chand*—for Respondent.

Judgment.—Plaintiff's next friend offered, on the 18th July 1924, to be bound by the oath of the defendant, and this offer was accepted by the latter on that very day. It appears that no application allowing the plaintiff to revoke the agreement to be bound by the oath was presented to the Court until after the oath had been administered, but that an application to that effect was made to the Commissioner before the administration of the oath, and the question for determination is whether the plaintiff should have been allowed to revoke his offer to be bound by the defendant's oath.

Now, there is nothing in Ss. 9, 10 and 11, of the Indian Oaths Act which allows a party, who has agreed to the administration of an oath by his opponent, to revoke his offer after it has been accepted by the latter ; but as held in *Thoyi Ammal* v. *Subbaraya Mudali* (1), the Court has discretion to allow retraction if good grounds are shown therefor. I am, however, unable to hold that any ground has been shown which would have justified the revocation. Indeed, as pointed out above, the application to the Court was made after the oath had been administered, and it was, therefore, too late for the Court to pass an order disallowing the taking of the oath by the defendant.

The statement on oath made by the defendant is conclusive, and the application for revision preferred by the plaintiff is accordingly dismissed with costs.

Petition dismissed.

(1) [1899] 22 Mad. 234.

A. I. R. 1926 Lahore 240 (2)

BROADWAY, J.

Kallu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 1619 of 1924 Decided on 23rd January 1925, made by the Dist. Mag., Karnal, on 21st November 1924.

Penal Code, Ss. 179 *and* 193—*Reply by witness that he does not remember the answer to a question put by Court is not refusal to answer.*

Where a Court asks a witness the name of his grandfather to which the witness replies that he does not remember, it is not refusal to answer within the meaning of S. 179 ; if the answer is false he may be proceeded with under S. 193.

Order.—Kallu, son of Data Ram has been convicted of an offence under S. 179, Indian Penal Code, read with S. 480,

Criminal P. C., and has been sentenced to a fine of Rs. 50, or in default to undergo one week's simple imprisonment. The learned District Magistrate has reported the case to this Court recommending that the conviction be set aside and the fine refunded.

This recommendation is based on the fact that the said Kallu had not committed the offence of which he has been convicted. It appears that Kallu was being examined as a witness and was asked the name of his paternal grandfather. To this question he applied that he did not remember the name of that gentleman. The learned Magistrate treated that as a contempt of Court holding that the reply given was "not consistent with reason," and that, therefore, Kallu had refused to answer the question put to him. The learned District Magistrate is right in his view that Kallu did not refuse to answer the question. As a matter of fact he did give an answer to the question put. If the answer was a false one Kallu committed an offence under S. 193, Indian Penal Code. He certainly did not render himself liable to being dealt with under S. 480, Criminal P. C. I, therefore, accept the recommendation of the learned District Magistrate and set aside the conviction. The fine must be refunded.

Conviction set aside.

A. I. R. 1926 Lahore 241

LEROSSIGNOL AND MARTINEAU, JJ.

Mt. Lakho—Defendant—Appellant.

v.

Lachman Das—Plaintiff—Respondent.

First Appeal No. 587 of 1924, Decided on 20th January 1926, from the preliminary decree of the Senior Sub-J., Rawalpindi, D/- 17th December 1923.

Hindu Law—Maintenance—Widow—Debts by husband for family purposes—Sale of family house for such debts—Widow can be evicted from possession thereof.

Debts contracted by a Hindu take precedence even over the widow's claims for maintenance, and if a sale of the family dwelling house takes place and is for a family necessity the widow is liable to be evicted if she is in occupation of the house.

[P 241 C 2]

Gobind Ram Khanna—for Appellant.

M. S. Bhagat and *Dev Raj Sawhney*—for Respondent.

LeRossignol, J.—This appeal arises out of an action for the recovery of the sum of Rs. 5,861 which was alleged to be due on a mortgage debt secured on a house. The trial Court decreed the claim with the exception of a small sum of penal interest. The suit was against one adult and one minor son of the mortgagor and also against his vidow, Mt. Lakho, who challenged their liability on the mortgage on the ground that the mortgaged property was joint family property and the debt was incurred without necessity for an illegal purpose and the right of the widow to reside in the house was paramount.

The Court below found that though the house was joint family property, the debt was properly incurred for a family purpose and for necessity, and that the right of the widow to maintenance and residence had to be postponed to the just claims of her late husband's creditor. The sons of the mortgagor have preferred no appeal against the decree of the Court below, and the only appellant is Mt. Lakho who has paid on the appeal a Court-fee of only Rs. 10.

This gives rise to the first contention for the respondents that the appeal is not properly stamped, inasmuch as the appellant urges in her grounds of appeal that the debt was bad and consequently prays to be relieved in respect of the whole of the plaintiff's claim. Counsel for the appellant admitting the force of this contention urges that he has no intention to urge that the debt was improperly incurred by the mortgagor, but limits his appeal to the prayer that even if the debt was properly incurred the right of the widow to residence in the family house is paramount. In support of his contention he has referred us to Gour's Hindu Law which, however, far from supporting his thesis, is directly in his disfavour. In Mulla's Principles of Hindu Law on page 472, 4th Edition, and again on page 488 it is written: "Debts contracted by a Hindu take precedence of the right to maintenance and debts contracted by a Hindu take precedence even of the widow's claim for maintenance;" and on page 490: "If the sale of the family dwelling house is for a family necessity the widow is liable to be evicted even though the purchaser had notice at the time of purchase that she was in occupation of the house."

For these reasons we hold this appeal to be without force and dismiss it with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 242 (1)

HARRISON, J.

Rikhi Kesh—Plaintiff—Appellant.

v.

Mela Ram—Defendant—Respondent.

Second Appeal No. 2014 of 1925, Decided on 15th January 1926, from the order of the Senior Sub.-J., Amritsar.

* *Court-fees Act, S. 7 (iv) (f)—Suit for accounts—Plaintiff can value his claim at any figure as stamp is to be made up subsequently if greater relief is granted.*

The option or discretion of the plaintiffs in fixing his valuation is not confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented, though possibly combined with other circumstances the fact that such relief can be ascertained might be a reason for holding that the suit for accounts does not lie. The plaintiff is entitled to exercise the privilege of valuing his relief at any figure he chooses, and the stamp will have to be made up subsequently if relief of greater value be granted to him.

Dev Raj Sawhney—for Appellant.

Moti Sagar & Har Parshad—for Respdt.

Harrison, J.—Pandit Rikhi Kesh of Amritsar brought a suit against Mela Ram, his brother, for rendition of accounts, and valued his relief at Rs. 100. The defendant Mela Ram objected that the suit did not lie in this form and the trial Court held that this was so, and passed an order to the effect that the plaint be returned for amendment. On appeal the Senior Subordinate Judge held that the suit for rendition of accounts did lie, and to this extent he accepted the appeal. He further held, however, that the valuation should have been Rs. 3,800 on the strength of an application made in a partition suit pending at the time between the same parties, and he directed the stamp to be made up to this figure.

From this order an appeal has been presented and counsel relies on *Baru* v. *Lachhman* (1), *Manna Lal* v. *Samandu* (2). The wording of the section is perfectly clear and I do not think there is any force in the contention on the other side that the option or discretion of the plaintiff in fixing his valuation is confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented, though possibly combined with other circumstances the fact that such relief can be ascertained might be a reason for holding that the suit for accounts does not lie. The decision here, against which no appeal has been presented, is that the suit does lie in this form, and, therefore, the plaintiff is entitled to exercise the privilege of valuing his relief at any figure he chooses, and the stamp will have to be made up subsequently if relief of greater value be granted to him.

I accept the appeal and direct that this suit proceed on the original stamp. The costs of the appellant will be paid by the respondent.

Appeal accepted.

(1) [1913] 111 P.R. 1913=228 P.W.R. 1913=23 P.L.R. 1914.

(2) [1906] 46 P. R. 1906=94 P. L. R. 1906.

A. I. R. 1926 Lahore 242 (2)

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Chiranji Lal and *others*—Defendants—Appellants.

v.

Shib Lal and *others* — Plaintiffs & Defendants—Respondents.

Letters Patent Appeal No. 148 of 1924, Decided on 25th November 1925, from the judgment and decree of Broadway, J., D/- 5th March 1924, in Civ. App. No. 2596 of 1923.

(a) *Limitation Act, S. 23 — Closing drains emitting water is a continuing wrong.*

Action of a person in closing up certain drains which emitted water from another's building on to the former's premises is a continuing wrong within S. 23. [P 242 C 2 ; 343 C 1]

(b) *Limitation Act, Art. 120—Art. 120 is only residuary.*

Art. 120 is a residuary article and applies only when no other specific article governs the case. [P 243 C 1]

Shamair Chand and *Sagar Chand*—for Appellants.

K. J. Rustomji—for Respondents.

LeRossignol, J.—This appeal arises out of an action to recover Rs. 400 as compensation for damage caused to the plaintiffs' building by the action of the defendants in closing up certain drains which emitted water from the plaintiffs' building on to the defendants' premises ; and the sole question for decision is whether the suit is within time.

The alleged damage is said to have occurred between August 1918 and September 1920, but obstruction took place in September 1917 and the suit was instituted on the 21st May 1921. The District Judge assessed the damage at Rs. 60,

and the decree was affirmed by this Court in Single Bench.

A preliminary objection was raised that the suit was a small cause and the learned Judge in chambers had no jurisdiction. But adjudication on this point was not prayed for from the Court below and it cannot be heard now for the first time. For the appellants it is urged that S. 23 of the Limitation Act has been wrongly applied to the facts of this case as the wrong was not a continuing wrong, but we have no hesitation in holding that the wrong was a continuing wrong and that the provisions of S. 23 of the Limition Act have been properly applied. On tho next point, however, we think the appeal must succeed. It is urged that the limitation for the suit is two years under Art. 36 of the Second Schedule to the Limitation Act. On the allegations in the plaint, at any rate, a portion of the damage occurred prior to the 21st of May 1919 and there is no evidence to show how much damage was caused after that date and within two years of suit.

For the respondents it is contended that Art. 36 of the Second Schedule to the Limitation Act does not apply and that Art. 120 furnishes the proper period of limitation. Art. 120 is, however, a residuary article and applies only when no other specific article governs the case. Clearly the act of the defendants in obstructing the drains in defiance of an injunction obtained by the plaintiffs was an act of malfeasance. Article 36 covers the facts of this case, and the effect of that article read with S. 23 of the Act is that the suit must be brought within two years from the date when the malfeasance takes place but that inasmuch as the offence is a continuing one, the date of the damage shall be deemed to be the date of the malfeasance.

In the absence of evidence as to the amount of damage which occurred within two years of suit the suit must fail. We accordingly accept the appeal and dismiss the suit, but in the special circumstances of the case direct that parties shall bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 243

LEROSSIGNOL, J.

Muhammad—Plaintiff—Appellant.

v.

Muhammad Ali and *another*—Defendants—Respondents.

Second Appeal No. 1178 of 1924, Decided on 22nd December 1924, from a decree of the Dist. J., Jhelum, D/- 3rd January 1924.

Pre-emption—Previous refusal by pre-emptor operates as waiver.

A pre-emptor, previously refusing to buy the property on the ground that he had no money should be considered to have waived his right to pre-empt. [P 244, C 1]

Amar Nath Chona—for Appellant.

Gobind Ram Khanna—for Respondents.

Judgment.—The plaintiff in this case asked for two reliefs, first, for a declaration that the sale impeached should not affect his reversionary rights, and secondly in the alternative for possession of the land as a pre-emptor. The first Court found that the sale was without necessity and, therefore, gave the plaintiff a declaration. The learned District Judge in appeal held that the sale was for necessity and dismissed the suit evidently overlooking the alternative claim to pre-empt.

Some time before effecting the sale now impeached, the vendor, a widow, applied to the Collector for permission to sell her land to one Fateh Muhammad, a non-agriculturist, for Rs. 600, and in those proceedings the plaintiff, on the 18th August 1921, made a statement to the effect that he could not afford to buy the land : and that so far as he was concerned the vendor was at liberty to sell it to Fateh Muhammad for Rs. 600 or to anybody who would give her the cost price for it. The Collector refused to sanction the sale of the land to Fateh Muhammad on the ground that it was worth more than Rs. 600.

The first Court held that this statement of the plaintiff did not amount to waiver, but merely to a refusal to purchase the land for Rs. 600 and the learned District Judge merely says : " I am not prepared to dispute that finding."

A second appeal has been preferred to this Court and I am asked to remand the case so that the plaintiff's right to pre-empt may be determined, but I see no need for adopting that course as I hold

it is clearly proved that the plaintiff in 1921 waived his right to purchase the land on the ground that he had no money at all and could not afford to purchase it. The land was subsequently sold to the present vendee for Rs. 500, and I do not think that the plaintiff should now be allowed to intervene after his clear disclaimer of any intention to purchase the land at any price.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 244

ADDISON, J.

Singh Ram—Plaintiff—Appellant.

v.

Kaka and *another*—Defendants—Respondents.

Second Appeal No. 1490 of 1925, Decided on 21st December 1925, from the decree of the Senior Sub-J., 1st Cl., Rohtak, D/- 13th March 1925.

Punjab Tenancy Act, S. 77 (j)—Suit for declaration that kamiana is not recoverable from house owners is not barred.

A suit for declaration that kamiana dues were not recoverable from snch residents of a village as were owners of their houses does not come under Cl. (j) of S. 77 ofthe Tenancy Act and is cognizable by the Civil Courts. 67 *P. R.* 1905 *Foll.* Though, therefore, the lambardars can sue in the revenue Courts for the recovery of this cess the person proceeded against can bring a suit for a declaration in the civil Courts whatever the value of such declaration may be to him. Kurhi kamini is a cess of the nature of a house or ground rent. The burden of proving that the plaintiffs are liable to pay this cess is upon the landlord where it is admitted that the plaintiffs are out-and-out purchasers of their houses and sites inside the village. [P 245 C 1, 2]

Shamair Chand—for Appellant.

G. S. Salaria—for Respondents.

Judgment.—The defendants, who are Jat lambardars of village Bidhlan in the Rohtak Tahsil, sued four mahajans of the same village in the revenue Courts for recovery of kurhi kamini cesses and obtained decrees. Each of these mahajans then filed a suit for declaration that he was not liable to pay kurhi kamini as he had actually purchased his houses and the sites thereunder and was not merely a cultivator or kamin to whom the sites had been given for residence. It was found by the trial Court that such suits were cognizable by the civil Courts and that the plaintiffs were the purchasers of their houses and were not holding the sites as kamins or cultivators. It then went on to find that the burden of proof was upon the proprietors of the village to establish that those who purchased houses were liable to pay this cess which was in the nature of a ground rent and which would thus be ordinarily recoverable from those who were given permission to occupy sites as kamins or cultivators. The lower appellate Court also held that the suits were cognizable by the civil Courts and that the plaintiffs were out-and-out purchasers of their houses and sites, but it held that as there was a custom of payment of kurhi kamini cesses in this village, it was incumbent upon the plaintiffs to establish that they were not liable. It accordingly remanded the suits for a re-trial on this issue after it changed the burden of the issue. The trial Court then held again that this cess was in the nature of a ground rent and that the defendants have failed to prove that they had ever realized it from the plaintiffs. It, therefore, again decreed the suits. The lower appellate Court then accepted the appeals and dismissed the suits holding that the cess in question was in the nature of a hearth cess and not of a ground rent and that it applied to all persons who were not proprietors of the village estate, that is, village agricultural land. It brushed aside the fact that the defendants had failed to prove its collection from the plaintiffs by noting that the defendants said that the accounts were kept by the village mahajans who did not produce them. Certificates were obtained from the lower appellate Court in order to allow second appeals to be preferred to this Court and they are now before me.

In paragraph 248 (f) of Rattigan's Digest of Customary Law "kurhi kamini" is defined as a house or ground rent levied from non-proprietor residents. It was held in 74 *P. R.* 1879 that kurhi Kamini dues were of the same nature as house or ground rent. In that case there was a finding that such rent had been paid in the past by the persons who were sued. Again in 21 *P. R.* 1888 it was held that this cess must be regarded as ground rent. The question had to be decided in order to hold as to which

Court should hear the appeal. In Fallon's Dictionary "kurhi" is defined as a household or family or house tax while "kamin" is described as a menial servant. The meaning of the phrase, therefore, is a house tax or rent on menial servants according to the dictionary. It was held in 49 *P. R.* 1891 that the cess called kamiana was a due customarily leviable from the Kamins of the village and a suit for its recovery was cognizable by the revenue Courts. In 95 *P. R.* 1907 kurhi kamini was held to be in the nature of a hearth cess and to be the equivalent of the door cess or haqq-buha of the western districts. It was further held that a suit for its recovery lay in the revenue Courts as was done in the case now before me. This ruling, however, makes no allusion to the earlier rulings discussed by me where it was laid down that this cess was in the nature of a house or ground rent. The dictionary also was not consulted. In any case this ruling is an authority for the view that the suits for the recovery of this cess were properly brought in the revenue Court.

In 67 *P. R.* 1905, however, it was held that a suit for declaration that kamiana dues were not recoverable from such residents of a village as were owners of their houses did not come under Cl (j) of S. 77 of of the Tenancy Act and was cognizable by the civil Courts. This ruling has never been dissented from and must be followed. Though, therefore, the lambardars can sue in the revenue Courts for the recovery of this cess the person proceeded against can bring a suit for a declaration in the civil Courts whatever the value of such declaration may be to him.

Following the earlier rulings, therefore, and the dictionary meaning of the words I hold that kurhi kamini is a cess of the nature of a house or ground rent. This view was also accepted by Mr. Joseph, the Settlement Officer of that district, in 1910. He held that a proprietor who became an owner of a house by virtue of purchase was exempt from its payment. A different view was, however, taken by the Financial Commissioner who, following certain revenue decisions, held that it was a hearth tax. There seems to me to be no foundation on which this view can be based. In these circumstances I hold that the burden of proving that the plaintiffs are liable to pay this cess is upon the defendants, seeing that it is admitted that the plaintiffs are out-and-out purchasers of their houses and sites inside the village. The words "kurhi kamini" cannot be taken to mean a tax designed to show the overlordship of the proprietors of the agricultural land as against all other residents in the village but only a kind of ground rent recoverable from kamins and cultivators to whom sites have been given for as long as they remain in the village.

It is true that the names of the plaintiffs' ancestors who purchased the sites and houses before 1880 are recorded in the lists of "kurhi kamini" payers in the wajib-ul-arzes of 1880 and 1909. It was held, however, in 40 *P. R.* 1879 that such entries do not bind anyone except the proprietors who are parties to them, Similary an entry in the Wajib-ul-arz was held not to be sufficient to base a claim for grazing dues in 61 *P. R.* 1875. It is also admitted that there is no proof in the present case that the plaintiffs ever paid the dues in question. That is very good evidence against the custom that they are liable to pay it. It was not sufficient for the defendants merely to say that the accounts were kept by the mahajans who did not produce them. Even if the accounts were written up by mahajans which also has not been established, the book in which the entries were made would be kept by the lambardars. Besides, the usual person to keep such accounts would be the patwari. The burden therefore being upon the defendants to prove that the plaintiffs were liable to pay this cess, it is clear that they have failed to prove it and it was scarcely disputed that this would be so if the burden of proof was upon the defendants. I hold that no custom has been established to the effect that the plaintiffs are liable to pay the cess in question and accepting the appeals I decree the piaintiffs' suits with costs in this Court.

Appeal accepted.

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A. I. R. 1926 Lahore 246

BROADWAY AND JAI LAL, JJ.

C. M. DeSouza—Appellant.

v.

S. B. Billimoria—Respondent.

Miscellaneous First Appeal No. 3135 of 1924, Decided on 16th February 1925, from the order of the Dist. J., Delhi, D/- 3rd December 1924.

(a) *Companies Act, Ss.* 202 *and* 196—*Appeal.*

An order refusing an application for the inspection and copies of statements of persons examined under S. 196 is appealable. [P. 246, C. 2]

(b) *Companies Act, S.* 196—*Only creditor or contributory or party to proceedings can inspect notes of examination.*

It is only a creditor or contributory or some party to the proceedings which are pending who would be entitled to the inspe ction of notes of examination under S. 196. [P. 246, C. 2]

Tek Chand and *Diwan Ram Lal*—for Appellant.

Moti Sagar and *Ram Kishore*—for Respondent.

Broadway, J.—In November 1917, a company was formed under the name and style of the Development Corporation of India, Limited. In February 1924, this Company went into liquidation and Mr. Billimoria was appointed Official Liquidator. In the course of the liquidation the Official Liquidator considered it necessary to move the Court under S. 196 of the Indian Companies Act, 1913, for the examination of certain persons. Among these persons was one Mr. DeSouza who had at one time been a director of the Company and who claimed to be a secured creditor of the Company. Prior to the examination of Mr. De Souza certain other persons had been examined.

Mr. DeSouza applied to the Court in charge of the liquidation asking to be allowed to inspect the record and to obtain copies of the notes of his examination as well as of the examination of Messrs. Treby, Moir and Macperson. He was given a copy of his own statement. By an order dated the 3rd of December 1924, his application for the inspection and copies of the statements of the other persons named was refused.

Against this order he has preferred an appeal to this Court.

At the hearing Mr. Moti Sagar raised a preliminary objection to the effect that the order passed was not an appealable one. Mr. Tek Chand relied on S. 202, Indian Companies Act, and claimed that it was wide enough to cover an appeal from an order of this nature. Mr. Moti Sagar urged on the authority of *South Indian Mills Co.* v. *Burn and Co.* (1), that such orders were only appealable as would give a right of appeal if the Court had been sitting in its ordinary jurisdiction. In the case cited it was held by a Division Bench of the Madras High Court that the framing of issues by a Court in a petition for the winding up of a company was not an "order" against which there was right of appeal, Mr. Tek Chand relied on *Basheshur Nath* v. *Kanhaya Lal* (2), and *Kesavaloo Naidu* v. *Murugappa Mudali* (3). Those decisions are not directly in point, but having regard to the phraseology of S. 202, Indian Campanies Act, it seems to me that that section is wide enough to make an order of this nature appealable."

On the merits, however, I think this appeal must fail. Clause 7 of S. 196, Companies Act, runs as follows :

Notes of the examination shall be taken down in writing ... ... and shall be open to the inspection of any creditor or contributory at all reasonable times.

Theproceedings are pending and, therefore, it is only a creditor or contributory or some party to the said proceedings who would be entitled to the inspection now claimed. Mr. Tek Chand contended that he was : (a) a creditor, (b) a contributory, and (c) a past director, and that, therefore, he was entitled to inspect the record. Further he urged that the section itself is not exhaustive and that the Court exercised its discretion wrongly in refusing to allow the inspection prayed for.

So far as his claim to inspection is based on being a contributory, the matter is clear. S. 158 defines the term "contributory" as meaning every person liable to contribute to the assets of a company in the event of its being wound up, etc. Mr. DeSouza has not been placed on the list of contributories either as a past or present member, and therefore it is clear that as he is not a contributory, he has no right to inspect.

The question whether he is or is not a creditor, and as such entitled to inspect,

(1) [1912] 16 I. C. 794.
(2) [1913] 34 P. R. 1913=45 P. L. R. 1914.
(3) [1907] 30 Mad. 22=16 M. L. J. 537.

rests on how far his claim can be regarded as that of a creditor. It appears that when the liquidator issued notices to all creditors as required by the Act Mr. DeSouza through his Solicitor, wrote to the Official Liquidator and asked for the payment of a definite sum of money which he claimed to be due to him under a mortgage. The liquidator refused to recognize the claim and directed Mr. DeSouza to prove the same in Court. This Mr. DeSouza refused to do, finally saying that he would rest on his security. It thus appears that Mr. DeSouza has not as yet been recognized as a creditor and has not proved his claim. Up to the present moment, therefore, I do not think that he can be regarded as a creditor for the purposes of S. 196 (7) and, therefore, he has no right to inspect.

Finally, as to his position of a past director : that admittedly stands or falls with his claim to be a contributory, and as Mr. DeSouza is not a contributory, he has no right as a past director in this connexion.

As to the question of discretion : Mr. Tek Chand drew our attention to Palmers' Companies Law, 11th Edition, page 592, rule 19. Under the English Law it appears that every person who has been a director or officer of a company which is being wound up shall be entitled, free of charge, and every contributory and every creditor, whose claim or proof has been admitted, shall be entitled on payment of a fee, to inspect the file of proceedings. It appears from this rule that only a creditor whose claim or proof has been admitted is entitled to inspect, and I therefore hold that in the present case Mr. DeSouza is not entitled to the inspection asked for and that the learned Distict Judge has not exercised his discretion in such a manner as would justify interference in appeal.

I would, therefore, dismiss this appeal with costs.

Jai Lal, J.—I concur.

Appeal dismissed.

A. I. R 1926 Lahore 247

SCOTT-SMITH, J.

Buta and *others*—Plaintiffs—Appellants.

v.

Ghulam Muhammad and *others*—Defendants—Respondents.

Second Appeal No. 438 of 1924, Decided on 23rd December 1924, from a decree of the Dist. J., Jullundur, D/- 22nd December 1923.

(a) *Punjab Courts Act* (6 *of* 1918), *S.* 41—*No certificate is necessary for a second appeal in a suit for declaration that an alienation by widow should not affect the reversionary rights.*

A second appeal without a certificate is competent when the suit is for a declaration that an alienation by widow should not affect the reversionary rights of the plaintiffs as there is no question as to the existence or validity of any custom, because a widow cannot effect an alienation except for necessity when the case is governed by custom. [P. 247, C. 2]

(b) *Custom* (*Punjab*)—*Alienation*—*Prohibition against alienations by widow applies to exchanges also.*

The customary prohibition against alienations by a widow applies to cases of sale and mortgage as well as to cases of exchange. [P. 248, C. 1]

Azim Ullah—for Appellants.

Anant Ram—for Respondents.

Judgment.—This is a second appeal from the order of the lower appellate Court dismissing the appellants' suit for a declaration that an exchange of certain land effected by Mt. Niamte, the widow of their collateral, should not affect their reversionary rights, on the ground that the exchange had not resulted in any detriment to the estate. Counsel for the respondents raised a preliminary objection to the effect that no second appeal was competent in the absence of a certificate ; but there is no question as to the existence or validity of any custom in this appeal. Admittedly a widow cannot effect an alienation except for necessity when the case is governed by custom. It is explained in previous rulings of this Court and the Chief Court. The land given in exchange was one plot near the village abadi, whereas that received in exchange consisted of three plots at some distance from the abadi, and, therefore, prima facie it appears that the the land received in exchange is less valuable than that given. But even supposing that there was no detriment to the estate still the widow could only make an

exchange of land for a necessary purpose. It was so pointed out in the case of *Nihali* v. *Lehna* (1) where at page 5 the following passage occurs :

" It is also urged that the customary prohibition against alienations by a widow only applies to cases of sale and mortgage and not to cases of exchange, but no authority in support of this argument is quoted, and, in our opinion, it is necessity alone which can justify any sort of alienation by a widow. We are aware of no authority to the effect that a widow can make exchanges even for improvement. She is bound to preserve the estate, and it appears to us that to allow the proposition that she can effect exchanges for the mere purpose of improving it or getting a large income from it, would be to open the door to all sorts of rash speculations and enterprises which might prove highly injurious or inconvenient to the reversioners."

No authority to the contrary has been cited by counsel for the respondents. The mere fact that the two appellants' share in the land exchanged will only be very small does not appear to me to affect their rights in any way. Moreover the other reversioners, who did not join in the suit and who have been made defendants pleaded that the exchange was detrimental to their rights.

I, therefore, accept the appeal, and setting aside the order of the lower appellate Court restore that of the trial Court decreeing the plaintiffs' claim with costs throughout.

Appeal accepted.

(1) [1911] 2 P. R. (1911)=27 P. W. R. 1911= 46 P. L. R. 1911.

A. I. R. 1926 Lahore 248

BROADWAY, J.

Aisha and *others*—Petitioners.

v.

Crown—Opposite Party.

Criminal Revision No. 1789 of 1925, Decided on 29th January 1926, against the order of the S. J., Ambala, D/- 29th August 1925.

(a) *Criminal trial—Sentence of fine* in futuro *is illegal.*

The sentence directing the accused to pay a fine *in futuro* is illegal : 13 *P. R.* 1903 ; 16 *Mad.* 230; 24 *All.* 309 ; 22 *Bom.* 766 ; 8 *P. R.* 1916 ; 27 *Cal.* 565 ; and 40 *All.* 569, *Foll.* [P. 248, C. 2]

(b) *Criminal P. C., S.* 239—*Certain notice was issued to four accused living in separate houses—Their joint trial for failure to obey the notice is illegal.*

Where the four accused lived in four separate houses although the houses adjoined one another and a notice was directed to each separately to take certain steps in connexion with the building occupied by each of them, the failure to obey the noice issued can not be regarded as one transaction. The joint trial of the four accused is illegal. [P. 249, C. 1]

Shamair Chand—for Petitioners.

Broadway, J.—This petition for revision has arisen out of a prosecution launched by certain persons living in Simla, under S. 133 of the Municipal Act. It appears that there were four prostitutes living in Simla carrying on their trade as such. Notice was issued to each of them under S. 153 of the Municipal Act directing them to prevent disorderly persons from frequenting their house and using it as a brothel. Some eight or nine months after this notice had been issued the present complaint was lodged. They were found guilty of a breach of the notice issued under S. 153 and each of them was sentenced to pay fine of Rs 3 for every day commencing from the day after the date of judgment, if they should allow their houses to be used as brothels and allow disorderly persons to come there.

A petition for revision filed by them having been dismissed by the learned Sessions Judge of Ambala, they have come up to this Court in revision through Mr. Shamair Chand who has advanced points for consideration : firstly, he has urged that the sentence of fine in futuro is illegal and unjustified. In support of his contention he has cited various authorities commencing with *Crown* v. *Gurditta* (1) and ending with *Crown* v. *Dharma Shah* (2), so far as this Court is concerned ; *Queen-Empress* v. *Veerammal* (3) ; *Ram Krishna* v. *Mohendra Nath* (4) *Emperor* v. *Wazir Ahmad* (5) ; *Emperor* v. *Amir Hasan Khan* (6) ; and *In re Limbaji* (7). All these authorities support Mr. Shamair Chand's contention and show that the sentence passed directing the petitioners to pay a fine in futuro is illegal.

The next point raised was that the trials contravened the provisions of S.239 Criminal P. C. This point was taken before the learned Sessions Judge and

(1) [1903] 13 P. R. 1903 Cr.=171 P. L. R. 1903.
(2) [1916] 8 P. R. Cr. 1916
(3) [1893] 16 Mad. 230.
(4) [1900] 27 Cal. 565.
(5) [1902] 24 All. 309=(1902) A. W. N. 70.
(6) [1918] 40 All. 569=16 A. L. J. 527.
(7) [1898] 22 Bom. 766.

was considered by him. It was decided against the petitioners on the ground that they were persons accused of the same offence committed in the course of the same transaction. I am unable to follow the learned Sessions Judge in this. The four petitioners lived in four separate houses although it appears that the houses adjoined one another. The notice was directed to each of the petitioners separately to take certain steps in connexion with the building occupied by each of them. I am unable to see that the failure to obey the notice issued can be regarded as one transction. In follows therefore that the trial of the four petitioners was illegal.

I, therefore, set aside the conviction and sentence and remand the case to the Magistrate who will proceed against each of the petitioners separately. It should be borne in mind that the bject of S. 153 of the Municipal Act is to punish a breach of a notice under that section, such breach having been completed at the time of conviction and that punishments to take effect in the future in the event of any future breach are not warranted by law.

Case remanded.

A. I. R. 1926 Lahore 249

CAMPBELL, J.

Roshan Lal—Plaintiff—Appellant.

v.

Rustomji and *others*—Defendants—Respondents.

Second Appeal No. 1947 of 1924, Decided on 28th January 1925, from a decree of the Dist. J., Lahore, D/- 14th April 1924.

Hindu Law—Alienation—Manager can do what is best for all—Necessity includes benefit of estate.

The manager of a joint family has an implied authority to do whatever is best for all concerned, the test being whether the transaction was one into which a prudent owner would enter in order to benefit the estate. The word "necessity" includes not only a case of actual pressure on an estate or a danger to be avoided by prompt discharge of liabilities but also an act benefiting the estate. (*Case law considered*) [P 249, C 2]

Mehr Chand and *Kahan Chand*—for Appellant.

Durga Das—for Respondents.

Judgment.—This second appeal arises out of a suit bya son to challenge a sale of 2 kanals 9 marlas of land by his father at the rate of Rs. 1,000 per kanal. The findings of the lower appellate Court are that the plaintiff and the vendor formed a joint Hindu family at the time of the sale and that the transaction was for the benefit of the estate. The suit was dismissed on these findings.

In second appeal two arguments have been addressed to me. The first is based on the summary set forth by their Lordships of the Privy Council in *Brij Narain Rai* v. *Mangla Prasad Rai* (1) of the circumstances in which the managing member of a joint undivided family can alienate or burden the estate. The first of these is stated to be that he cannot alienate or burden the estate except for purposes of necessity and it is contended that the term "necessity" represents actual pressure on an estate or danger to be averted by prompt discharge of liabilities, etc., and that an act of improvement of the estate cannot come within its scope. Against this view the lower appellate Court has cited two rulings both of which are apposite. The first is *Nagindas Maneklal* v. *Mahomed Yusuf Mitchela* (2) where adult coparceners had sold a dilapidated house. The family was in fairly good circumstances and it was not necessary to sell the house but the house yielded no income. It was held that the agreement of sale was binding on the minor coparceners and that there was no reason to put a restricted interpretation upon the word "necessity" so as to exclude a case like that before the Judges. Mr. Justice Fawcett expressed the opinion that there was no authority for holding that legal necessity was confined entirely to cases where debts are to be paid or there is other financial pressure, and he cited in support of this view the observations of their Lordships of the Privy Council in *Hanoomanpersaud Pandey* v. *Babooee Munraj Koonweree* (3) which recognized the power of the manager for an infant heir to charge an estate not his own "in case of need or for the benefit of the estate." The second case was a decision by the Patna High Court printed as *Sheotahal*

(1) A.I.R. 1924 P. C. 50.
(2) A.I.R. 1922 Bom. 122.
(3) [1854-57] 6 M. I.A. 393=18 W.R. 81 footnote=2 Suther. 29=1 Sar. 552 (P.C.).

Singh v. *Arjun Das* (4) and dated the 10th of March 1920. There joint family property had been mortgaged in order to to pay the premium for a 7 years' lease which was held to have resulted in considerable benefit to the joint family. It was argued before the learned Judges that later decisions of the Judicial Committe had modified the rule laid down in *Hanoomanpersaud Pandey* v. *Babooee Munraj Koonweree* (3) and that the present rule requires a calamity affecting the whole family or necessity for its actual support or indispensable religious duties to justify an alienation. A large number of authorities was examined in connexion with this argument and the conclusion reached was that there had been no modification of the previous rule and that the manager of a joint family has an implied authority to do whatever is best for all concerned, the test being whether the transaction was one into which a prudent owner would enter in order to benefit the estate.

The learned vakil for the appellant before me has urged that in *Sahu Ramchandra* v. *Bhup Singh* (5) the rule had been stated in the restricted form which he put forward. This is not so, for on page 444 the correct and general principle is said to be that if the debt was not "for the benefit of an estate" then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, and elsewhere allusion is made to "estate or family necessity," and in explaining the term "necessary purposes" the following passage occurs:

> The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by transaction.

This definition certainly does not exclude what might be described as benefit to the estate.

The second argument is that there was no benefit to the estate in the present case but the findings of fact of the lower appellate Court are against this contention. They are that a fancy price was obtained for the land, that the land was yielding no income to the joint Hindu family and that the sale proceeds were invested in five years' cash certificates bringing in interest at the rate of Rs. 150 per annum. The sale was effected in May 1920. The lower appellate Court took notice of the fact that the actual cash certificates had not been produced in the trial Court, but it held that this was not necessary as there was no reason to disbelieve the statement of the witness Bhagwan Das who said that the investment had actually been made. An attempt has been made to re-agitate this point and the statement has been made to me that the cash certificates were actually called for by the plaintiff in the rial Court. This statement, however, is proved from the record to be incorrect.

Neither finding of the learned District Judge that the transaction was for the benefit of the estate, and that under Hindu Law it binds the plaintiff can be interfered with, and I dismiss the appeal with costs.

Appeal dismissed.

(4) [1920] 1 P.L.T. 136=(1920) P.H.C.C. 155.
(5) [1917] 39 All. 437=44 I. A. 126 (P. C.)

A. I. R. 1926 Lahore 250

BROADWAY, J.

Mul Chand and *another*—Accused—Petitioners.

v.

Crown—Opposite Party.

Criminal Reference No. 1295 of 1925 Decided on 11th January 1926, made by the S. J., Karnal, on 16th July 1925.

Police Act (5 *of* 1861), *S.* 34—*Playing cards in a street is not an offence—Players assaulting constable prohibiting playing is not an offence under S.* 332, *I. P. C., but is under I. P. C., S.* 323.

Playing cards is not an offence and does not come within any of the eight clauses of S. 34, and the act of a constable in prohibiting the men from playing cards is not in the discharge of his duty. So any assault by the persons so playing on the constable does not come under S. 332 I. P. C., but is an offence under S. 323 I. P. C. [P 250, C 2, P 251, C 1]

Shamair Chand—for Petitioners.

Grounds.—It is urged on behalf of the applicants that the constable was not authorized to prohibit them from playing cards in the street and so the assault (even if it was committed) does not fall within the meaning of S. 332, I P. C. I think this contention is right. Playing cards is not an offence and does not come within any of the eight clauses of S. 34 of the Police Act.

So the act of the constable in prohibiting the men from playing cards was not in the discharge of his duty. As to who began the fight first I cannot believe that the applicants who are Banyas by caste and respectable shop-keepers of the Rohtak town could have dared to slap the constable first. In my opinion the conviction is not right. The proceedings are therefore forwarded for revision to the High Court with a recommendation that the conviction and sentences of the applicants be set aside and the fine, which has been paid, be refunded.

ORDER.

Broadway, J.—The learned Sessions Judge is right in his conclusion that the petitioner had not committed an offence by playing cards in the street. Nevertheless, in my judgment the petitioners were not justified in assaulting tbe police constable. I, therefore, alter the conviction to one under S. 323, Indian Penal Code, and reduce the fine in each case to Rs. 5. The fines, if paid, in excess of that amount, will be refunded.

Conviction altered.

A. I. R. 1926 Lahore 251

CAMPBELL, J.

Abdul Qadir and *others*—Defendants—Appellants.

v.

Ilahi Bakhsh and *others*—Plaintiffs—Respondents.

First Appeal No. 1193 of 1924, Decided on 8th January 1925, from a decree of the Dist. J., Sialkot, D/- 8th February 1924.

(a) *Civil P. C., S.* 11—*Scope.*

A mixed question of law and fact cannot be re-agitated. [P. 252, C. 1]

(b) *Civil P. C., S.* 100—*Existence of custom.*

The question of the existence of a custom is a mixed question of law and fact. [P. 252, C. 1]

Tek Chand—for Appellants.

Badri Das, Mahommed Munir and *Niaz Mahommed*—for Respondents.

Judgment.—A preliminary objection that no appeal lies has no force. It is suggested that the suit is of the nature cognizable by Courts of Small Causes, and since the value of the subject-matter does not exceed Rs. 500, S. 102 of the Civil P. C. applies. The plaint, however, contains a prayer for an injunction and as framed the suit for that reason could not have been tried by a Court of Small Causes. The objection is overruled. The origin of the suit is as follows: Nur Din, the father of Defendants Nos. 1 and 2 and Abdul Qadir and Abdul Aziz, Defendants Nos. 3 and 4, who are majawars of a certain Muhammadan shrine in Sialkot, on the 2nd of July 1906. mortgaged to a Hindu, one Chuni Shah, certain property including their share in the offerings made at the shrine. The suit is based upon that mortgage and is brought by the successors-in-interest of Chuni Shah for Rs. 278 which is alleged to represent the mortgagee's share of the offerings for a certain period.

The principal plea of the defendants was that the rights in these offerings were inalienable and amongst others the three following issues were framed: (1) Is the right in offerings alienable? (2) Cannot the defendants raise objections as to the rights being non-transferable? (3) Whether S. 11 of the Civil P. C. operates as a bar to this suit?

The previous suit referred to was one brought in 1912 by Chuni Shah for Rs. 310, the mortgagee's share of the offerings, and the defendants were Nur Din and Abdul Qadir, Abdul Aziz and a fourth man, Taj Din, who was said to be the person who actually collected the offerings. The third issue in that suit was: Is the income from the offerings of the khankah not alienable? And this was decided in the negative, namely, that the offerings were alienable, It has been held by both the Courts below that this decision is res judicata. In the present suit, on the issues above quoted the suit has been dismissed in consequence. The only question for decision in second appeal is whether there is in fact any res judicata.

It was argued before the learned District Judge and repeated in the present memorandum of appeal, that the transfer of a share in the offerings in suit was an act opposed to public policy and contrary to the trusts of the Muhammadan religion, and the case for the appellants is that because the previous decision was on a point of law there is no res judicata. Mr. Tek Chand for the appellants concedes that the case law on S. 11 of the Civil P. C., may be summarized as follows: When the

previous question in issue which has been decided is one purely of fact all High Courts are agreed that it cannot be re-agitated. They also agree that it cannot be re-agitated when the question is a mixed one of law and fact, but when it is a question of pure law there is a distinct conflict of opinion, and there is no direct authority in any pronouncement by this Court or by the Chief Court.

Mr. Badri Das contends that the question is a mixed one of law and fact, and I think that he is right. The Court in the previous suit decided that the rights in the offerings were alienable because a custom prevailed sanctioning such practice, and the origin of the custom lay in certain instances of alienation which were held to have occurred. According to S. 5 of the Punjab Laws Act in questions regarding any religious usage or institution the first rule of decision must be any custom applicable to the parties concerned, and thus the former decision was that by reason of the existence of the custom the alienation then in question and now in question was legal. The question of the existence of a custom or at any rate of this particular custom is, in my view, a mixed question of law and fact, because the instances which are the basis of the finding are undoubted facts. Therefore, I come to a contrary decison to that of the Court which decided the case of 1912, as the question of the alienability of the rights to the offerings would involve disturbance of a finding of mixed law and fact and indeed principally of fact, namely, the existence of a particular custom applicable to this particular religious institution. The decision, therefore, of the lower appellate Court was correct, and the appeal must fail. It is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 252

LEROSSIGNOL, J.

Labhu and *another*—Plaintiffs—Appellants.

v.

Sawan Singh— Defendant — Respondent.

Second Appeal No. 1113 of 1924, Decided on 19th November 1924, from the decree of the Dist. J., Jullundur, D/- 25th January 1924.

Custom (Punjab)—Alienation for debts already due and untainted by immorality binds collaterals.

An alienation for paying off debts which at the time of the alienation were due, and had been incurred by the vendor for the purpose of building a house, is binding although the house may have been constructed on unusually spacious lines as that circumstance would not have prevented the vendor from being sued upon those debts and proceeded against in execution. [P 252 C 2]

Anant Ram for *Badri Das* — for Appellants.

Devi Dayal—for Respondent.

Judgment.—This appeal arises out of a suit by collaterals for a declaration that a sale of land should not affect the rights on the death of the vendor.

The Courts below have concurred in finding that the sale was necessary in order to pay antecedent debt which was really due and which had not been contracted wastefully or recklessly or with a view to defraud the reversioners. This is a finding of fact and in accordance with law, for the debts at the time of the alienation were due and had been incurred by the vendor for the purpose of building a house. The house may have been constructed on unusually spacious lines but that circumstance would not have prevented the vendor from being sued upon those debts and proceeded against in execution. As the debts were debts already due and untainted by immorality, the vendee was justified in paying the money to the vendor for their liquidation. It is urged that part of the house built by the vendor is a serai which may be dedicated to the public, but this is a matter which the plaintiffs will be competent to challenge if and whan the dedication takes place.

I dismiss the appeal with costs.

Appeal dismissed.

** A. I. R. 1926 Lahore 255
Full Bench

SHADI LAL, C.J.,
LEROSSIGNOL, BROADWAY,
HARRISON, FFORDE AND
CAMPBELL, JJ.

Devi Ditta Mal—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 1561 of 1921, Decided on 5th March 1926, from the decree of the Sub-J., 1st Class, Lahore, D/- 29th March 1921.

** (*a Railways Act, S.* 140—"*May*" *is not equivalent to* "*must*".

Word "may" in the section cannot be interpreted as the equivalent of "must": *A. I. R.* 1923 *All.* 301, *Diss.* When the Agent of a railway has directed the public to serve notice of claims, not on him but on his Traffic Manager, Claims, and notice has been served on that Traffic Manager, that service constitutes a service on the Agent and is a sufficient compliance with the provisions of S. 77 of the Indian Railways Act, and equivalent to a notice to the Railway Administration. [P. 256, C. 1.]

** (*b*) *Railways Act, Ss.*77 *and* 3 (6)—*Agent of a railway is not viewed as an agent but a principal and the maxim* delegatus non potest delegate *does not apply in his case*—Maxims—Delegatus non potest delegate *and notice to agent's nominee is notice to agent.*

The maxim *delegatus non potest delegate* lays dawn the general rule that when a principal has entrusted a power or duty to an agent, the latter cannot delegate that power or duty to another person. But the law enacted by S. 77 read with S. 3, sub-S. (6) of the Indian Railways Act views the Agent of a railway as a principal and not as a delegate; and the maxim which prohibits, subject to certain exceptions, a delegation by a delegate, in other words, a second delegation, cannot be invoked for the purpose of preventing the principal himself from delegating his power. The doctrine is well recognized that whatever a person has power to do himself he may do by means of an agent. *Cui facit per allum facit per se,* Moreover, the maxim has a very limited application even to a delegate or agent. It applies only when the delegation involves a trust or a discretion in the agent for the exercise of which he is selected. It applies only to acts which the delegate has expressly or impliedly undertaken to perform personally, but it does not apply to acts for which in the ordinary course of business a sub-agent may or must be employed.[P. 256, C. 5.]

(c) *Railways Act, S.* 77—*North-Western Railway—Goods Tariff, Pamphlet* 1, *page* 16, *R.* 7 *does not render notice to, "Traffic Manager, Claims" as notice to Government of India direct.* (*Per Shadi Lal, C. J. and Broadway, J., contra Harrison and Fforde, JJ.*)

Per Shadilal, C. J. and Broadway, J. contra, Harrison and Fforde, JJ.,—The Rule No 7 in the Goods Traffic Pamphlet 1, page 16 which came into force with effect from last October 1920, cannot be said to have been issued by the Secretary of the Railway Board and, therefore, the Traffic Manager, Claims Section, of the North-Western Railway at Lahore should not be treated as a delegate of the Government of India for the purpose of entertaining claims for compensation, and that the communication of the claims to that officer does not amount to a communication to the Government of India; Civil Appeal No. 2050 of 1923, (*Secretary of State* v. *Jalal-ud-din*), *Diss.* [P. 255 C. 1.]

Tek Chand, Amin Chand Mehta and *Mehr Chand Mahajan*—for Appellant.

C. Carden Noad—for Respondent.

Shadi Lal, C. J.—The question of law formulated for determination by the Full Bench is:

Whether a notice served on the Traffic Manager, Claims, is sufficent compliance with the provisiou of Sections 77 and 110 of the Indian Railways Act, and, therefore, equivalent to a notice to the Railway Administration.

The answer to the question depends upon tbe interpretation to be placed upon S. 77 of the Indian Railways Act, 9 of 1890; for it is clear that S. 140 prescribes only the modes of effecting the service of notice and does not specify the person or persons upon whom the notice of a claim should be served.

Now Section 77 provides that a person shall not be entitled to * * * compensation for the loss, destruction or deterioration of animals or goods delivered to railway for carriage unless his claim for compensation has been preferred in writing to the Railway Administration within six months from the date of the delivery. In order to find the meaning of the phrase "Railway Administration" we must turn to S. 3, sub- S. (6) of the Act, which lays down that the expression "Railway Administration" in the case of a railway administered by Government (and we are here dealing with the case of the North-Western Railway which is administered by Government) means "the Manager of the Railway and includes the Government." To satisfy the requirements of S. 77 the claimant must, therefore, prove that he has preferred his claim either to the Manager (now called Agent) of the Railway or to the Government.

It is common ground that the claim for compensation in the case before us was submitted, not to the Agent of the North-Western Railway, but to an officer described as "Traffic Manager, Claims" and it is argued that, as the Traffic Manager in the Claims Department has been authorized by the Government of India to enter-

tain claims under S. 77, service of the claim upon him should be regarded as tantamount to service upon the Government of India. Our attention has been invited by the learned advocate for the plaintiff to the Goods Tariff Pamphlet for 1916 (Ex. P. 17) issued by the North-Western Railway which, at page v of the preface contains a rule prescribing that

> Any application in connection with claims for compensation .... should be made to the Traffic Manager, Claims Section, Lahore.

It is urged that this rule was made by the Government of India in the Railway Department and constitutes an announcement by theGovernment to the public that claim for compensation shall be submitted to the Traffic Manager, Claims Section. The notification of the claims to the Traffic Manager should consequently be deemed to be a notification thereof to the Government of India.

This contention is founded upon the judgment of a Division Bench of this Court in the *Secretary of State* v. *Jalal-ud-din*(1)which is undoubtedly an authority in favour of the plaintiff. The learned Judges, who decided that case, held that the rule in question was issued by the Secretary to the Railway Board on behalf of the Government of India, and that the communication of the claim to the Traffic Manager in pursuance of that rule was tantamount to a communication to the Government of India.

There can be no doubt that the Secretary to the Railway Board has been authorized, by a notification under Section 139 of the Indian Railways Act, to sign on behalf of the Governor-General in Council all documents for the purposes of the said Act, vide Notification No. 802. printed at page 233, of the *Gazette of India*, 1905 Part 1. But the question is whether the rule quoted in the judgment and invoked by the learned counsel for the plaintiff was issued by the Secretary to the Railway Board. The pamphlet in question (Ex. P. 17, gives no indication of the authority by whom the rule was framed, but it appears that the learned Judges, who delivered the judgment in the *Secretary of State* v. *Jalal-ud-din* (1), had before them a copy of the Goods Tariff Pamphlet 1, which came into force with effect from lst October 1920, and Rule 7, relied upon by them is found at page xvi of that pamphlet Now,this rule is followed by Rule 8,which prescribed a schedule of "Rates"; and it is immediately below this latter rule that the following words are printed:

F. A. Hadow,
Secretary, Railway Board,
Delhi, dated 10th January 1910.

I consider that the words quoted above apply only to R. 8, which is printed immediately above those words, and not to R. 7 or any other rule preceding it. It must be remembered that the pamphlet purports to be a compilation of the rules prescribed by various authorities with respect to the carriage of the goods traffic over the North-Western Railway, and there is no reason to suppose that all those rules emanated from the Railway Board or that, if a particular rule was issued by the Board, the rule preceding it must be attributed to the same authority. Indeed, Rr. 1 to 6 contain information relating to various routine matters, e. g., the documents wherein the correct rates for goods traffic are published, the liability of the rates to alteration, the business hours observed in the office of the North-Western Railway, etc, and it could not be seriously contended that rules of the above description were promulgated by the Governor-General in Council through the Railway Board. It is to be observed that R. 8 prescribing a schedule of 'rates' was framed in 1919, and it is noteworthy that the words quoted above, though they are found in the pamphlet issued after the promulgation of that rule, are not published in the pamphlet of 1916 which contains the rule relating to the preferment of claims to the Traffic Manager. Now, if this rule also was framed by the Railway Board, there is no reason why the said words should not have been appended to it in the pamphlet of 1916 and why they should have appeared for the first time after 1919.

The learned Government Advocate entirely repudiates the suggestion that the rule relating to the submission of claims was made by the Railway Board, and Mr. Tek Chand has expressed his inability to refer us to any notification or any other document which would show that it was issued by any person who was empowered to act on behalf of the Gov-

(1) Civil Appeal No. 2050 of 1923.

ernment of India. While R. 8 was undoubtedly framed by the Railway Board, and issued over the signature of its Secretary, there is no justification for the assumption that R. 7 should be ascribed to the same authority. I cannot, therefore, endorse the view taken by the learned Judges in *Secretary of State* v. *Jalal-ud-Din* (1), that the Traffic Manager, Claims Section, should be treated as a delegate of the Government of India for the purpose of entertaining claims for compensation, and that the communication of the claims to that officer amounted to a communication to the Government of India.

The question, however, remains whether the submission of claims to the Traffic Manager in the Claims Department is tantamount to its submission to the Agent, North-Western Railway. Now, the object of the Legislature in enacting S. 77 was to protect railways from unnecessary litigation and to afford them an opportunity to investigate the claims of the public within a reasonable time, and to satisfy them if they are found to be valid. The law laid down by that section accordingly requires a claimant to prefer within six months his claim to the person who has the authority to settle it. That person is ordinarily the Agent of the Railway, but the Agent has multifarious duties entrusted to him and cannot personally attend to all of them. He has no alternative but to delegate some of his functions to officers subordinate to him, and the learned Government Advocate does not seriously dispute the proposition that, if the Agent had authorized the Traffic Manager to receive claims on his behalf, the requirements of the law have been fulfilled.

Now it seems to me that the rule in question, though not emanating from the Government of India, must have been promulgated by the Agent. It is contained in a pamphlet, which was issued apparently under his authority, and it is impossible to believe that the Traffic Manager would frame a rule of that character without the sanction of the Agent and would thereby usurp the function of his superior officer. There can be little doubt that all claims for compensation are, as a matter of fact, settled by the Traffic Manager, and that his authority has never been challenged. The publication of the rule in a pamphlet issued to the public on behalf of the North-Western Railway, the course of conduct warranted only by that rule, and the impossibility of any subordinate authority framing a rule usurping the function of the Agent, point irresistibly to the conclusion that the rule must have been authorized by the Agent himself.

The learned counsel on both sides have cited several judgments of the High Courts in support of their respective contentions, but it is unnecessary to discuss them here. Suffice it to say that there is considerable divergence of judicial opinion on the question whether a claim must always be preferred to the Agent, or whether its communication to the Traffic Manager in the Claims Department is a sufficient compliance with the section. In view of the rule discussed above I hold that the Agent had deputed the Traffic Manager in the Claims Department to receive claims on his behalf, and that it was not necessary for the plaintiff to communicate his demand to the Agent direct. There is no warrant for the proposition that the Agent of a Railway could not delegate this duty to a subordinate officer. The maxim *delegatus non potest delegare* lays down the general rule that when a principal has entrusted a power or duty to an agent, the latter cannot delegate that power or duty to another person. But the law enacted by S. 77 read with S. 3, sub-S. (6) of the Indian Railways Act views the Agent of a Railway as a principal, and not as a delegate; and the maxim which prohibits, subject to certain exceptions, a delegation by a delegate, in other words, a second delegation, cannot be invoked for the purpose of preventing the principal himself from delegating his power. The doctrine is well recognized that whatever a person has power to do himself, he may do by means of an agent *cui facit per allum facit per se*. My answer to the reference is accordingly in the affirmative.

Before concluding I consider it necessary to point out that the law on the subject is in a very unsatisfactory condition. The High Courts have expressed divergent views on the question referred to us, and in view of the uncertainty created by the case law and aggravated by the rules framed on the subject by several railways, the public are entitled to know, and the Legislature should

consider it its duty to make it clear, beyond all possible doubt, whether they should address their demand to the Traffic Manager or to the Agent direct.

LeRossignol, J.—The question referred to this Bench is whether a notice served on the Traffic Manager, Claims, North-Western Railway, is a sufficient compliance with the provisions of Ss. 77 and 140 of the Indian Railways Act, and, therefore, equivalent to a notice to the Railway Administration which in the case of a State owned railway, means the Manager of the Railway and includes the Government.

If we were limited to the bald terms of the reference, the answer would have to be in the negative, for the Traffic Manager, Claims, is not authorized by the Act to receive notice on behalf of the Railway Administration ; but the real meaning of the reference is whether the notice of claim can be validly conveyed to the Railway Administration by communication to an officer other than the Agent or Manager. In my opinion, the answer depends on whether the recipient of the notice was authorized by the Railway Administration to receive it.

The Manager of the North-Western Railway is not called the Agent, and it is conceded that in this case the claim was submitted to the Traffic Manager, Claims, within the period prescribed by S. 77. S. 140 of the Act indicates the manner in which any notice required by the Act may be served and with all respect, I am unable to adopt the view that the word "may" in this case must be interpreted as the equivalent of "must." Had the Legislature meant "must' it would have used that word and not "may." With all deference I disagree with the ruling in *Cawnpore Cotton Mills Co. Ltd.* v. *G. I. P. Ry.* (2). Law has no affinity with the magic art and there is no peculiar virtue in any given method of serving notice ; the essence is that notice shall be duly served.

In the case before us it is said that the Manager of the Railway in a pamphlet distributed for a consideration to the public has directed claimants not to trouble him with their claims of compensation, but to deliver them to his Traffic Manager, Claims. If such is the case the Manager of the Railway, in my opinion, is clearly estopped from urging that the notice was not served upon him personally instead of upon his Deputy specially designated by him for this purpose.

The maxim *delegatus non potest delegare*" has no application to a case of this description; for the Manager of the Railway is treated by the Indian Railway Act as a principal and not as an agent. Moreover, the maxim has a very limited application even to a delegate or agent. It applies only when the delegation involves a trust or a discretion in the agent for the exercise of which he is selected. It applies only to acts which the delegate has expressly or impliedly undertaken to perform personally but it does not apply to acts for which in the ordinary course of business, a sub-agent may or must be employed.

Now it is obvious that the Manager of the Railway has to employ a sub-agent for the disposal of claims. This is established by the fact that Government employs or authorizes him to employ and pay a Traffic Manager Claims. For the foregoing reasons my reply to the reference is that when the Manager of the Railway has directed the public to serve notice of claims not on him but on his Traffic Manager, and notiee has been served on that Traffic Manager, that service constitutes a service on the Manager and is a sufficient compliance with the provisions of S. 77 of the Indian Railways Act and equivalent to a notice to the Railway Administration. Even in the absence of such a direction, such a notice to the Traffic Manager, Claims, is good service on the Railway Administration, if the notice is left at the office of the Traffic Manager, and the office of the Traffic Manager is included in the office of the Agent or Manager, matters which would have to be determined by evidence. It is conceded that if Government by notification had authorized the Traffic Manager, Claims to receive notice, the notice would be a sufficient compliance with the requirements of the law and if the Manager has similarly authorized the Traffic Manager, Claims, I fail to see how the two cases can be regarded differently.

Broadway, J.—The question referred to the Full Bench is whether a notice served upon the Traffic Manager, Claims, is a sufficient compliance with the provision of Ss. 77 and 140 of the Indian

(2) A. I. R. 1923 All. 301.

Railways Act, and, therefore, equivalent to a notice to the Railway Administration. This question arose in a suit against the North-Western Railway which is a State railway. The majority of the authorities cited by Mr. Tek Chand dealt with company Railways, and as the position of a Railway managed by a Company is not precisely the same as that of a State Railway, I do not think it necessary to discuss the said authorities. The North-Western Railway has issued a Goods Tariff Pamphlet or Manual in which the public are informed that applications in connexion with claims for compensation should be made to the Traffic Manager, Claims Section, Lahore. This Goods Tariff Pamphlet or Manual has been issued under the authority of the Agent of the North-Western Railway. It seems to me clear, therefore, that the Agent has authorized the Traffic Manager, Claims Section, to receive notices in connexion with claims for compensation and that, therefore, any member of the public addressing the Traffic Manager, Claims Section, in connexion with a claim for compensation or loss of goods etc., must be held to have given the requisite notice to the Agent. I agree with the learned Chief Justice that a notice to the Traffic Manager, Claims, cannot be considered as a notice to the Government of India. I would, therefore, answer the reference in the affirmative.

Campbell, J.—The question referred to the Full Bench is : " Whether a notice served on the Traffic Manager, Claims, is a sufficient compliance with the provisions of Ss. 77 and 140 of the Indian Railways Act, and, therefore, equivalent to a notice to the Railway Administration." The learned Judges of the Division Bench by whom the reference has been made have spoken of an apparent conflict between the decisions in (a) *B. B. and C. I. Ry., Bombay* v. *Manohar Lal Parwin Chand* (3) and (b) *Secretary of State* v. *Jalal-ud-din* (1). In my view there is no conflict, and this indeed is conceded by each of the learned opposing counsel who have appeared before us. In the latter case, which dealt with a State Railway, the North-Western Railway, it was decided on evidence that presentation of the claim prescribed by S. 77 to the Traffic Manager, Claims, was in fact a direct presentation to the Government of India, the Railway Administration, and the Judges, of whom I was one, expressly declined to go into the question of whether presentation to the Traffic Manager, Claims, was in any sense presentation to the Agent or Manager. The former case related to a company Railway, and the learned Judges had to decide whether a claim preferred to the General Traffic Manager was a claim presented to the Railway Company though the Agent, who is authorised by S. 140 of the Indian Railways Act to represent the Railway Administration for purposes of S. 77. They held that it was not, because there was no evidence either that the Agent had given any authority to the General Traffic Manager to receive claims on his account, or that notice sent to a General Traffic Manager reaches the Agent automatically.

In reply to the arguments addressed to us by Mr. Tek Chand for the appellant, the learned Government Advocate has suggested that in *Secretary of State* v. *Jalal-ud-din* (1) an erroneous view was taken of the facts because of a mistake in reading the evidence. The present proceedings are not those of an appeal on the facts against that decision. Furthermore the learned Government Advocate has been unable to substantiate his suggestion, and has submitted that no attempt has been made to obtain the material necessary for so doing during the ten months since the judgment was delivered.

What has actually been argued before us is a question of more restricted scope than that put in the order of reference and it may be formulated thus.

When an official handbook published and sold to the public by the Administration of a State Railway contains a direction in the term quoted below, is notice of claim for compensation presented to one of the officials named therein notice to the Railway Administration within the meaning of S. 77 Indian Railways Act ?

Claims. Any application in connexion with claims for compensation and refund of overcharges relating to stations on the undermentioned districts, except Karachi and Quetta Districts, and Kalka Simla Railway, should be made to the Traffic Manager, Claims Section, Lahore. Applications relating to Karachi and Quetta Districts and Kalka Simla Railway should, however, be made to the District Traffic

(3) A. I. R. 1923 Lah. 84.

Superintendent, Karachi or Quetta, and the Superintendent, Simla, as the case may be.

The learned Government Advocate on behalf of the Secretary of State has not asked us to accept the view of the Allahabad High Court expressed in *Cawnpore Cotton Mills Co., Ltd.*, v. *G. I. P. Ry.* (2) that S. 140 of the Act the word "may" must be read as "must" and that service of a notice or a document on a Railway Administration can only be made in one of the three ways set forth in that section. He has admitted that, as ruled in *A. Mahadeva Ayyar* v. *S. I. Railway Co.* (4) it would be sufficient if the Agent or Manager has somehow knowledge of the claim within the specified time. In these circumstances I would answer the question in the affirmative. If the direction in the handbook is that of the Government of India, as was held in *Secretary of State* v. *Jalal-ud-Din* (1) then, for the reasons given in that judgment, a claim made to the Traffic Manager, Claims, is a claim made to the Government of India and is directly presented to the Railway Administration if the direction is that of the Manager, (or Agent, as he is styled, of the North-Western Railway). It must be remembered that he, unlike the Agent in India of a Railway Company, is by the definition contained in S. 3 (6) of the Act, himself the Railway Administration, and for the same reason service on the Traffic Manager, Claims, would be direct service on the Administration. From another point of view the same conclusion is reached. The Manager must be presumed to carry out the duties of his office properly. One of those duties, imposed on him by statute in his capacity as the Railway Administration, is to receive claims for compensation and, if the Railway Administration (either in the person of the Government or in that of the Manager) has told the public to present such claim to a certain named subordinate official, the presumption must be that a claim presented to that official within time reaches the Manager within time.

Harrison, J.—I agree throughout with the views expressed by Campbell, J. The correctness of our decision in *Secretary of State* v. *Jalal-ud-Din* (1) has been questioned though the Government Advocate thinks it possible that there may have been a mistake in the reading of a certain document. He has been unable to verify his suspicions; and there being no appeal on the facts before us we could not, in my opinion, go into the question even if he were in a position to place definite ascertained facts before us. I adhere to the views expressed in our judgment in that appeal, and hold that, for the reasons therein detailed, service on the Traffic Manager of the North-Western Railway is service on the Government of India.

It appears to me that under the circumstances the further question of what constitutes service on the Agent strictly speaking does not arise and in our previous judgment we gave our reasons for declining to go into the matter. The most difficult point that of legal estoppel which is dealt with in 38 *I. C.* 844, has not been raised. The important point of whether the methods of service described in S. 140 are exhaustive and exclusive, and whether "may" means "must" has been conceded by the learned Government Advocate who accepts the view taken by the Madras High Court. If my adherence to our previous decision does not make my opinion an obiter dictum I would agree in answering the question in the affirmative.

Fforde, J.—The facts of the case out of which this reference has arisen may be stated shortly. On the 23rd of June 1919 the plaintiff despatched from Howrah railway station a consignment of 40 bales of gunny bags to be delivered at Jhang Maghiana. This consignment reached its destination on the 8th September 1919, in a wet and damaged condition. On the 15th of June 1920, the consignors, who are the appellants before us, sued the North-Western Railway Administration for damages for negligence in the carriage of the goods in question. The North-Western Railway being a State-owned concern the Secretary of State for India in Council was named as a defendant.

At the hearing before the trial Judge one of the defences raised was that no valid notice of the claim had been served on the Administration in compliance with the provisions of Ss. 77 and 140 of the Indian Railway Act of 1890.

Section 77 provides that:

A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried

(4) A. I. R. 1922 Mad. 362 (F. B.).

by railway, or to compensation for the loss, destruction, deterioration of the animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Section 140 provides that :

Any notice or other document required or authorized by this Act to be served on a Railway Administration may be served, in the case of a Railway Administration by the Government or a Native State on the Manager and, in the case of a railway administered by a Railway Company, on the Agent in India of the Railway Company :

(a) by delivering the notice or other document to the Manager or Agent ; or

(b) by leaving it at his office ; or

(c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under part III of the Indian Post Office Act, 1866.

The notification of claim in the present case was admittedly given to the Traffic Manager, Claims, at the head office of the North-Western Railway at Lahore, within the prescribed time, and is proved to have been received by him on the 20th October 1919. The trial Court held that the notice is bad, inasmuch as it had not been served upon the Manager or Agent of the Railway as provided by S. 140, and has dismissed the suit on that ground. The question which has been referred to the Full Court for determination is whether the notice served upon the Traffic Manager, Claims, is a valid service upon the Agent of the Railway—and therefore upon the Railway Administration—having regard to the statutory provisions referred to.

There are two decisions of this Court in which the effect of such a notice has been considered. The first of these is *B. B. & C. I. Ry. Bombay* v. *Manohar Lal Parwain Chand* (3). In that case the claim was directed to the General Traffic Manager of the Railway, who had admittedly received it. The Court, however, held that this notice was not a sufficient compliance with the statutory provision, inasmuch as it had not been shown by evidence that the Agent of the Company had invested the General Traffic Manager with authority to receive service of the notice. There was moreover no evidence that notice served upon the General Traffic Manager reaches the Agent automatically, and the Court found that there was no ground for holding that the Agent was in fact informed of this claim by his General Traffic Manager. In the course of his judgment LeRossignol, J., remarked :

If it could be shown by evidence that the Agent had invested some subordinate with authority to receive service on his account, he would no doubt be estopped from pleading that notice had not been served upon him personally.

If I may be permitted to say so, I entirely agree with this dictum, which may be applied to the facts of this case.

In the present case it is in evidence that in the Goods Tariff pamphlet of the North-Western Railway, which came into force on the 1st of October 1919, there is published a notice wnich runs as follows :

7 *Claims.* Any application in connexion with claims for compensation and refund of overcharges relating to stations on the undermentioned districts, except Quetta and Karachi districts and Kalka-Simla Railway, should be made to the Traffic Manager, Claims Section, Lahore.

A similar notice has appeared in all subsequent issues of these pamphlets up to the year 1925, when, for the first time, a change is made by substituting the word "Agent" for Traffic Manager, Claims. This alteration appears to have been made in view of the present litigation.

These pamphlets are issued from the headquarters office of the Lahore North-Western Railway. They are available to the public on payment, formerly of four annas and now of one rupee. As these pamphlets contain the general rules of Indian railways and general classification of goods, and also the North-Western Railway's subsidiary rules, exceptions, variations, schedules and station to station rates it can hardly be suggested that they are not issued with the knowledge and approval of the Agent, more especially as the first page bears the name of the person who is the Agent for the time being of the Railway. Accordingly any rule, notice, or rate contained in these books must be deemed to have been inserted with the knowledge and approval of the Agent. In the rule contained in the 1925 pamphlet, as I have pointed out above, it is the Agent to whom communications are directed to be addressed, and it would be absurd to suppose that this reference to him could have been inserted without his knowledge and approval.

It follows that a rule directing the public to make any application in connexion with claims for compensation and refund of overcharges to the Traffic Manager, Claims Section, Lahore, amounts to an express authority from the Agent

investing the Traffic Manager, Claims, with the duty of receiving such communications. In the face of this rule it is hard to understand how the Railway authorities can consider themselves justified in raising the defence which the Government Advocate has been instructed to press on their behalf. The Administration, for its own convenience, to facilitate the working of its intricate system, directs the public to address all applications in reference to certain matters to the head of a department who is especially authorized to deal with those matters, and when a member of the public complies with these directions, he is then told that he had no legal right to adopt the course which the Administration has requested him to adopt.

The Government Advocate has been driven to arguing that the words "any application in connexion with claims for 'compensatson and refund of overcharges" do not refer to the notifications contemplated by S. 77 of the Indian Railways Act. Such a contention does not appear to me to require serious consideration. The provisions in the Goods Tariff pamphlet have clearly been drafted with reference to S. 77. The words in the Company's notice "any application in connexion with a claim for compensation or refund of overcharges" being almost indentical with the expressions used in S. 77, namely, that a person shall not be entitled to "a refund of an overcharge in respect of animals or goods" or to compensation" for their loss, etc.

The Government Advocate further contends that this rule in the Railway pamphlet is ultra vires as the Agent has no power to confer upon the Traffic Manager, Claims, an authority to receive notice the mode of service of which is regulated by S. 140, and he contends that the maxim *delegatus non potest delegare* applies in such a case. In my opinion the principle enbodied in this maxim has no application to a case such as this. The Agent of the Railway is a ministerial officer, and the ordinary rule is that a ministerial officer may appoint a deputy to act for him in the discharge of his ministerial duties. It cannot be suggested that the Agent has no power to set up a department to deal with claims, and it seems absurd to suggest that having created such a department he cannot authorize the head of that department to receive notices of the claims with which the department has to deal. Moreover, this is not a case of an express delegation of powers to an Agent. It is the public who are empowered by statute to serve their notice in a particular manner. The Agent's duties in dealing with such applications come within the scope of his ordinary duties as executive head of this particular railway system. If the contentions of the learned Government Advocate in this respect were to be accepted, it would paralyze the functioning of a great organization such as the North-Western Railway. The Agent does, and must, for purpose of efficient administration, delegate a great many of the duties which devolve upon him.

Section 77 of the Indian Railways Act, merely requires that a Railway Administration shall be served with notice of a claim and S. 140 prescribes the mode in which the service may be effected. The latter section is obviously in relief of the public. An ordinary person can hardly be expected to know how a Railway Administration is to be served with a notice, and S. 140 is obviously drafted with a view to assisting him in that respect. But I cannot agree that S. 140 is exhaustive or that the word "may" in that section has to be construed as "must." It could not be suggested, for instance that where the Solicitor to a Railway Company agrees to accept notice of claim, such a notice duly served upon him within the prescribed period is not binding upon the Company.

This matter has been very fully dealt with in a Full Bench decision of the Madras High Court in *A. Mahadeo Ayyar* v. *S. I. Railway Co.* (4), in which most of the previous authorities were discussed. It was there held that it would be a sufficient compliance with S. 77, if notice of claim was served upon any officer deputed by the Railway Company or its Agent or Manager to receive such notice. I find myself in complete agreement with the comprehensive judgment of Kumaraswami Sastri, J., delivered in that case.

The second case decided by this Court is to be found in an unreported judgmeut of a Division Bench, in Civil Appeal No. 2050 of 1923. In that case, as in the present one, the claim for compensation was addressed to the Traffic

Manager, Claims Section, of the North-Western Railway. The same plea was taken by the North-Western Railway, the respondent in that case also, as has been taken here. The Court there decided that the notice was valid upon the ground that service upon the Traffic Manager was equivalent to service upon the Government of India. This conclusion was arrived at by an examination of one of the Goods Tariff pamphlets, which came into force on the 1st of October 1920. The Court held that under R. 7, printed at page XVI, of the preface, a communication of a claim addressed to the Traffic Manager amounted to a communication to the Government of India, and this conclusion appears to have been arrived at because the name of the Secretary to the Railway Board appears at the end of these rules. On an examination of the document in question, however, it appears that the name of the Secretary to the Railway Board and the name of the Chief Auditor of the Railway, affixed under different dates, the former under date the 10th of January 1919, and the latter the 10th of December 1918, appear to have been affixed to a schedule of maximum and minimum rates. This schedule comes under R. 8, at page XVII, and has nothing whatsoever to say to R. 7, which is expressed to deal with claims only. There are in this preface eight rules, each of which deals with district matters. For instance, the first rule sets out the authorites for correct rates over the North-Western Railway. The second rule provides for the supersession of all rates, arrangements, notices and information contained in previous tariffs and pamphlets. The third rule declares that all rates, arrangements, notices and informations are liable to alteration. The fourth informs the public as required by S. 60 of the Indian Railways Act, of how and where certain information can be obtained. The fifth rule prescribes the hours at which sheds and offices of the Railway are open for the transaction of business. The sixth deals with complaints against the railway staff; and the seventh is the rule already discussed at some length, namely the one which provides that claims for compensation should be made to the Traffic Manager.

Rule 8 deals entirely with rates, and it is a schedule to this which is signed by the Auditor and the Secretary to the Railway board. The fact that the name of the Secretary to the Railway Board is appended to the schedule to the tariff only, is borne out by the certificate of the Auditor, and it is further borne out by the fact that on the last page of the preface we again find the name of the Secretary to the Railway Board, and the name of the Chief Auditor of the North-Western Railway, appended to a schedule of maximum permissible rates. It cannot be supposed that the signature of the Secretary to the Railway Board, coupled with that of the Chief Auditor, is required to be appended to R. 6, for instance, which is concerned only with the mode in which complaints against the railway staff of inattention or obstructiveness should be addressed. These signatures appear nowhere else in a volume which contains some 447 pages. In the Goods Tariff pamphlet of the 1st October 1919, we find similar rules, but with considerable variations in some cases. The names of the Auditor and the Secretary to the Railway Board are, however, again appended, as in the previous pamphlet, to schedules of rates, and appear nowhere else. In the 1921 edition of the pamphlet the preface is cut down to a few very short rules occupying only half a page, and on the following two pages appear schedules of maximum rates signed as before by the Auditor and the Secretary to the Railway Board. Following these comes Chapter I, beginning with the general rules, in which, at R. 6, appear the instructions to the public to direct their applications in connexion with claims, and so forth, to the Traffic Manager, Claims Section. The signature of the Secretary to the Railway Board does not appear anywhere in these general rules. In the 1925 pamphlet the same arrangement is adopted.

It seems clear from these documents that the signature of the Secretary to the Railway Board far from being an authority from the Board sanctioning the rules as to the mode of directing claims, is appended solely for the purpose of authorizing a particular schedule of tariffs or of confirming jointly with the Auditor, a particular set of tariffs.

I accordingly find myself unable to agree that the rule prescribing a mode of

service of claims has the sanction of the Government of India through the Secretary of the Railway Board, and, therefore, I am unable to agree that the service of a notice of claim upon the Traffic Manager is equivalent to service upon the Government of India. I am satisfied, however, for the reasons I have given that the service of the notice in question upon the Traffic Manager is good service upon the Agent, in view of the fact that the Agent must be deemed to have authorized the Traffic Manager to receive such notices on his behalf,

My answer, therefore, to the reference is that the service of the notice, under the circumstances of the present case, is a good service upon the Railway Administration.

By Court.—Our answer to the reference is in the affirmative.

Reference answered.

A. I. R. 1926 Lahore 262

ADDISON, J.

Chet Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 958 of 1925, Decided on 7th December 1925, from the order of the 1st Class Mag., Amritsar, D/- 15th August 1925.

Arms Act (1878), *S.* 20—*Special indication of intention to conceal must exist.*

Each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or 20 of the Arms Act: 1 *S. L. R.* 18 *Cr.* (*F.B.*) and 8 *P.R. Cr.* 1915, *Foll.*

For a conviction to fall under S. 20 there must be some special indication of an intention that the possession of the arms was being concealed from a public servant or from a railway official.

[P 263, C. 2]

Muhammad Rafi—for Appellant.

Govt. Advocate—for the Crown.

Judgment.—The appellant, Chet Singh, has been convicted under Section 20 of the Arms Act for being in unlawful possession of two revolvers and ten loaded cartridges in such a manner as to indicate an intention that his possession of them might not be known to any public servant. He has been sentenced to seven years' rigorous imprisonment together with a fine of Rs. 500, and he has appealed.

The case on the merits was not seriously argued and it has been established beyond dispute that he had these articles in his possession. In fact, a trap was laid for him into which he fell. Karam Singh, lambardar, informed the police that the appellant was in the habit of selling revolvers and opium, and the Sub-Inspector of Police asked him to let him know whenever he had any to sell. Accordingly the lambardar in question settled with the appellant that he would bring some persons to buy revolvers from the appellant at a particular place and time. The appellant went to this place on horse-back, carrying in front of him a gunny bag in which were the revolvers and cartridges in question together with 8-1/4 seers of Kabul opium. He was seized as they were settling the price. There is not the slightest doubt that he had these two revolvers and ten cartridges, and he was properly convicted and the question only remains as to whether the conviction should have been under Section 19 (f) or Section 20 of the Arms Act.

It was held by a Single Judge of this Court in *Ibrahim* v. *Crown* (1), that S. 20 of the Arms Act, applied only to cases where the import or export of arms was attempted. This decision was based on *Crown* v. *Azu* (2) and *Ahmad Hossein* v. *Queen Empress* (3). In *Ahmad Hoossein* v. *Queen-Empress* (3), however, what had happened was that the police searched the appellant's house and found some arms in it. It was held that in a case such as that S. 20 did not apply. It was not held that that section only applied to the import and export of arms. *Crown* v. *Azu* (2) was a similar case. There, when the accused's house was searched, certain fire-arms were found under a heap of straw, where they were concealed in order that visitors should not see them. It was held that this was not a concealment with the intention specified in S. 20. The following words might be quoted:

The possession was no doubt furtive, but it is not every act of furtive possession that is penal under the first paragraph of S. 20. The possession must be furtive as against public servants, railway servants or public carriers, and such cases would generally occur where arms were being illicitly imported or transported. It is probable that the accused concealed the firearms in order that visitors to his

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(1) [1912] 9 P.R. 1912 Cr.=128 P.L.R. 1913=44 W. R. 1912 Cr.

(2) [1906] 1 S.L.R. 18 Cr. (F.B.).

(3) [1900] 27 Cal. 692=4 C. W. N. 750.

house should not see them and give information against him, but such a concealment would not fall under the first part of S. 20. There is no reason to suppose that the accused anticipated a search of his house by a public servant; and if he had, he would probably have buried the fire-arms. I, therefore, think that the arms were not concealed in such a manner as to indicate the intention stated in the first part of section 20.

These words do not mean that a conviction under S. 20 can only be obtained in cases of import or export of arms. What was said was that such convictions would generally occur where arms were illicitly imported or transported, that is, taken from place to place, as it would usually be on such occasions that the person in possession of them would attempt to conceal them from a public servant or a railway employee, etc.

In *Khem Singh* v. *Crown* (4), the view taken in *Ibrahim* v. *Crown* (1) was not followed, and it was held that each case of concealment of arms must be decided on its own facts; that is, as to whether it fell under S. 19 or 20 of the Arms Act, and that the circumstances in that case showed that the concealment was made so that the possession of the weapons should not be known to the police, and the offence, therefore, fell under S. 20. *Faqiria* v. *Emperor* (5) is another case of this High Court where the concealment of a chhavi was held to fall under S. 20 of the Arms Act and the principle laid down in *Khem Singh* v. *Crown* (4) was again followed in *Sher Ali* v. *Emperor* (6). The head-note of *Channan Singh* v. *Crown* (7) is to the effect that something more than an ordinary concealment should be established in order to bring the illegal possession of arms within the meaning of S. 20 of the Arms Act. It also goes on to add that S. 20 applies only to cases where the import or export of arms is attempted. It would appear, however, from the body of the judgment that it was not necessary for the decision of the case to add what is given in the second part of the head-note.

In my judgment the general principle laid down in *Khem Singh* v. *Crown* (4), which was decided by a Division Bench of this Court, is correct, namely, that each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or S. 20 of the Arms Act. If, however, arms were merely concealed in a house, which, it could not be anticipated, the police would come and search, S. 20 would not apply. For a conviction to fall under S. 20 there must be some special indication of an intention that the possession of the arms was being concealed from a public servant or from a railway official. For example, if arms were carried hidden on a railway journey this special intention might be easy to infer. The same would be the case if arms were carried concealed through a city where numerous constables were posted or if they were carried past or through a police station. It would not be so easy to infer this intention if the arms were carried concealed in the open country where it was not anticipated that any public servant would be met, though even in such cases it might be possible to arrive at a finding that the intention was to conceal them from the police. In fact the words already quoted from *Crown* v. *Azu* (2) and the principle laid down in *Khem Singh* v. *Crown* (4) give the correct method of discriminating as to what section the offence does fall under.

In the case now before me it is obvious that it cannot be inferred that the appellant was carrying the arms in question so as to conceal them from the police. He did not anticipate meeting the police. He was merely carrying them in a convenient manner to the place arranged for their sale. He wrapped the opium, cartridges and two revolvers in a gunny bag and carried them to that spot in front of him on his horse. It was scarcely possible for him to have carried them exposed. This case, therefore, clearly falls under S. 19 (f) of the Arms Act.

I accordingly accept the appeal and alter the conviction to one under S. 19 (f), Arms Act. As this is a case of trafficking in arms, I sentence the appellant to the full sentence of three years' rigorous imprisonment, together with a fine of Rs. 250, and in default of its payment, to three months' further rigorous imprisonment.

Conviction altered.

(4) [1915]8 P. R. Cr. 1915=76 P. L. R. 1915.
(5) [1922] 66 I. C. 995=23 Cr. L. J. 339
(6) A. I. R. 1923 Lah. 79.
(7) A. I. R. 1925 Lah. 395.

* A. I. R. 1926 Lahore 264

CAMPBELL AND DALIP SINGH, JJ.

Sat Narain and *another*—Plaintiffs—Appellants.

v.

Sri Kishen Dass and *others*—Defendants—Respondents.

First Appeal No. 2173 of 1916, Decided on 20th January 1926, against the decree of the Dist. J., Delhi, D/- 13th April 1916.

(a) *Civil P. C., O. 22, R. 2—Abatement in respect of a distinct portion of the whole property included in suit does not entail abatement as regards the whole property.*

Where in the course of the suit or appeal the plaintiffs lose their right to pursue their remedy in respect of a certain distinct portion of the whole of the property included in the suit, by reason of abatement on account of failure to bring the legal representative of the party representing the portion of property on record, the whole suit or appeal does not abate. [P 266 C 1]

* (b) *Practice — High Court — Reference to Full Bench — Full Bench's judgment is in the nature of an opinion only and is not a judgment.*

Where the Full Bench is asked for a ruling on an abstract question of law to guide the Division Bench charged with the duty of deciding an appeal and the parties to the appeal, being interested in the same abstract question, are allowed to appeal and argue the question, there is no reason to hold from that fact that, contrary to the ordinary practice of the Court, the appeal was before the Full Bench for the determination of any issue or ground of appeal peculiar to it. The judgment of the Full Bench is in the nature of an opinion intended for the guidance of the smaller Benches and one which would be binding on them if not subsequently reviewed and altered by a higher authority. [P 267 C 1]

* (c) *Presidency Towns Insolvency Act, Ss. 17 and 52 (2) (b)—After the adjudication of the father forming joint family with his sons, the Receiver is vested with all the power that father had before insolvency to dispose of the joint property to pay off his untainted antecedent debts.*

When at the commencement of his insolvency a father has the power to enforce by sale of the whole joint family estate the pious obligation of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity to exercise that power for the benefit of the insolvent vests in the Receiver after adjudication, whatever may be the technical effect of the adjudication upon the coparcenary in its other aspects. The observation of their Lordships of the Privy Council in *A. I. R.* 1925 *P. C.* 18 that the words in S. 2 "disposing power" must be taken to mean ,an absolute and unconditional power of disposal appears to have no connexion with the interpretation of S. 52 (2) (b). One cannot on the strength of that observation read the word "property" in S. 52 (2) (b) as though it were "property over which or the profits of which the insolvent has an absolute and unconditional disposing power which he can exercise for his own benefit". In the first place, however, S. 2 does not contain an exhaustive definition of the word property. Secondly the words in S. 2 are "any person" and not "the insolvent". Thirdly, if so construed, S. 52 (2) (b) would become a mere redundant repetition of S. 52 (2) (a), since all property over which the insolvent has an absolute and unconditional disposing power which he may exercise for his own benefit is, by the definition in S. 2, included in the word "property" and so comes within the scope of S. 52 (2) (a). The insolvency of a father neither takes away the pious obligation of the sons nor destroys the curious right possessed by the father to enforce it, and this being so, the exercise of that right by a receiver in insolvency (who is very far from being in the position of an ordinary stranger alienee) is in any way repugnant to the principles of Hindu Law. *A. I. R.* 1923 *Mad.* 55, *not Rel. on.* [P 268 C 1, 2]

* (d) *Hindu Law—Partition—Joint family of father and sons — Before partition provision must be made for debts by father and joint family.*

In the event of a partition suit against a father by sons for division of the joint family property, provision must first be made for all debts due by the joint family, as such including debts due by the father. [P 269 C 1]

Tek Chand and *Mool Chand*—for Appellants.

Moti Sagar for *C. Bevan Petman, M. S. Bhagat, Sardha Ram* and *Shamair Chand*—for Respondents.

Judgment.—On the 5th April 1913, Rai Bahadur Sri Kishna Das of Delhi mortgaged to the Bank of Upper India the immovable property detailed in list 1 on page 9 of the printed paper book. He acted both for himself and as guardian of his two sons Sat Narain and Sada Nath then minors. On 26th September 1913 Sri Kishen Dass was adjudicated insolvent by the High Court of Bombay under the Presidency Towns Insolvency Act.

On the 14th the Bank brought a suit at Delhi for realisation of the mortgage debt of Rs. 4,64,021-15-8 bo sale of the mortgage property. The defendants were Sri Kishen Dass, his sons and the Official Assignee. On 2nd October 1914 the sons through a next friend sued the Bank, the Official Assignee and their father for a declaration that their share in the mortgaged property was one half and that the mortgage was not binding on them, and for an injunction to stop the sale of the property by the Official Assignee.

On the 11th January 1915 the same minors brought a second suit for partition of their share (described as one half) in the whole of the joint family property, including the mortgaged properties,

against their father, the Official Assignee, the Bank, and various purchasers of various items of property from the Official Assignee. It is with this suit that we are directly concerned and our judgment will also dispose of the appeal in the declaratory suit.

All three suits were tried by the District Judge, Delhi. Issues were framed in all three, but decision of the other two was postponed for that of the partition suit.

In the partition suit it was held firstly that the property was ancestral or purchased with the profits of the ancestral banking business and therefore coparcenary and that the son's share was as claimed, one half; secondly, that the adjudication order in insolvency against Sri Kishen did not operate to make the plaintiffs insolvents, but did operate to vest the disposing power of Sri Kishen Dass, as regards the coparcenary property, in the Official Assignee, and that the onus was on the plaintiff to avoid transfers made by the Official Assignee for the purpose of discharging the liabilities of the family firm by showing that the debts discharged were illegal and immoral; thirdly, that the debts due to unsecured creditors specified in a schedule filed by Sri Kishen Dass in the Insolvency Court, amounting to Rs. 11,83,825 were such for which the plaintiffs as Hindus sons could not escape liability; fourthly, that none of the purchases was invalid for want of consideration; fifthly, that there was nothing illegal about the sales by the Official Assignee of agricultural land; and sixthly, on the question whether the plaintiffs were bound by the mortgage debt to the Bank of Upper India, that the Bank loans were taken for perfectly legitimate purposes and were employed in the discharge of antecedent debts and that the plaintiffs could not escape the liability of discharging the debt. On these findings the suit was dismissed by order dated the 13th April 1916, At the time that the suit was instituted the major portion, but not the whole of the joint family property, had been sold by the Official Assignee.

On the same date, 13th April 1916, the declaratory suit was dismissed as a necessary consequence of the judgment in the partition suit.

The Bank suit was disposed of on 17th April 1916. There originally had been contention between the plaintiff Bank and the defendant Official Assignee, and issues were struck on the disputed points. Later on the sons of Sri Kishen Dass came in with pleadings that the debts due by their father to the Bank were not for their benefit or for family necessity and were illegal and immoral, and that any decree passed should not be against the mortgaged property, but should be purely personal against Sri Kishen Dass. These pleas were traversed by the plaintiffs and afterwards the suit was suspended pending the decision in the partition suit. On the 24th April 1916 the Official Assignee confessed judgment, and it was held that against the sons of Sri Kishen Dass the suit was res judicata on the finding in the partition suit that they were bound by the mortgage debt to the Bank. Judgment was given for the amount claimed with interest at 7 per cent. per annum up to the date of realization and costs "against the estate of the insolvent in the hands of the Official Assignee, Bombay," the learned Judge observing that since the estate had already been sold in the insolvency proceedings a sale decree would be meaningless. Sada Nand and Sat Narain, the sons of Sri Kishen Dass, appealed against the decree to this Court but their appeal (No. 2172 of 1916) had been dismissed in default.

The same persons have also appealed in the declaratory suit (Appeal No. 2171 of 1916) and in the partition suit (Appeal No. 2173 of 1916) and our judgment deals with these two appeals, but for all practical purposes the declaratory appeal has merged in the partition appeal and our findings will be pronounced on the record of that case.

It is admitted for the appellants that the decree against them in the mortgage suit is final, that they are bound by the mortgage, and that the debt to the Bank secured by the mortgage is neither illegal nor immoral. The main question for decision is the position in law of the Official Assignee in his dealings with the joint family property including the sons' share, the major portion of which property, as already stated, he has transferred by sale to various auction purchasers.

Before coming to direct discussion of this question we must dispose of the

individual case of one of these purchasers, Ghulam Mohy-ud-Din Khan, Respondent No. 12, to whom the Official Assignee sold for Rs 41,000–Lot No. 19, in list 2, filed with the plaint (page 11 of the printed record) which specifies property in suit other than that mortgaged with the Bank.

On the 4th October 1920 an application was presented by the plaintiffs stating that Ghulam Mohy-ud-Din was dead and praying that his legal representatives be substituted for him on the record. The affidavit attached admitted that death had occurred more than six months previously. The appplication was granted subject to all just exception.

The legal representatives have now presented an affidavit that death took place on 20th March 1918, and this has not been contradicted. We hold that the appeal against Ghulam Mohy-ud-Din has abated and that the application of 4th December 1920, if treated as one to set aside the abatement, should have been put in within 60 days of the abatement, which took place automatically six months after death, and that it is out of time. After hearing argument on the question of extension of time under S. 5 of the Limitation Act, we have decided that no good cause has been shown, and we reject the application. The representatives of Ghulam Mohy-ud-Din will have their costs of the proceedings.

A preliminary objection by Mr. Bhagat for one of the respondents that this abatement necessitates the dismissal of the whole appeal, we hold, to be without force. The inference sought to be drawn from cases where suits for partial partition have been dismissed are fallacious. Here the whole property was included in the suit, and all that has occurred is that in the course of the suit the plaintiffs have lost their right to pursue their remedy in respect of a certain distinct portion of that property.

Yet another preliminary objection must be disposed of, which, however, is directly concerned with the main point of dispute. The sons of Kishen Dass were plaintiffs in another suit in which they claimed to pre-empt certain house property as owners of a contiguous and dominant tenement. The defence was that on their father's insolvency their share of the joint family property vested in the Official Assignee and they ceased to be owners for purposes of the Punjab Pre-emption Act. The District Judge decreed their claim, and on appeal by the vendees to the High Court, the question was referred to a Full Bench, whether an order of adjudication against a father vests in the Official Assignee his sons' interest in the joint family property. At the first hearing before the Full Bench an advocate representing the Bank in the present litigation made a request that the parties to it should be given an opportunity of being heard on the point referred since the decision would also affect these appeals. The Full Bench directed "that the hearing of the aforesaid appeals be expedited and that notices issue to the parties interested therein requiring them to appear and argue the question referred to the Full Bench. Accordingly counsel for the Bank appeared and was heard by the Full Bench. The judgment delivered is printed as *Bihari Lal* v. *Sat Narain* (1) and answered " the question referred to the Full Bench in the affirmative " and on the record of the present Appeal, No. 2173, was placed an order signed by two out of the three Judges who composed the Full Bench in the following terms : "See judgment in Civil Appeal No. 2134 of 1915."

The pre-emption appeal was decided in accordance with the Full Bench judgment against the sons of Sri Kishen Dass and they appealed to his Majesty in Council. The appeal was accepted and their Lordships of the Judicial Committee held that it was not the intention of the Presidency Towns Insolvency Act that on the insolvency of a father the joint property of his family should at once vest in the assignee. We shall return presently to their Lordships' judgment which was delivered on 24th October 1924, and is published as *Sat Narain* v. *Bihari Lal* (2). What we are concerned with immediately is a contention by the respondents before us that the order signed by the two Judges referred to above is a judgment disposing of this appeal in part which has not been appealed from to the Privy Council and decides finally so far as this Court is concerned that the whole of the

(1) A. I. R. 1923 Lah. 1 (F. B.)
(2) A. I. R. 1925 P. C. 18.

joint property including the son's share, vested in the Official Assignee, Bombay.

Subsequently to the Full Bench decision on 19th July 1922 the present appeals and Appeal No. 2172 came up for decision before another Bench of two Judges and an appllcation was presented on behalf of the appellants for the taking of the fresh evidence on commission, which was granted. The present contention was not raised upon that occasion, and in our opinion it is based upon a misconception of the function performed by the Full Bench. In another appeal the Full Bench was asked for a ruling on an abstract question of law to guide the Division Bench charged with the duty of deciding that appeal. The parties to our appeal, being interested in the same abstract question, were allowed to appear and argue the question, but there is no reason to hold from that fact that, contrary to the ordinary practice of the Court, those appeals were before the Full Bench for the determination af any issue or ground of appeal peculiar to them. The judgment of the Full Bench was in the nature of an opinion intended for our guidance, as well as for that of the other Bench and one which would have been binding upon us, had it not subsequently been reviewed and altered by a higher authority, in the other appeal. As matters have turned out, the decision of their Lordships of the Privy Council has superseded it as the authoritative pronouncement which we are to apply to the question of what vested in the Official Assignee on the adjudication of Sri Kishen Dass as an insolvent. We overrule the, objection that the Full Bench has passed orders actually deciding this part of the appeals before us.

The Privy Council judgment is conclusive in favour of the appellants that the adjudication order did not immediately vest in the Official Assignee by virtue of their father's insolvency their interest in the joint family property. The case for the respondents now is that under S. 52 (2) (b) of the Presidency Towns Insolvency Act the Official Assignee had the right to sell that interest for the purpose of paying debts which the appellants as Hindu sons were under a pious obligation to discharge.

We have not permitted Mr. Tek Chand, the appellants' learned advocate, to argue that, in transacting the sales made by him, the Official Assignee did not purport to sell the whole property including the sons' interest. This point was not taken in the memorandum of appeal, and it could and should have have been taken if the appellants had intended to rely upon it.

Under S. 17 of the Presidency Towns Insolvency Act when a person becomes insolvent his "property wherever situate" vests in the Official Assignee and becomes divisible among his creditors. The first part of S. 52 of the same Act states that the property of an insolvent divisible among his creditors is referred to in the Act as the property of the insolvent and specifies certain exemptions. S. 52 (2) runs as follows :

"Subject as aforesaid, the property of the insolvent shall comprlse the following particulars namely :

(a) All such property as may belong to or be vested in the insolvent at the commencement of the insolvency, or may be acquired by or devolve on him before his discharge ;

(b) the capacity to exercise and to take proceedings for exercising all such powers in respect of or over property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.

Section 2 is the definition section of the Act and regarding the word "property" it says :

2. "In this Act, unless there is anything repugnant in the subject or context,

(e) "property" includes property over which or the profits of which any person has a disposing power which he may exercise for his own benefit.

The Full Bench judgment in *Bihari Lal* v. *Sat Narain* (1) held that in consequence of this definition the power of a Hindu father to sell joint property and utilize the proceeds for the payment of his debts converted the whole joint property on his insolvency into property of the insolvent within the meaning of S. 17 of the Act. Their Lordships of the Judicial Committee said in effect :

No, there is something in the subject and context repugnant to this interpretation. The father's power to dispose of the joint property is not absolute, but conditional on his having debts liable to be satisfied out of the joint property, and S. 2 seems to contemplate an absolute and unconditional power of disposal. It is difficult to reconcile the provisions of S. 52 (2) (b) with the proposition that the property itself vests in the assignee.

This is as far as their decision went. The question before them was

whether, for purposes of pre-emption, a son ceases to be an "owner" of joint family property immediately on his father becoming insolvent, and they answered it in the negative; they did not require to and did not examine the scope of S. 52 (2) (b). In regard to it they made, in passing, two other observations, in addition to the one referred to above: firstly that the power to obtain a partition of the joint family property was a power which the Official Assignee might have exercised under S. 52 (2) (b); and secondly, the following at the cnnclusion of their judgment:

> It may be that under the provisions of S. 52, or in some other way, that property (i. e. the joint family property) may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee and no such provision should be read into the Act.

Their Lordships also stated in their judgment that the question before them was to be decided on the wording of the Presidency Towns Insolvency Act, and on that Act alone. Applying this method we hold on what we conceive to be the plain terms of S. 17 and S. 52 (2) (b) that when, at the commencement of his insolvency, a father has the power to enforce by sale of the whole joint family estate the pious obligation of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity to exercise that power for the benefit of the insolvent vests in the Receiver after adjudication, whatever may be the technical effect of the adjudication upon the coparcenary in its other aspects.

The observation of their Lordships of the Privy Council that the words in S. 2, "disposing power," must be taken to mean an absolute and unconditional power of disposal appears to us to have no connexion with the interpretation of S. 52 (2) (b). We have been asked on the strength of that observation to read the word "property" in S. 52 (2) (b) as though it were "property over which or the profits of which the insolvent has an absolute and unconditional disposing power which he can exercise for his own benefit." In the first place, however, S. 2 does not contain an exhaustive definition of the word "property." Secondly, the words in S. 2 are "any person" and not "the insolvent." Thirdly, if so construed, S. 52 (2) (b) would become a mere redundant repetition of S. 52 (2) (a), since all property over which the insolvent has an absolute and unconditional disposing power which he may exercise for his own benefit is, by the definition in S. 2 included in the word "property" and so comes within the scope of S. 52 (2) (a). The insolvency of a father neither takes away the pious obligation of the sons nor destroys the curious right possessed by the father to enforce it and, this being so, we cannot see that the exercise of that right by a Receiver in insolvency (who is very far from being in the position of an ordinary stranger alienee) is in any way repugnant to the principles of Hindu Law. The present litigation is an example of what the sons can do if they wish to contest the exercise of the power on the ground that the debts are fictitious or immoral.

We are supported in this conclusion by the decision of the Madras High Court in *Official Assignee of Madras* v. *Ramchandra* (3), which was expressly re-affirmed by a Full Bench in *I. L. R.* 47 *Mad.* 81 that the Official assignee under the Presidency Towns Insolvency Act, although the interest of the sons does not vest him by reason of the adjudication of the father, yet he, standing in the shoes of the insolvent, can alienate the minor sons' interest in the joint property for the purpose of paying the insolvent's debts unless they were incurred for an illegal or immoral purpose, the presumption being that they were not, and that he is entitled to all the rights of the insolvent father, excluding such as are in their nature personal to a member of the family as such but including the right to possession of the family property. The same view was taken by the Allahabad High Court in *Bawan Das* v. *O. M. Chiene* (4) and *Sita Ram* v. *Beni Prasad* (5) under the Provincial Insolvency Act, where the definition of "property" in S. 2 is the same as in S. 2 of the Presidency Towns Insolvency Act, and where there is no subsequent provision corresponding with S. 52 (2) (b) of the Presidency Towns Insolvency Act. The latter ruling also followed the former in accepting as a rule of Hindu Law another proposition

(3) A. I. R. 1923 Mad. 55.
(4) A. I. R. 1922 All. 79.
(5) A. I. R, 1925 All. 221.

which is material to the present case, namely that, in the event of a partition suit against a father by sons for division of the joint family property, provision must first be made for all debts due by the joint family, as such, including debts due by the father. This rule is enunciated in other text-books besides Trevelyan's Hindu Law to which the learned Allahabad Judges referred. An argument has been addressed to us that the rule stated is not in fact supported (so far as the Mitakshara school is concerned) by any of the authorities cited by Mayne, Trevelyan, Mulla, or Gour. The doctrine, however, is firmly established in the words used by their Lordships of the Privy Council in *Brij Narain* v. *Mangala Prasad* (6)

> that debt has been contracted by the father, and the pious obligation incumbent on the son to see the father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt.

It seems to us necessarily and obviously to follow that a Hindu father, with the fear before him of imprisonment for debt in this world, or of punishment in the next world, is entitled to plead in resistance to a partition suit by his son that his own share of the property after partition and his own separate property are not sufficient to satisfy his antecedent debts. The Allahabad Court has gone so far as to hold in *Sita Ram* v. *Beni Prasad* (5), that when during insolvency proceedings against a father the sons obtain a partition, the Receiver can step in at partition and take the property allotted to the sons for payment of the father's debts.

These Madras and Allahabad decisions are, no doubt, based largely on the approval of Mr. Justice Latham's ruling in *Fakir Chand* v. *M. Hurrukchand* (7), which was noticed by their Lordships in *Sat Narain* v. *Bihari Lal* (2) and was held not to be a guide for determination of the question before them because that case was decided under a different statute. But their Lordships nowhere say that the rule deduced by Mr. Justice Latham from S. 7 of the Indian Insolvency Act 11 and 12 Vic. 21, namely. that a vesting order vests in the Official Assignee a father's right to dispose of his sons' interest for payment of his own just debts, does not harmonise with S. 52 of the Presidency Towns Insolvency Act.

It remains to apply these our findings to the facts of this appeal. Leaving out of consideration the property sold to Ghulam Mohi-ud-Din in regard to which the appeal has abated, the joint family property is valued by the plaintiffs-appellants at Rs. 4,24,321. This includes the property mortgaged to the Bank, valued at Rs. 3,76,902. Of the mortgaged property a diwankhana and mahal sarai at Delhi valued at Rs. 40,000 and 100 shares of the General Cloth Mills, Delhi, valued at Rs. 6,500 have not been sold. The unmortgaged property has been sold before suit (a temporary injunction in the declaratory suit dated 7th November 1914 prevented any sales after suit) except certain subjects at Farrukhabad valued at Rs. 9,000 (vide pp. 9-13 and 55-57 of the printed record.

The debt due to the Bank and for the payment of which by final decree the plaintiffs-appellants have been held to be liable is Rs. 4,64,021-15-8, and interest at 7 per cent. per annum is still running on the unpaid portion. Including the sale price of Rs. 41,000 paid by Ghulam Mohi-ud-Din the Bank has realized Rs. 3,11,900.

As regards other unsecured debts a schedule showing a total of these as Rs. 11,83,825 was admitted on evidence by the trial Court but is not on the printed record. The plaintiffs were called upon to admit these (p. 116 of the printed record) and in reply did not deny their existence but pleaded that all were illegal or immoral by reason of their having been incurred in gambling in silver, cotton and wheat at Bombay and in rash speculative ventures theatres, wrestling matches, seats for processions and popular amusements at the 1911 Delhi Durbar. On the 4th issue the plaintiffs-appellants led evidence regarding some of the Bombay dealings but failed to connect them with any particular entries on the schedule, and also, regarding some of the Durbar enterprises, even if added to the losses on the Bombay transactions, did not amount to one-third of the scheduled liabilities (including apparently the Bank debt), and further : (a) that although there was evidence that the Bombay branch of the family firm engaged in gambling transactions these were not shown to have been paid for or to

(6) A. I. R. 1924 P. C. 50.
(7) [1883] 7 Bom. 438.

have occasioned the bankruptcy or to have been forbidden by law, and (b) that the Durbar losses had been exaggerated and were due neither to immoral nor to illegal transactions.

It is clear that since the sale proceeds were less than the amount due to the Bank the appellants can have no relief in respect of the properties sold. They were unquestionably liable for the Bank's debt, and we have held that the Official Assignee was by law entitled to sell their interest in the joint property in order to satisfy their father's just antecedent debts. Their share in the unsold property, however, has not vested in the Official Receiver, and it is conceded that they are entitled to ask for a decree for partition of this, subject to provision being made for the payment of their father's debts which were not incurred for illegal or immoral purposes. Ground of Appeal No. 18 of Appeal No. 2173 attacks the taxation of costs in the lower Court, and on this we hold that the appellants must succeed against all the respondents. The lower Court's judgment ordered that costs be allowed first to the purchasers of property and the balance to the Official Assignee. When the decree was drawn up each purchaser respondent was allowed a separate counsel's fee calculated apparently on the value of either the whole or half of the property sold to him, and the Official Assignee was given a fee on the value of the unsold property. The total counsel's fees payable by the plaintiffs by this process amounted to Rs. 4,995. In our judgment this was not a case to which the rule allowing separate fees to defendants setting up separate distinct defences should have been applied.

We accept Appeal No. 2173 against all the respondents to the extent of ordering that the pleader's fee of the respondents in the decree of the lower Court shall be a single one calculated on Rs. 2,48,528-4-3 in accordance with Rule 3, page 82, Rules and Orders of the Chief Court, Volume III, and that this fee shall be divided proportionately among the defendants according to half the value of their purchases and (in the case of the Official Assignee) half the stated value of the unsold property. The several respondents are not entitled to have the division made without reference to the share of Ghulam Mohi-ud-Din. He must be included in the calculation, but actually the amount of pleader's fee allowed by the Court will not be reduced in his case.

In other respects we dismiss Appeal No. 2173 against Respondents 4 to 11 who are purchasers of property from the Official Assignee and the costs of those who have appeared before us, namely, the assignees from Janki Das (No. 4) and Prag Das-Mangal Sen (No. 8) will be paid by the appellants. As against Sri Kishen Dass the Official Assignee and the Bank of Upper India, which remains interested in the unsold property, we accept the appeal both in regard to costs as stated above and also to the extent of giving the plaintiffs appellants a preliminary decree declaring their share in the unsold properties No. 1 on page 9 ; No. 18 on page 11, and Nos. 5 to 11 on page 12 of the printed record (to be described in full in the deeree) to be one-half : and directing that division shall only be made after provision for the satisfaction of the remainder of the debt due to the Bank and of such other antecedent debts of Rai Bahadur Sri Kishen Dass, as the plaintiffs fail to show are immoral or illegal. Since the Bank has virtually succeeded, the appellants will pay its costs of this appeal and since the appellants have been unsuccessful in respect of the property sold and their success against the Official Assignee is to all appearances a barren one, we allow them no costs against the absent respondents.

The appeal in the declaratory suit (No. 2171) must be dismissed and is dismissed with costs. It related exclusively to the property mortgaged to the Bank and the plaintiffs-appellants can get no relief by declaration in respect of it. What relief they were entitled to regarding the unsold property has been decreed to them in the other appeal.

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SHADI LAL, C. J., AND ZAFAR ALI, J.

Ghulam Jannat—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 604 of 1925, Decided on 10th December 1925, from the order of the S.-J., Multan, D/- 29th April 1925.

(a) *Criminal P. C., S. 350—Statement before one committing Magistrate is admissible in Sessions Court though case was committed by his successor.*

Where the Magistrate, who recorded the statement of the accused, was transferred, and the case was eventually committed to the Court of Sessions by his successor.

Held; that the statement was admissible in evidence under S. 287, in view of S. 350 of the Code. [P 271 C 2]

(b) *Criminal P. C., S. 401—Young girl married to boy of 13 and giving birth to illegitimate child—Child murdered—Girl sentenced to transportation—Case is fit for remission of sentence.*

Where a young girl of 18 years was married to a boy 13 years old, and she contracted an intimacy with one S and became pregnant, and when she suddenly gave birth to an illegitimate child, she strangled it owing to her anxiety to conceal her shame.

Held: that she was rightly convicted of murder and sentenced to transportation for life, but that it was a fit case in which, in view of the mitigating circumstances, the Local Government should exercise the powers vested in it by S. 401 and 402. [P 271 C 2]

Abdul Razuk—for Appellant.

Abdul Rashid—for the Crown.

Shadi Lal, C. J.—On the morning of the 3rd February 1925, the corpse of a newly-born child with a strip of cloth tied round its neck was found in the bath-room of a mosque called Pir Gauhar Sultan Masjid, situate outside the Delhi Gate of the Multan City. The Civil Surgeon who conducted the post mortem examination, deposes that the child had been born alive and that death was due to asphyxia caused by strangulation. The Sessions Judge of Multan has convicted the appellant, Mt. Ghulam Jannat, of the murder of the child, and has sentenced her under S. 302, Indian Penal Code, to transportation for life.

Now, the evidence of Miss Shaw, who medically examined Mt. Ghulam Jannat, leaves no doubt that the latter had recently given birth to a child; but the question for determination is whether she committed the murder. Mt. Ghulam Jannat lives in a small hamlet about 3 or 4 miles from the town of Multan, and there is ample evidence on the record that, on the afternoon of the 2nd of February 1925, the day before the date of the discovery of the corpse in the bath-room, she came to Multan accompanied by her mother Mt. Aishan; and that she was seen going towards the mosque. There is also reliable evidence to the effect that on the 8th February the prisoner produced from a trunk inside her house a chaddar from one edge of which a small strip had been torn off and the strip of cloth found tied round the neck of the child exactly fits that chaddar. Moreover, in the statement made by her on the 11th February 1925, before the committing Magistrate, she admitted that she had given birth to a child in the bath-room of the mosque, and that, after tearing off a strip of cloth from her chaddar she had tied it round the neck of the child in order to stop its cries and thereby to prevent the discovery of the birth. It appears that the Magistrate, who recorded the statement, was subsequently transferred; and that the case was eventually committed to the Court of Session by his successor. In view, however, of S. 350, Criminal Procedure Code, we consider that the statement recorded on the 11th February has been rightly admitted in evidence under S. 287, Criminal Procedure Code: vide *Sessions Judge of Mangalore* v. *Malinga* (1).

It appears that Mt. Ghulam Jannat, who is a young girl of 18 years of age, is married to a boy who is only about 13 years old; and that she contracted an intimacy with one Shahu and became pregnant. There can be little doubt that, when she suddenly gave birth to an illegitimate child in the town of Multan she was anxious to conceal her shame, and she accordingly tied a strip of cloth round the neck of the child and strangled it.

The confession made by the prisoner before the committing Magistrate, corroborated as it is by the circumstantial evidence described above, leaves no doubt that she killed the child. She has, therefore, been rightly convicted of murder, and transportation for life is the minimum punishment prescribed by law for the offence of murder. We

1) [1908] 31 Mad. 40.

accordingly confirm the conviction and dismiss the appeal.

While we are unable to reduce the sentence inflicted by the Sessions Judge we consider that this is a fit case in which, in view of the mitigating circumstances the Local Government should exercise the powers vested in it by Ss. 401 and S. 402, Criminal Procedure Code. We accordingly direct that the proceedings be forwarded to the Local Government with a copy of our judgment and our recommendation that the sentence of transportation for life may be commuted to one of rigorous imprisonment for three years.

Appeal dismissed.

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CAMPBELL, J.

Alia—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 643 of 1924, Decided on 5th July 1924, against an order of the Addl. S.-J., Lahore, D/- 12th January 1924.

Evidence Act, S. 114, Ill. (1)—No presumption arises when accused is found possessed of stolen property several months after theft and several miles away from the place of occurrence.

Where the accused was found possessed of stolen goods several months after the theft and at a place several miles away from the place of occurrence no presumption that he is either the thief or a receiver of stolen property arises and the onus is not on the accused to explain how he got the property and the prosecution cannot succeed by proving the defence to be false. [P 272 C 2]

Taj-ud-din—for Petitioner.

Ahmad Hassan—for the Crown.

Judgment.—This judgment will dispose of Criminal Revisions Nos. 643 and 644 of 1924. The petitioner has been convicted of two offences under S. 412, Indian Penal Code, and the findings of the learned Sessions Judge are as follows: On the night of the 26th April 1922 a number of currency notes were stolen from the house of Nawab Sadullah Khan at Lahore. One of these notes was sold in the Karnal District by Alia, petitioner to one Sardha Ram in the following August and three in the ensuing month of September. The learned Sessions Judge has held that possession by Alia of the notes having been proved it was for him to explain where he got them. and that since Alia was in possession of the notes a few months after the theft the legal presumption is that he is either the thief or a receiver of stolen property.

I cannot agree with this proposition. All the learned counsel, who represents the Crown, can say in support of the conviction is to refer to the first illustration under S. 114, Indian Evidence Act. This illustration deals with the case of a man in possession of stolen goods soon after the theft. The petitioner is not proved to have been in possession of these notes soon after they were stolen. He was also in possession of them many miles from Lahore, where they were stolen, and no connexion between the petitioner and Lahore, or any person likely to have stolen the notes at Lahore has been proved. I suspect that the learned Sessions Judge has been influenced by the fact that the petitioner is a member of a criminal tribe which fact in this particular connexion is irrelevant.

According to the prosecution evidence the transfer of the notes by petitioner to Sardha Ram was done perfectly openly and the learned Sessions Judge appears to have accepted statements that the petitioner is a well-to-do man. It is true that his defence has been throughout that he was never in possession of the notes, but the prosecution was not entitled to succeed merely by proving this defence to be false. In short no presumption was justified from the fact of possession that the petitioner knew or had reason to believe the notes to be stolen and admittedly there is no evidence direct or indirect of any such guilty knowledge. The convictions must, therefore, be set aside. I accept both petitions and acquit the petitioner who will be released from jail.

Conviction set aside.

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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MARTINEAU AND MOTI SAGAR, JJ.

Mt. Sham Devi — Defendant — Appellant.

v.

Ram Nath—Plaintiff—Respondent.

First Appeal No. 1256 of 1921, Decided on 7th April 1924, from a decree of the First Class Sub-J., Lahore, D/- 9th May 1921.

Hindu Law — Religious endowment — In the absence of contrary usage or proof, that the ordinary devolution is opposed to the object of trust, the management devolves according to orainary rules and the Shebait cannot nominate a successor by will.

Unless it is shown that the devolution of trusts according to the ordinary rules of inheritance is inconsistent with, or opposed to, the purposes the founder had in view in creating the trust or that a different custom or usage prevails in the institution, the management of the endowed property passes according to the ordinary rules of inheritance and the manager or the shebait has no power to nominate his successor by Will : 35 *Cal.* 226 and *A. I. R.* 1922 *All.* 285, *Foll.* 6 *Bom.* 298 *Dist.* [P. 274, C. 2]

Jagan Nath Aggarwal and *Jagan Nath Bhandari*—for Appellant.

Sheo Narain and *Kunwar Narain*—for Respondent.

Judgment.—This is an appeal from a decision of Pandit Omkar Nath Zutshi, Subordinate Judge of Lahore, dated the 29th May 1921, awarding plaintiff a decree for possession of certain houses and shops in the city of Lahore. The property is admittedly debutter and belonged originally to one Radha Kishan who dedicated it to religious purposes by a deed of endowment dated the 10th Phagan, Sambat 1899 (corresponding to 24th February 1843). One Behari Lal was appointed manager of the endowed property, and he was succeeded in the management thereof by his son Balak Ram. Balak Ram has now died and the plaintiff Ram Nath, who claims to be his adopted son, has brought this suit for possession, alleging that as an adopted son he is also entitled to succeed to the management by the ordinary rule of inheritance. The defendant, Mt. Sham Devi, professes to be the widow of the deceased and claims to be in possession under a Will alleged to have been executed in her favour on the 16th April 1917. The validity and due execution of the Will are denied by the plaintiff, and it is also denied that the defendant was lawfully married to the plaintiff's adopted father Balak Ram. A further contention is raised to the effect that, even if the Will was duly executed, the deceased under the law had no power to make a testamentary disposition of the management of the endowed property and that the Will was, therefore, wholly inoperative. The only relevant issues in the case with which we are now concerned are the following:

(1) Was plaintiff validly adopted by the deceased Balak Ram ?

(2) Did Balak Ram make a valid Will in favour of the defendant and did he possees any power under law to make such a Will ?

(3) Was defendant lawfully married to Balak Ram and was she entitled to succeed to the management of the endowed property independently of the Will ?

The Subordinate Judge found in favour of the plaintiff on all these issues and decreed the suit.

It is clearly proved by the evidence that the plaintiff had been validly adopted by the deceased Balak Ram, and in fact the finding of the learned Judge of the Court below on this point has not been seriously contested by the defendant in this appeal. The adoption is supported not only by the oral testimony of the witnesses produced on behalf of the plaintiff but also by the admissions made from time to time by the deceased Balak Ram himself. We must accordingly hold that the adoption has been fully established and that there is no force in the first two grounds of appeal.

The question relating to the due execution of the Will also does not admit of any doubt whatever. The execution is proved by large number of witnesses whom there is no reason to disbelieve, and there can be no doubt that the deceased was in a free disposing state of mind when the document is alleged to have been executed. The finding of the learned Subordinate Judge on this point is that the Will was executed under undue influence and that the defendant was exercising dominating influence over Balak Ram's mind which prevented his bringing an unbiassed and free mind to the disposal of his property. This finding, in our opinion, is wholly unsupported by any evidence and cannot, therefore, be accepted. The onus of proving undue influence was

clearly upon the plaintiff and he has wholly failed to discharge it. We must, therefore, hold that due execution of the Will has been clearly proved and that the Will is not bad by reason of any undue influence having been exercised over the deceased.

The next question for consideration is whether the defendant was lawfully married to the deceased. The decision of this question appears to us to be wholly unnecessary as, in our opinion, the decision of the case turns really upon the determination of the question as to whether in law the deceased had or had not the power to make a testamentary disposition of the management of the endowed property.

It is contended by Mr. Jagan Nath for the appellant that the onus of proving that the plaintiff, as an adopted son, was entitled to succeed to the management to the exclusion of defendant was upon the former and that he had wholly failed to discharge it. He further argues that in the absence of any provision in the deed of endowment as to the succession, and in the absence of any evidence on the record of any custom or usage in this institution regulating the devolution of the office of shebait, the defendant was entitled to remain in possession, and that the plaintiff's suit should have been dismissed. Pandit Sheo Narain, on the other hand contends that the onus was upon the defendant and that as she had produced no evidence in support of any custom regulating the mode of succession the plaintiff's suit has been rightly decreed. We have carefully considered this matter and have consulted the various authorities cited by the learned counsel in support of their respective contentions and the conclusion which we have arrived at is that the plaintiff's contention is right and that the defendant's appeal must fail. The rule of law relating to the devolution of trusts in such cases is thus stated by Mayne in para. 439 of his well-known treatise of Hindu Law and Usage :—

"The devolution of the trust, upon the death or default of each trustee, depends upon the terms upon which it was created, or the usage of each particular institution, where no express trust-deed exists. Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heirs of donee, according to the rule that a grant without words of limitation conveys an estate of inheritance unless such devolution is inconsistent with, or opposed to, the purpose the founder had in view in creating the trusts."

This rule is in complete harmony with the principles of equity, justice and good conscience and appears to us to be the correct rule which ought to be followed in cases of the present nature. The rule is not unsupported by authority. In the case of *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1) it was ruled that shebait is a manager or quasi trustee for the benefit of the idol and has, therefore, no power to alienate the hereditary office of shebaitship by Will. The High Court of Allahabad has taken much the same view as the Calcutta High Court: *Goswami Puran Lalji* v. *Ras Behari Lal* (2). The case of *Mancharan* v. *Pranshankar* (3), on which reliance has been placed by the learned vakil for the appellant, is clearly distinguishable. It has not been shown in the present case that the devolution of trust according to the ordinary rules of inheritance is inconsistent with, or opposed to, the purpose the founder had in view in creating the trust or that a different custom or usage prevailed in this institution. Indeed it is admitted that on the death of Behari Lal, the first incumbent, his son, Balak Ram, succeeded to the management of the trust. It would thus appear that the ordinary rule of inheritance prevailed in this institution, it having been recognized without any challenge or objection for a very long period. We, therefore, agree with the learned Subordinate Judge in holding that Balak Ram was incompetent to nominate a successor by Will to the managership of the property in suit, and that the document relied on by the defendant, even if she was lawfully married to the deceased was invalid.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1908] 35 Cal. 226=12 C. W. N. 323=7 C. L. J. 315.
(2) A. I. R. 1922 All. 285.
(3) [1881] 6 Bom. 298.

A. I. R. 1926 Lahore 275

BROADWAY, J.

Bhagat Singh and *another*—Defendants—Appellants.

v.

Mathra and *others*—Plaintiffs—Respondents.

Second Appeal No. 1618 of 1925, Decided on 7th January 1926, from a decree of the Dist. J., Gurdaspur, D/- 3rd April 1925.

Specific Relief Act, S. 42—Cause of action.

Where evidence is being created which would affect the plaintiff's rights at a subsequent date he has a right to sue under S 42. 38 *Mad.* 1162 *Appr.* [P. 275, C. 2]

Mehr Chand Mahajan—for Appellants.

Fakir Chand—for Respondents.

Judgment.—The house in dispute in the litigation giving rise to this second appeal originally belonged to one Jiwan. Jiwan died some 40 years ago leaving him surviving a widow, Mt. Naraini, but no issue. Mt. Naraini continued to live in that house with a man named Bhagat Singh. Mathra and others, reversioners of Jiwan, on the 31st October 1921, instituted a suit against Mt. Naraini and Bhagat Singh, alleging that Bhagat Singh was making alterations in the house in such a manner as led the plaintiffs to think that Mt. Naraini had gifted the house to him, and asking for a declaration that the alterations so made and the expenses so incurred would not affect their reversionary rights. Naraini and Bhagat Singh both contested the suit vigorously alleging, inter alia, that they were husband and wife and that the suit was barred by limitation. The Courts below, after a consideration of the evidence led, came to the conclusion that while the plaintiffs were Jiwan's collaterals and, therefore, reversioners, the marriage set up between Mt. Naraini and Bhagat Singh had not been proved, and granted the plaintiffs a decree as prayed. Bhagat Singh has come up to this Court in second appeal through Mr. Mehr Chand Mahajan. It appears that Mt. Naraini died while the appeal was pending in the lower appellate Court.

Mr. Mehr Chand has addressed me on three points. One point was that as Mt. Naraini had died while the appeal was pending in the lower appellate Court, the lower appellate Court should have acted in accordance with that what was laid down in *Sat Bharai* v. *Sat Bharai* (1) and dismissed the plaintiffs' suit. I am, however, not pressed with this contention. The facts in *Sat Bharai* v. *Sat Bharai* (1) were quite different. There the trial Court had refused to grant an injunction, and in appeal an injunction was granted after the holder of the limited estate had died. Next, Mr. Mehr Chand raised an entirely new point and one that had admittedly never been raised nor argued in any of the lower Courts. He urged that, having regard to the provisions of S. 42 of the Specific Relief Act, the suit as framed was incompetent. He pointed out that what was complained of was that certain structural alterations were being made in the house, and from this he urged it was evident that the status of the plaintiffs was not interfered with in any way and they had no cause of action. Here again I am unable to agree. The plaint definitely stated that the structural alterations led the plaintiffs to the conclusion that Mt. Naraini had gifted the property to Bhagat Singh and the conclusion the plaintiffs came to was that evidence was being created which would affect their rights at a subsequent date. This would give them a right to sue. This view is in consonance with what was held by a Division Bench of the Madras High Court in *Gandla Pedda Naganna* v. *Sivanappa* (2) where their Lordships say :

> So far as Madras is concerned, the latest authority is in favour of the position that wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff he will have a cause of action to sue under S. 42,

There can be no doubt that the action taken by Bhagat Singh in the present case might well be regarded as the creation of evidence to support a gift in his favour, and I am therefore of opinion that the suit was competent.

Finally, it was urged that the finding on the question of the marriage between Mt. Naraini and Bhagat Singh, although one of fact, was open to examination, inasmuch as the learned District Judge had not given due weight to the presumption arising out of long and continued cohabitation between a man and woman

(1) [1913] 65 P. R. 1913=46 P.L.R. 1913=24 P.W.R. 1913.

(2) [1915] 38 Mad. 1162=27 M. L. J. 520.

who were in a position to marry. Reference was made to *Indar Singh* v. *Thakar Singh* (3) where it was held that.

there is in law a presumption in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and this presumption of law can be repelled only by strong, distinct and conclusive evidence.

In the case while the learned District Judge has not specifically referred to long cohabitation in my judgment it is perfectly clear that he has not lost sight of the fact that these two persons had been living together for a considerable period. The importance of the marriage lies in the fact that if the marriage could be held to have taken place when the cohabitation first began Mt. Naraini would have forfeited her estate on marriage and the present suit would undoubtedly be barred by limitation. In the present case both of them definitely set up an *anand* marriage and led evidence to support their allegation, which evidence has been held wholly unreliable by both Courts. As pointed out by Mr. Faqir Chand there was every reason why these two should not marry ; for their marriage would have entailed the forfeiture of Mt. Naraini's estate or, at any rate, the risk of forfeiture ; and the manner in which Bhagat Singh of recent years began to make alterations in the house is a strong indication that the view taken by the Courts below is correct. It seems to me that Bhagat Singh was endeavouring to create evidence which he could refer back to as showing a gift in his favour.

In these circumstances I must dismiss this appeal with costs.

Appeal dismissed.

(3) [1921] 2 Lah. 207=3 L. L. J. 310.

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[3]A. I. R. 1926 Lahore 276

CAMPBELL, J.

Taj Mohammad—Plaintiff—Appellant.

v.

Farid Khan and *others*—Defendants—Respondents.

Second Appeal No. 1603 of 1924, Decided on 20th January 1925, from a decree of the Dist. J., Multan, D/- 8th March 1924

Provincial Small Cause Courts Act (11 *of* 1887), *S.* 2. *Art*, 13—*Suit against person improperly collecting dues from party primarily liable—There is no second appeal.*

To apply Art. 13 the claim should be directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable and a suit against a person who has improperly collected the dues from the party primarily liable is not within the scope of Art. 13, so there is no second appeal in such a suit.

[P. 276, C. 2, P. 277, C. 1]

Mekr Chand Mahjan for *Dalip Singh*—for Appellant.

Amar Nath Chona for *Fakir Chand*—for Respondents.

Judgment.—This judgment will dispose of Civil Appeals Nos. 1603, 1604 and 1605 of 1924. In each case the value of the subject-matter of the original suit did not exceed Rs. 500 and the preliminary objection is raised that no second appeal lies by virtue of S. 102 of the Civil P. C.

All three suits were of the same nature. The plaintiff. Taj Mohammad, is the lambardar of Mauza Burana in the Multan District. In 1903 he brought a suit against the Hindu panchayat of the village and against his co-lambardar Mohammad Khan for a declaration that he was entitled to Rs. 8-6-0 per cent. of the *dhart* or weighment dues, and he obtained a decree on appeal Since then Mohammad Khan the co-lambardar, has died and the post held by him has been brought under reduction. The present plaint alleges that Farid Khan, son of Mohammad Khan, has gone on realizing his father's share of the weighment dues since the latter's death, that is to say, another Rs. 8-6-0 per cent. and the suits are for recovery from him of those realisations for various periods on the ground that the lambardar or lambardars alone have a right to them and that they have been improperly collected by Farid Khan who is not a lambardar.

The question for decision is whether the suits come within Art. 13 of the Second Schedule to the Provincial Small Cause Courts Act. If they do not, a second appeal is barred by S. 102 of the Civil. P. C. read with S. 15 (2) of the Provincial Small Cause Courts Act.

It has been held repeatedly that to apply Art. 13 the claim should be directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable, and that a suit against a person who has improperly collected the dues from the party

primarily liable is not within the scope of Art. 13. This has been made clear, inter alia, in *Harnam* v. *Gandu* (1). *Jowahir Singh* v. *Sardar Man Singh* (2) and *Pohla* v. *Pertap Singh* (3). Indeed the previous suit referred to above was ruled by the Chief Court to be a small cause in spite of the fact that it was for a declaration [Vide *Mohar Singh* v. *Taj Mahamed* (4)]. This latter decision may or may not be correct but the other judgments are quite definite on the point.

The learned counsel for the appellant can do no more than to rely upon an obiter dictum in *Harnam* v. *Gandu* (1). which contains the observation that a claim of the kind dealt with where the bone of contention really is the title of the defendant to the dues received by him, might be framed in such a manner as not to be cognizable by a Small Cause Court as for instance, if the suit had been to establish an exclusive right as against the defendant to discharge the functions of the office to which the dues were payable during a specific period and for damages for infringement of that right. The present suits as framed, however cannot be called suits to establish a right on the part of the plaintiff to discharge the functions of the office of lambardar. It is true that the plaintiff has inserted the word " harja" in describing the sums which he claims but that fact cannot help him.

I dismiss all the three appeals with costs.

Appeals dismissed.

(1) [1889] 81 P. R. 1889.
(2) [1892] 84 P. R. 1892.
(3) [1887] 2 P. R. 1887.
(4) [1913] 120 P. R. 1912=103 P. L. R. 1913 =64 P. W. R. 1913.

A. I. R. 1926 Lahore 277

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Jawahar Singh—Plaintiff—Appellant.

v.

E. D. Sassoon & Co.—Defendants—Respondents.

Letters Patent Appeal No. 155 of 1924, Decided on 26th November 1925, from the judgment of Harrison, J. D/- 31st March 1924, in Civil Appeal No. 386 of 1922.

Civil P. C., S. 20—Relief consisting of declaration that decree was fraudulent and injunction restraining attachment and sale of property—Court within whose jurisdiction property is situate can try the suit.

Where the plaintiff in the case seeks two reliefs (1) a declaration that the decree is inoperative on the ground of fraud ; and (2) an injunction for the protection of his property against attachment and sale in execution of that decree; the second prayer cannot be ignored for the prupose of determining the jurisdiction of the Court. It is, therefore, clear that part of the cause of action arises at the place where the property sought to be attached is situate, and the suit is consequently cognizable by that Court : 25 *All.* 48 ; 37 *All.* 189 ; 39 *All.* 607 and 5 *C. W. N.* 559 *Foll.* [P.278 C 1]

Dev Raj Sawhney—for Appellant.

J. M. Mackay—for Respondents.

Shadi Lal, C. J.—On the 26th April 1918, Messrs. Sassoon and Company obtained a decree for a certain sum of money against the firm ofFidhan Singh-Jawahar Singh in the Court of the Additional Judicial Commissioner, Karachi. The decree was transmitted for execution to the Senior Subordinate Judge of Amritsar, and in execution thereof certain immovable property belonging to the judgment-debtors was attached.

The plaintiff, Jawahar Singh, has brought the present suit for a declaration that the decree is inoperative as it was obtained by fraud, and for an injunction restraining the decree-holders from executing the decree against his property in Amritsar. The question for determination is whether the Amritsar Court has jurisdiction to entertain the suit. Now, S. 20, Civil Procedure Code, lays down, inter alia that a suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The cause of action in the present case consists of two parts, one of which arose at Karachi where the decree is sought to be impeached as fraudulent was passed and the other at Amritsar where the property of the plaintiff was attached. The Amritsar Court has, therefore, jurisdiction to entertain and determine the suit. The rule has been laid down in *Banke Behari Lal* v. *Pokhi Ram* (1) ; *Jawahir* v. *Neki Ram* (2), *Khushali Ram* v. *Gokul Chand* (3) and *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (4).

(1) [1902] 25 All. 48=(1902) A. W. N. 179,
(2) [1915] 37 All. 189=13 A. L. J. 190.
(3) [1917] 39 All. 607=15 A. L. J. 638,
(4) [1900] 5 C. W. N. 559.

The learned counsel for the decree-holders contends that in the cases cited above the suit was brought by a judgment-debtor, but that the present action was brought by the plaintiff as a third party on the allegation that he was not liable under the decree. Now, we have carefully considered the allegations in the plaint, and we are of opinion that though that document is not artistically framedthe substance of the plaintiff's claim is that, while under the decree as it stands he is liable for the payment of the money, there are various reasons why the decree should be held to be inoperative as against him. The suit must, therefore, be treated as one brought by a judgment-debtor ; and, as a material portion of the cause of action, namely, the attachment of his property, arose at Amritsar, he is entitled to ask the Amritsar Court to determine the suit.

If the suit had been solely to set aside the decree obtained at Karachi, the Amritsar Court would not have been competent to entertain. The only cause of action in that case would have been the obtaining of the decree by fraud, and, as it arose in Karachi, no Court other than the Karachi Court would have been competent to hear the suit. Such a suit belongs to the category exemplified by the judgment in *Umrao Singh* v. *Hardev* (5) but as pointed out above, the plaintiff in the present case seeks two reliefs. (1) a declaration that the decree is inoperative on the ground of fraud ; and (2) an injunction for the protection of his property against attachment and sale in execution of that decree ; and we consider that the second prayer cannot be ignored for the purpose of determining the jurisdiction of the Court. It is, therefore, clear that part of the cause of action arose at Amritsar, and the suit is consequently cognizable by the Senior Subordinate Judge of Amritsar.

For the aforesaid reasons we accept the appeal, and setting aside the judgment of the Single Bench as well as that of the Subordinate Judge, we remit the case to the latter for disposal in accordance with law. Costs of this appeal shall be costs in the cause.

Case remitted.

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5) [1907] 29 All. 418=4 A. L. J. 392=(1907) A. W. N. 112.

A. I. R. 1926 Lahore 278

MARTINEAU, J.

Thambu—Petitioner.

v.

Crown—Opposite Party.

Criminal Revision No. 1594 of 1925, Decided on 1st February 1926, against the order of the S.J., Karnal, D/- 1st July 1925

Penal Code, S. 499—Imputation ordinarily implies accusation—Accused making police report resulting in search of complainant's house—Accused is guilty under S. 499.

An imputation ordinarily implies an accusation or something more than an expression of a suspicion. An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation would have so where a person makes a report to police that a theft was committed and that he suspects a certain person which results in the search of that person's house, the person must be deemed to have made an imputation within the S. 499. [P 278 C 2]

Shamair Chand—for Petitioner.

Nand Lal for *Amir Singh*—for Crown.

Martineau, J.—The petitioner Thambu made a report at the police station that some property of his had been stolen from his threshing-floor, and that he suspected Amir Singh, Bhagwana and another man, as tracks of the thieves went towards their village. Amir Singh prosecuted Thambu for defamation in respect of that report, and Thambu has been convicted, the Courts below finding that he has failed to show that his report against Amir Singh was justified.

The only point that seems arguable in revision is whether the petitioner can be said to have made an "imputation" concerning Amir Singh within the meaning of S. 499 of the Indian Penal Code, as an imputation ordinarily implies an accusation, or something more than an expression of a suspicion, which was all that the petitioner's report contained. It is however, rather difficult to draw the line An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation would have, and in his case the report resulted in the police searching Amir Singh's house. It hink, therefore, that the conviction was right. But the petitioner's statement in his report that he suspected Amir Singh does not call for a heavy fine, and the fine of Rs. 100 which has been imposed is excessive. I reduce the fine to one of ten rupees, which will be paid to the complainant.

Fine reduced.

A. I. R. 1926 Lahore 279

SCOTT-SMITH AND FFORDE, JJ.

Murad Bibi and *another*—Defendants—Appellants.

v.

Amir Hamza and *another*—Plaintiffs—Respondents.

First Appeal No. 386 of 1919, Decided on 23rd December 1924, from a decree of the Senior Sub-J., Jullundur, D/- 30th November 1918.

Custom (Punjab)—Muttazai Pathans of Basti Mithu Sahib are governed by agricultural custom—Daughters do not inherit in presence of near collaterals—Onus of proving that they do so is on the daughter.

Muttazai Pathans of Basti Mithu Sahib of Jullundur district are governed by agricultural custom and not by Muhammadan Law in matters of inheritance and the daughters among them do not inherit in presence of near collaterals of the last male owner. In such cases the onus of proving that the daughters do so inherit lies on the daughter. [P 283, C 1]

Badri Das and *Balwant Rai*—for Appellants.

Tek Chand and *Ghulam Mohy-ud-Din Khan*—for Respondents.

Judgment—Muhammad Hussain and Khadim Hussain, Muttazai Pathans of Basti Mithu Sahib, a suburb of Jullundur City, were two brothers. Muhammad Hussain died on the 6th of May 1902, leaving a widow, Mt. Murad Bibi, and a daughter, Mt. Fatima, defendants-appellants, as well as two other daughters. A dispute arose as to succession to his property, and Khadim Hussain set up a Will in his favour dated the 6th of May 1902. Eventually there was a civil suit in which it was held that the Will was not genuine. Subsequently Mt. Murad Bibi brought a suit and got a decree against her brother-in-law for joint possession of her husband's share in the family property; but as she could not get full enjoyment of her share she applied for partition. The revenue Courts refused partition and Mt. Murad Bibi then, on the 15th of May 1916, instituted a civil suit for a declaration that she is entitled to partition of her share. With her was associated as plaintiff Mt. Fatima to whom she had made a gift of one-third of her share. The lower Court gave the ladies a decree and Khadim Hussain has filed an appeal in this Court, No. 433 of 1919. On the 5th of July 1917 Khadim Hussain filed a suit for a declaration to the effect that the deed of gift dated the 19th of August 1914, executed by Mt. Murad Bibi in favour of her daughter Mt. Fatima, should not affect his reversionary rights after the death or remarriage of the donor. The lower Court disposed of this suit and that brought by the ladies above referred to together, and gave the plaintiff a decree for the declaration sought. From this decree Mt. Murad Bibi and Mt. Fatima have brought the present appeal. The Court, in disposing of both the suits directed that the parties should bear their own costs. In Khadim Hussain's suit Mt. Murad Bibi and Mt. Fatima have filed an appeal (No. 385 of 1919) as regards their costs. We proceed in this judgment to dispose of the ladies' appeal against the lower Court's declaratory decree in favour of Khadim Hussain to the effect that the gift of Mt. Murad Bibi should not affect his reversionary rights.

In the suit brought by Khadim Hussain he alleged, as regards part of the property that it did not belong to the widow at all. This, however, was decided against him and the point has not been raised in appeal before us. The issues in the suit brought by Mt. Murad Bibi and Mt. Fatima were framed on the 18th of August 1916, and will be found on page 26 of Paper-book A. The second issue was whether the gift made by Plaintiff No. 1 to Plaintiff No. 2 is valid, the onus being laid upon the plaintiffs. In the case brought by Khadim Hussain issues were struck on the 21st August 1917: see page 12 of Paper-book D: and the fifth and sixth issues were as follows :

5. Has the plaintiff locus standi to contest the gift ? onus on the plaintiff, and.

6. If so, is the gift lawful ? onus on the defendants.

Subsequently on the 5th of October 1917, these issues were altered and then read as follows :

5. Has not the plaintiff locus standi to contest the gift ? onus on the defendants.

6. Is the gift lawful ? onus on the defendants.

Evidence in both cases was heard together and Mt. Murad Bibi and Mt. Fatima produced their evidence first. At the time when the issues in Khadim Hassain's case were amended on the 5th of October 1917, only one witness on the other side had been examined. From that time on, the onus of proving the validity of the gift was placed upon Mt. Murad Bibi and

Mt. Fatima. Mr. Badri Das urges that the onus of proving that the gift was invalid should have been on Khadim Hussain. In support of this contention he urges that the parties are Muttazai Pathans and live in a suburb of Jullundur City, and that they migrated to this part of the country from the Peshawar district six generations ago, and that prima facie there is no presumption that they are governed by agricultural custom. He also states that they do not themselves cultivate land and that they are called Pirzadas. Now, in the lower Court it was never contended that the parties did not themselves cultivate their lands, or that they followed any other pursuit than that of agriculture. Nor was any stress laid on the fact that they had migrated from the Peshawar district; nor was it ever alleged that they were governed by Muhammadan Law. Bakhshi Tek Chand, who appeared for Khadim Hussain, referred us to the written pleas of the ladies at pages 7–9 of Paper-book D, where in para. 3, it is stated that according to the custom of the parties' tribe, the plaintiff has no right to succeed to the property of Mt. Murad Bibi whose reversionary heirs are her daughters. Again in para. 5 it is stated that according to the custom of the parties' tribe Defendant No 1, Mt. Murad Bibi, is full owner and is competent to alienate her property, and that even if no gift were made, still Defendant No. 2, Mt. Fatima, and her sister would succeed to any property that would be left by Defendant No. 1. Further, it is to be noted that Mt. Murad Bibi is in possession of her husband's share of the family property in accordance with general custom. If Muhammadan Law had applied she would have inherited 1/8th share only, while her daughters would have taken 3/4ths.

The parties are residents of Basti Mithu Sahib, a suburb of Jullundur Town and the judgment of the Division Bench of the Chief Court, dated the 27th of November 1905, in Civil Appeal No. 1404 of 1899 is very important in this connexion. It is printed at pages 387–395 of Paper-book B. The dispute was between members of the same family who are parties in the present case, Khadim Hussian being himself one of the plaintiffs. At page 389 in the judgment it is stated :

> In spite of their foreign origin and first settliment in the Bastis as horse-dealers there se nothing at present to distinguish these Pathan agriculturists from the surrounding agricultural tribes. They have lived by agriculture in groups from generations, and I, therefore, would agree with the Divisional Judge that Ghulam Hussain, deceased, was an agriculturist, and further that he had not an unrestricted power of alienation. The onus, therefore, lay on the defendants to show that Ghulam Hussain was competent by custom to make the gift in dispute.

Again, in Johnstone, J's judgment at page 395, the following passage occurs :

> I agree that these Pathans, though they may have come to Jullundur as horse-dealers, yet inasmuch as they have settled down as a compact village community and have apparently for six or seven generations lived by agriculture, can fairly be styled agriculturists. I also agree that in view of what has become their hereditary occupation, viz., agriculture, and also in view of the fact that the village is situated in the midst of the population following the rules in regard to succession to ancestral estate and alienation thereof, which are known as Punjab Agricultural Custom, it can reasonably be presumed that the powers of alienation of ancestral landed estate possessed by a soulless proprietor in this village are restricted.

It is true that in that decision the Judges left out of consideration cases of gifts to daughters on the ground that such gifts were specially favoured amongst endogamous Muhammadan tribes, but the decision is important as showing that the Judges considered that the members of this tribe were agriculturists and generally followed the customs of agriculturists.

In this connexion also the judgments of the Division Bench of the Chief Court in the case of *Ata Muhammad Khan* v. *Jiwani* (1) may be referred to. In that case the parties were Barki Sayyads of Basti Pir Dad Khan, a neighbouring Basti to that to which the parties to the present suit belong, and it was h ld that, according to the rule of the Customary Law generally applicable to agricultural tribes in the Punjab, the presumption was in favour of the exclusion of a daughter by a near collateral in the matter of succession to ancestral property and the onus is on the daughter to prove an exception to this rule. Having regard to these decisions, and to all the facts above stated, we are clearly of opinion that the onus was rightly laid upon Mt. Murad Bibi and her daughter to prove that the gift by the former to the latter was valid.

(1) [1915] 34 P. R. 1915=33 P. L. R. 1915= 2 P. W. R. 1915.

The third ground of the appeal is that the lower Court should have framed an issue as to how much of the property was ancestral and how much self-acquired. The contention of Mr. Badri Das is that even if the onus is on the ladies to prove that the gift was valid qua ancestral property, the onus would have been on Khadim Hussain to prove that the gift is invalid qua self-acquired property. In the plaint Khadim Hussain stated that the property in dispute was ancestral. In their pleas the defendants stated that a part of it was self-acquired, but they did not state how much of it was self-acquired. In his replication Khadim Hussain stated that the small portion of the property which was self-acquired had been acquired with the aid of income from the ancestral property. No issue was framed as to how much of the property was self-acquired, but the defendants got the special kanungo to produce an extract from the revenue papers, which is printed at page 109 of the Paper-book B. This extract is not admissible in evidence, and in any case it shows that only 134 kanals and 2 marlas of the family property was acquired by the brothers. Of this half, 67 kanals and 1 marla is Mt. Murad Bibi's share, out of which she has gifted only one, third, or 22 kanalas 7 marlas to her daughter. It is, however in our opinion, unnecessary that any further enquiry should be made as to how much of the property is self-acquired. Though the ladies pleaded that part of the property was self-acquired they did not go on to say that there was any difference in the custom as to succession to ancestral and self-acquired property. There was no allegation that the gift would in any case be valid qua the self-acquired property. The witnesses, who gave oral evidence as to the custom, made no difference as to the different kinds of property, and there is no such distinction made in the riwaj-i-am of 1885 or in that of 1913. We, therefore, are of opinion that the ladies never meant to plead that there was any difference in the custom dependent upon the question whether the property was ancestral or self-acquired. They meant to state that the custom was the same in each case.

A good deal of oral evidence was produced by the defendants, but very little stress has been laid upon it in this Court. The oral instances given by the witnesses are not well ascertained and we proceed to discuss the documentary evidence on the record about which lengthy arguments have been addressed to us.

Pages 2 to 103 of Paper-book B contain extracts from revenue papers the object of which is to show that daughters have in several cases succeeded to property, and on pages 104–107 a list of seventeen instances is given in which daughters succeeded either in virtue of gifts, or by inheritance. These were prepared by the special kanungo who did not produce the original documents in Court. They are not attested copies of any entries in the revenue records and are, therefore, not admissible in evidence. They have not been considered, and, in our opinion, rightly so by the lower Court.

Mr. Badri Das has referred us to the two pedigree tables printed at pages 453–81 of Paper book B in which the names of daughters appear in various places, and has argued from this fact that daughters have succeeded to their fathers in the presence of collaterals. No daughters' names do appear; but, apart from the fact that in many cases these daughters or their issues are shown as out of possession (bedakhal) it cannot be said to be clear from the mere presence of the names in the pedigree tables that daughters inherited their fathers' estate. They may have got it by gift, as gifts are specially favoured in this tribe, or the land may have passed from the father to his daughters' son either by inheritance or by gift. We do not think that the mere presence of the daughters' names in these tables is a sufficient ground for holding that they inherited their fathers' lands. In the second pedigree table the name of Sharaf Din appears who had two wives, Mt. Aishan and Mt. Fatima, and it appears that his property went to his two daughters Mir Begam and Sahib Zadi. He also had a brother Shams-ud-Din. The tamilknama at page 559 of Paper book B shows that the property was gifted to these daughters by Mt. Fatima who purported to be entitled to the property on account of dower due from her husband. If she received this land as dower it became her absolute property and she was entitled to dispose of it as she pleased. It appears, however, that the collaterals never disputed the daughters' rights to this property, but what they did dispute was the

right of Mt. Fatima to make a gift of her brother-in-law Shams-ud-Dins' property to her daughters. The final order upon the claim brought by the collaterals was that the share of Shams-ud-Din was allotted to them, see the final order printed at pages 563-564 of the Paper book B, which is in accordance with the award of arbitrator This instance, therefore, does not help the defendants.

An attempt was made to show that in the neighbouring bastis there was a custom under which daughters inherited in the presence of near collaterals. We proceed to consider the cases from these bastis in order.

Basti Ghuzan. Exhibit P 273 shows that one Haidar Ali made a gift to his brother and sisters. Subsequently Mt. Hur brought a suit for possession of her father's share and her right was admitted by all the defendants except one, and the Court gave her a decree, but the judgment does not show that any enquiry was made into custom.

Exhibit P 274 mentioned in the lower Court's judgment at page 132 of Paper book A is not now relied upon.

Exhibit P. 275 will be found at page 41 of Paper book C. That was a case where a widow had made a gift in favour of her daughter, and on a collateral suing, it was held that the widow had full ownership free from all restrictions which fetter property held on a life tenure and that the widow had the power to will it away to her daughters. This instance does not help the defendants because as the widow was found to be full owner she could obviously dispose of the property in any way she pleased.

These are the only instances cited by the defendants from Basti Ghuzan and we have no hesitation in agreeing with the lower Court that no well defined custom favouring daughters' succession in this basti has been established. Basti Pir Dad Exhibits 278, and 279 do not appear to be in point.

Exhibit P 280, printed at page 580 of Paper Book B. This case was decided in accordance with a special entry in the wajib-ul-arz of the village which allowed the gift. The case went in appeal and it appears that the appeal was referred to arbitrators, see Ex. P 282 at page 44 of Paper Book C, in which it is stated that the arbitrators, had decided in favour of the right to part with her land being allowed to the widow and this decision of theirs was said to be not inconsistent with the wajib-ul-arz.

Exhibit P 283, printed at page 584 et seq (Paper-Book B) is no doubt a case in point but the parties are clearly shown to be Barki Sayyads. It cannot be said that the parties to the present case who are Muttazai Pathans follow the same custom as Sayyads. The case of *Ata Muhammad Khan* v. *Jiwani* (1) was also from this basti, and the parties were stated to be Barki Sayyads, and it was held that a daughter was entitled to succeed to her father's ancestral property to the exclusion of her father's nephews. The owners of this basti as the lower Court notes, sometimes call themselves Pathans or Afghans, and at other times Barki Sayyads. We agree with the view of the Court that the custom of these people cannot be considered as the same as those of Muttazai Pathans of Basti Mithu Sahib.

Basti Baba Khel : The inhabitants of this basti are Barkis who came originally from Arabia and it does not follow that the parties to the present suit follow every custom which prevails amongst them. The instances produced are Ex. P 288 and 289 at page 277 of Paper-book B. These are mutations of gifts and no facts are given. Exhibits P 292—294 pages 281—284 of Paper Book B, relate to a decision in favour of daughters based upon a compromise in which there was no enquiry as to custom. Exhibits P 290 contains a statement, at page 278 of Paper-book B, by a number of persons in answer to a question whether, according to the present custom a gift of land made by a woman in favour of her daughter was lawful. This is the answer of a number of people and is not admissible in evidence under S. 32 of the Indian Evidence Act. It is quite clear that no custom has been proved to exist in Basti Baba Khel in favour of daughters.

There are two other bastis ; Basti Danishmandan and Basti Sheikh Darwesh, but the inhabitants in these are Ansaris whose customs are admittedly different from those of the inhabitants of Basti Mithu Sahib. Counsel for both parties admit this and it is not necessary for us, therefore, to discuss the instances from them.

An entry in the riwaj-i-am of 1885 will be found at page 553 of Paper-Book B.

It shows that generally speaking a daughter does not inherit in the presence of a son, a widow or a near collateral. In the last column exceptions in favour of certain Musalman tribes are made. Thus, in the case of Lodhi Afghans, Sayyads and Barkis if there be no sons, a daughter inherits even in the absence of a writing of her father. This entry was specifically relied upon by the Chief Court in *Ata Muhammad Khan* v. *Jiwani* (1), in which the parties were Barkis Sayyads. An exception was, therefore, made in the Riwaj-i-am of 1885 in favour of Lodhi Afghans, Sayyads and Barkis, but no such exception was made in favour of Muttazai Pathans, and we, therefore, consider that the absence of any mention of the parties' tribe is a strong point in favour of the view that in this tribe daughters do not inherit in the presence of near collaterals. In the later riwaj-i-am also no exception was made in favour of this tribe.

In fact the exception entered in favour of Lodhi Afghans, Sayyads and Barkis in the earlier riwaj-i-am has been omitted.

Bakshi Tek Chand referred us to the cases reported as *Nizam Din* v. *Mt. Fariga* (2) and *Mandas* v. *Shah Wasim* (3) the parties to which were Pathans of the Peshawar district as showing that some Pathans of that district were governed by custom in matters of inheritance and not by Muhammadan Law. His argument is that merely because Muttazai Pathans originally came from Peshawar, it does not follow that they are governed by strict Muhammadan Law.

In our opinion Mt. Murad Bibi and Mt. Fatima have failed to prove that by custom daughters inherit in the presence of brothers or near collaterals of the last male owner, or that the gift by the former in favour of the latter is valid. We therefore, dismiss the appeal, but as we are also dismissing the appeal filed by Khadim Hussain in the other cases, we direct the parties to bear their own costs in this Court.

Appeal dismissed.

(2) [1889] 68 P. R. 1889.
(3) [1896] 44 P. R. 1896.

A. I. R. 1926 Lahore 283

HARRISON, J.

Firm Bihari Lal-Jai Narain—Plaintiff—Petitioner.

v.

Har Narain Das and *others*—Defendants—Respondents.

Civil Revision No. 224 of 1923, Decided on 7th January 1925, from an order of the Small Cause Court Judge, Delhi, D/- 23rd January 1923.

Limitation Act, Art. 85—Plaintiff as commission agent received goods and discounted hundis—Suit on lengthy account is governed by Art. 85.

Where a commission agent who as such, received goods from the defendants and also discounted defendants' hundis sues the defendant on a lengthy account showing a shifting balance, sometimes in favour of the plaintiff and sometimes in favour of the defendant, his suit is on mutual, open and current account and so is governed by Art. 85 : 23 *P. R.* 1915, *Dist.*; *A. I. R.* 1922 *Lah.* 188, *Appl.* [P 283 C 2]

Tek Chand—for Petitioner.

Judgment.—In this case the plaintiff's suit has been dismissed as barred by limitation under Art. 83 and a revision from that order is before me.

The facts are briefly that the plaintiff sued on a lengthy account showing a shifting balance sometimes in favour of the petitioner and sometimes in favour of the other. He was a commission agent and as such received goods from the defendants and also discounted the defendants' hundis ; and he claimed on these facts that his suit was governed by Art. 85. The trial Court has relied on *Manghi Ram* v. *Firm of Ram Saran Das Maman Chand* (1), in which the facts are not identical ; for apparently there was no mutual, open and current account in that case and the transactions between the parties were confined to certain hundi transactions. Counsel for the petitioner has relied on *Ratan Chand* v. *Asa Singh* (2), *Ratan Chand* v. *Asa Singh* (3) and *Namberumal Chetty* v. *Kotayya* (4), the last of which is exactly in point and indeed the facts are identical with the small distinction that in that case the plaintiff advanced moneys to defendant out and out whereas in this case he merely discounted the hundis the result being the same.

(1) [1915] 100 P. L. R. 1915=35 P. W. R. 1915= 23 P. R. 1915.
(2) A. I. R. 1922 Lah. 188.
(3) [1921] 26 P. W. R. 1921.
(4) [1913] 14 M. L. T. 498.

Following these authorities I find that although the parties have had dealings as commission agent and principal in virtue of the mutual open and current account which relates both to these dealings and to the hundi transactions the suit is governed by Art. 85, and, therefore, is within time.

I accept the revision, set aside the finding of the trial Court and return the case for decision on the merits. Costs of the petitioner will be paid by respondents.

Case returned.

A. I. R. 1926 Lahore 284

ZAFAR ALI, J.

Ram Saran Das and *others*—Plaintiffs —Petitioners.

v.

Maulu and *others*—Defendants — Respondents.

Civil Case No. 485 of 1925, Decided on 30th October 1925.

(a) *Civil P. C., O. 39, Rr. 1 and 2 — Injunction can be granted only against a party to the suit.*

An injunction under O. 39, R. 1, cannot be granted against a person who is not a party to the suit, and R. 2 applies to defendants only. [P 284 C 2]

(b) *Civil P. C., S. 151—Government Officers.*

The Court does not possess an inherent power for granting injunctions against Government officers not subordinate to it. [P 284 C 2]

(c) *Punjab Land Revenue Act, S. 117 (2) (d)—Question of title determined by Civil Court — Appeal in High Court pending — Revenue Officer cannot be restrained by injunction.*

Where the question of title is determined by the Revenue Officer himself, and an appeal from his order is pending in the District Court or High Court, that Court is empowered by Cl. (d) of sub-S. (2) of S. 117 to issue an injunction to the Revenue Officer requiring him to stay proceedings pending the disposal of the appeal, but no such power is given either to the High Court or the District Court in a case where the question of title is enquired into and determined by a Civil Court. [P 284 C 2]

Balkisen Mehra—for Petitioners.
Jalal-ud-Din—for Respondents.

Order.—In this case the revenue officer to whom an application for partition was made directed the applicants to have the question of title that arose determined by a competent Court, and accordingly they instituted a sult for a declaration of their title. The suit was dismissed by the trial Court and the appeal preferred to the District Judge has also been dismissed. But the second appeal to this Court having been admitted to a hearing they apply for an injunction to the revenue officer for stay of partition proceedings which, it is stated, have been commenced on the application of the opposite party. An interim order was granted staying further proceedings; but the learned counsel who appears to-day on behalf of the respondents contends that this Court has no jurisdiction to issue an injunction to the revenue officer. This contention appears to be well founded. The application for injunction is made under O. 39, Rr. 1 and 2 and S. 151 of the Civil Procedure Code. Now it is clear that an injunction under O. 39, R. 1 cannot be granted against a person who is not a party to the suit and that R. 2 applies to defendants only. As regards S. 151 of the Civil Procedure Code there is nothing to show that this Court possesses an inherent power for granting injunctions against Government officers not Subordinate to this Court.

Where the question of title is determined by the revenue officer himself and an appeal from his order is pending in the District Court or High Court that Court is empowered by Cl. (d) of sub-S. (2) of S. 117 of the Land Revenue Act to issue an injunction to the revenue officer requiring him to stay proceedings pending the disposal of the appeal, but no such power is given either to the High Court or the District Court in a case where the question of title is enquired into and determined by a civil Court.

I am, therefore, of opinion that this Court has no jurisdiction to grant the injunction prayed for, and I accordingly dismiss the application and discharge the interim order.

Application dismissed.

A. I. R. 1926 Lahore 285

JAI LAL, J.

Rahmat and *others*—Plaintiffs — Appellants.

v.

Qaim Din and *another*—Defendants—Respondents.

Second Appeal No. 850 of 1925, Decided on 19th November 1925, from the decree of the Dist. J., Jhelum, D/- 27th February 1925.

Custom (Punjab)—Gift to Pichhlag is a gift to stranger and the property gifted does not revert to the donor's family on the extinction of donee's line.

A pichhlag is stranger and consequently a gift to pichhlag is a gift to a stranger, and so the property donated does not revert to the donor's family on the extinction of the donee's line. [P 285 C 2]

Hargopal and *M. L. Puri*—for Appellants.

Harish Chandra Mital and *Rija Muhammad Azam Khan*—for Respondents.

Jai Lal, J.—The last male holder of the land in suit was one Alla Dad. On his death his mother succeeded to it and thereafter his daughter Mt. Bibi. After the death of Mt. Bibi the land was mutated in favour of Qaim Din and Kalu defendants who claimed that it had originally been gifted to one Nur, an ancestor of Alla Dad, by Allah Yar, their ancestor and as the direct line of Nur became extinct, the land reverted to them. The plaintiffs Rahmat and Mehr Dad instituted the present suit claiming the property on the ground of their being collaterals of Allah Dad. The learned Judge has held that the plaintiffs are the collaterals of Allah Dad. There were other grounds of contention in this suit which need not be considered here. The only two points before me are whether it had been established that the property in the hands of Allah Yar was ancestral when he gifted it to Nur and secondly whether it reverted to the collaterals of Alla Dad on the extinction of the direct line of Nur. Nur, it has been found, was a pichhlag of Allah Yar. The learned District Judge has held that the proposition is established that when a gift is to a perfect stranger, then it is deemed to be an out-and-out gift and the property donated does not revert to the donor's family on the extinction of the donee's line, and has cited authority in support of this proposition. If, however, the gift is in favour of a relation, then he holds that it reverts. In *Mokku* v. *Karam* (1) it was held that a pichhlag among Gondals of Mauza Isar, Tahsil Bhera, was a perfect stranger and that the gift to him was invalid by custom. No other authority relating to a gift to a pichhlag has been cited on either side. The parties before me are Gujars of Tahsil Jhelum. There is no evidence of any special custom on the record. The learned District Judge has disposed of the point in the following terms :

"The question is whether among Gujars a pichhlag is to be regarded as a stranger. No direct authority on this point has been quoted. It appears to me that a gift to a stepson would be intended to benefit the stepson and provide for his maintenance and not to benefit his remote collaterals eventually when his line died out. I therefore hold that the gift reverts to the descendants of the original donor Allah Yar, i. e., the present appellant."

A pichhlag is not entitled to succeed to the estate of his step-father and for the purpose of inheritance he would be described as stranger, to the family of the step-father and consequently a gift to a pichhlag, would be a gift to a stranger, whatever may be the motiva for such a gift. The expression "strangere I think is used to distinguish the cas" of a person who might under certaie contingencies succeed to the estate of thn donor. In my opinion the reasoning oe the learned District Judge in support of his conclusion on this point is faultyf and is opposed to the principle underlying the previous judgments which he has quoted.

The learned Judge has found that the plaintiffs are the collaterals of the original donee Nur and consequently of Alla Dad. In view of the above finding the other matters in issue in this case do not arise. I accept this appeal and decree the plaintiffs' suit with costs throught.

Appeal accepted.

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(1) [1909] 63 P. R. 1909=79 P.L.R. 1909=84 P. W. R. 1909.

A. I. R, 1926 Lahore 286

CAMPBELL, J.

Fateh Mahomed—Plaintiff—Appellant.

v.

Mitha and *another*—Defendants—Respondents.

Appeal No. 929 of 1924, Decided on 8th January 1925, from a decree of the Dist. J., Dera Ghazi Khan, D/- 10th January 1924.

(a) *Mahomedan Law—Gift by father to son is complete on execution of deed—Registration or delivery of possession is not necessary.*

Under Muhammadan Law, a deed of gift executed by father to his minor son is complete and binding as soon as the donor executes the deed, and neither registration nor delivery of possession is necessary to make it complete: 19 *Mad.* 433; 35 *All.* 3 and 40 *Mad.* 204, *Considered.* [P 287 C 1]

(b) *T. P. Act, S. 123—Section does not apply to the Punjab.*

The provision that registration is necessary to validate a gift does not apply to the Punjab. [P 287 C 1]

Behari Lal—for Appellant.

Sleem for *Abdul Rashid*—for Respondents.

Judgment.—The facts out of which the present suit has arisen are as follows: One Mitha, on the 30th of August 1921, executed a document which has been held by the lower appellate Court to be a deed of gift, transferring to Fateh Mahomed, his infant son, an undivided share in a certain landed estate. Two days later, on the 1st of September 1921, Mitha executed a sale deed transferring by sale the same share to one Abdul Khaliq, a defendant in the suit, the price being Rs. 1,250. On the next day, the 2nd of September, this sale-deed was registered and on the 14th of September the mutation in favour of Abdul Khaliq the vendee was entered up by the patwari. The minor donee's paternal uncle, on the 5th of September presented the deed of gift of the 30th of August for registration, but on the 12th of October Mitha objected to its registration and the Sub-Registrar refused to register it. It was eventually registered on the 14th of November by order of the Registrar.

This suit is by Fateh Mahomed the minor donee for possession of the land. The trial Court dismissed the suit on the ground that under Muhammadan Law the gift of an undivided share in property capable of division, is invalid. Appeal was made to the District Judge who did not sustain the finding of the trial Court and held that this particular gift did not fall within the definition of Musha, the basic principle of which, he observed, is the exclusion of strangers and a valid gift of an undivided share of property could be made in favour of the son of the donor. In second appeal this pronouncement has not been challenged by the respondent Abdul Khaliq.

Before the learned District Judge, however, Abdul Khaliq supported the trial Court's order on two different grounds. One was that the deed of gift having been registered against the consent of the executant was not properly registered and hence was not admissible in evidence. This objection was repelled by the learned District Judge and again his finding is not contested before me. The second ground was that the gift was not complete and had been revoked. Here the learned District Judge upheld the respondent and dismissed the appeal. The plaintiff has come here on second appeal. The learned District Judge held that the deed of gift by S. 47 of the Registration Act took priority over the sale-deed, even though it was registered later than the latter, and that its registration was perfectly regular. He observed, however, that the real question was whether the gift was complete and he laid it down that in order to make the gift complete it was necessary for Mitha to do everything to transfer the possession of the land to the son. No actual change of possession was necessary since the gift was by a father to his minor son; but it was very necessary for Mitha to have the deed of gift registered. Instead of doing so he proceeded to make a sale in favour of another person two days later. Thus the gift was not completed and Mitha had every right to revoke it.

In coming to this conclusion the learned District Judge relied upon *Ramamirtha Ayyan* v. *Gopala Ayyan* (1), where it was held that a deed of gift being a voluntary transfer remains a nudum pactum until the donor has done all that is necessary to make it legally complete; that to do so, it is necessary inter alia, that it should be registered, but that he can be no more compelled to register the deed than to execute it in the first

(1) [1896] 19 Mad. 433=6 M.L.J. 207.

instance. The registration contrary tc the supposed donor's wishes of the deed under consideration was void and in such circumstances there was no gift. This dictum was disapproved in *Parbati* v. *Baij Nath Pathak* (2) and the decision in *Ramamirtha Ayyan* v. *Gopala Apyyan* (1) was expressly overruled by a Full Bench of the Madras High Court in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (3). It was there laid down that once an instrument of gift is duly executed, the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution. So far as the donor is concerned by executing the deed he does all that he need do, for registration can be effected even without his co-operation.

The above rulings, of course, were delivered in respect of cases where under the Transfer of Property Act a valid gift could only be made by a registered deed There is no such law in this province. The question for decision in this case is whether a complete gift was made on the 30th of August 1921 to the plaintiff, and really resolves itself into this: Did Mitha at the time when he executed that deed not intend to transfer the subject-matter to his son? The learned District Judge has not come to any finding about this intention but has held erroneously on the strength of a decision which he was not aware had been overruled, that between execution of the deed and registration the donor was entitled to change his mind if he wished to do so, and that he "revoked" the gift. A gift, however, once made cannot be revoked and the question is whether or not this gift was actually made. No help towards the solution is to be gained from the ordinary rule that a gift to be valid must be accompanied by transfer of possession. The learned District Judge is correct in saying that that rule does not apply to a gift by a father to his infant son. This exception is laid down in para. 303 of Wilson's Muhammadan Law and is admitted by the learned Counsel for the respondent to prevail. Counsel does not dispute the ruling of the Full Bench of the Madras High Court referred to above that so far as conveyance by written instrument is concerned a donor does all that is necessary when he executes the deed of gift. He argues, however, that the facts of the sale two days later and of the subsequent refusal to assent to registration are proof that on the 30th of August Mitha had no intention to gift the land and drew up the deed merely for some ulterior motive.

In my judgment this contention has no force. It is an everyday feature of ordinary life for a man to make up his mind to something on one day, and to change his mind the next day. This is what Mitha, who was examined as a defendant, practically admitted to have occurred in the present case, and Mitha was supporting not the plaintiff but Abdul Khaliq the vendee. In default of direct evidence to the contrary of which there is none, it must be presumed from the facts that Mitha paid Rs. 3 for a stamp paper, engaged a scribe, put his signature to the deed of the 30th of August, and had it attested formally by witnesses that at that time he intended what he caused to be set out in the deed.

The result of this finding coupled with those others of the learned District Judge which, as already stated, have not been challenged before me is that the appeal must be accepted and the plaintiff's suit must be decreed. I accept the appeal accordingly and give the plaintiff a decree for the land claimed together with costs throughout.

Appeal accepted.

(2) [1913] 35 All. 3=10 A.L.J. 300.
(3) [1917) 40 Mad. 204=31 M.L.J. 690=(1917) M.W.N. 112=4 L.W. 465.

A. I. R. 1926 Lahore 287

CAMPBELL, J.

Firm Hazura Mal-Lal Chand—Plaintiffs—Appellants.

v.

Rang Ilahi and *others*—Defendants—Respondents.

Mis. First Appeal No. 1955 of 1924, Decided on 20th January 1925, from an order of the Senior Sub-J., Montgomery, D/- 9th July 1924.

Civil P. C., S. 20—Suit by commission agent against principal can be entertained in a Court where the commission business is carried on.

A Court, having jurisdiction at the place where in compliance with the orders of the principal the commission agent works, is competent to

entertain a suit for balance of accounts by the commission agent against his principal.

[P. 288, C. 1]

Mehr Chand—for Appellants.

Judgment.—The two appeals, Nos. 1955 and 1956 of 1924 can be disposed of conveniently in one judgment.

There were two suits by different plaintiffs against the same defendants, Rang Ilahi and others, alleged to be the former proprietors of a defunct firm in Kasur. The plaintiffs in one case were Ruchi Ram-Khan Chand of Kamalia in the Montgomery district, and in the other Hazura Mal-Lal Chand of Okara in the same district. In each case the plaintiffs said that they were employed by the late firm of the defendants as commission agents to purchase in the Montgomery district cotton, grain, etc., and to despatch it to Kasur. In one case the plaintiffs alleged that a deposit of Rs. 200 had been made with them and paid at their shop at Kamalia by the defendants, and in the other case a similar deposit of Rs. 2,000, was stated to have been made. Both suits were for a balance due on accounts.

One of the defendants admitted in each case the dealings alleged by the plaintiffs and did not deny the deposits, but he also pleaded that the Montgomery Courts had no jurisdiction. The learned Senior Subordinate Judge proceeded to try this issue purely on the question of the place at which payment by the Kasur firm was to have been made. After discussing certain evidence he concluded that there had been a special agreement in each case that payment to the plaintiffs was to be made at Kasur in the Lahore district, the home of the defendants and from this fact he proceeded to lay down a rule.

In cases between commission agents and principals when money is specifically agreed to be paid at a place the claims are to be entertained only by those Courts having jurisdiction at that place.

As authority for this proposition he has relied upon *Motilal Pratabchand* v. *Surajmal Joharmal* (1).

Section 20, however, of the Civil P. C. enacts that a suit may be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. The expression "cause of action" is defined in *Motilal Pratabchand* v. *Surajmal Joharmal* (1), the ruling which the learned Senior Subordinate Judge has cited, as the bundle of facts which it is necessary for the plaintiff to prove before he can succeed in his suit. The learned Judge who decided that case, after laying down this definition, proceeded to explain what the bundle of facts must contain in a suit between a principal and commission agent. In that case the principal was the plaintiff and the commission agent was the defendant. It was explained that the plaintiff has to establish that he gave certain instructions to the defendant as his commission agent, that those instructions duly reached the defendant, that the defendant executed the commission with which he was charged, and that the defendant was bound to render an account, etc.

In the present case the plaintiffs had to prove inter alia that they received a commission from the defendants and that they executed it. That commission was the purchase of cotton, etc., in the Montgomery district and their alleged purchase of these goods, in compliance with the defendants order was, therefore, part of their cause of action. What the learned Senior Subordinate Judge has really been at pains to do is to demonstrate that the suits could also be brought in a Court in the Lahore district. To establish this fact does not lead to the conclusion that the Court of no other district has jurisdiction; for it is common phenomenon for a suit to be capable of institution in more than one district. The learned Senior Subordinate Judge's own Court has also jurisdiction since the alleged causes of action arose partly in the Montgomery district.

I accept both appeals with costs, and set aside the orders returning the plaints for presentation to the proper Court, They will be received back by the learned Senior Subordinate Judge and the suits be proceeded with.

Appeals accepted.

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(1) [1906] 30 Bom. 167=6 Bom. L. R. 1038.

A. I. R. 1926 Lahore 289

LEROSSIGNOL AND FFORDE, JJ.

Labh Singh—Defendant—Appellant.

v.

Shahban Mir and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 2343 of 1921, Decided on 14th December 1925, from the preliminary decree of the 1st class Sub-J., Amritsar, D/- 8th April 1921.

Civil P. C., S. 11—Prior decision—Suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed—Fresh suit by minor after majority is not barred.

Where a portion of a minor's property was sold by his guardian to discharge the debts of his father with permission of the Court but the vendee took possession of an area in excess of the land sold and the guardian, on her behalf and on behalf of the minor, sued the vendee for the excess when the Court refused to adjudicate on the plea, that the sale by the minor's guardian in excess of the land sanctioned by the Court was entirely without authority, on the ground that it had been raised too late and that the plaintiff could bring a separate action upon it and dismissed the suit, and the decision was not appealed against.

Held: that the previous litigation is not binding on the minor and he is not estopped by it from bringing a suit for recovery of the excess land taken possession of by the vendee.

[P. 289, C. 1]

Dev Raj Sawhney—for Appellant.

Gulam Rasul and *Khurshaid Zaman*—for Plaintiff—Respondent.

Le Rossignol, J.—This appeal arises out of an action brought by Shahban Mir who attained the age of 21 years during the pendency of the suit, for recovery of 321 square yards of land situate in Amritsar city. In his plaint he recited that at the date of his father's death he was five years of age and his mother was appointed his guardian by the District Judge, Amritsar, that in order to liquidate his father's debts his mother obtained permission of the District Judge to sell 600 square yards of land. that she sold 921 square yards instead of 600, that the alienation of 321 yards being the excess over 600 was entirely unauthorized and prejudicial to the plaintiff's interests and he was entitled to recover them.

Among other pleas the defendants, who consisted of the original purchaser and his assignees, urged that inasmuch as the plaintiff had sued for this land in earlier suits the matter was res judicata. But the learned Judge of the Court below has held that the first judgment referred to did not decide any point on the merits and that the judgment by the Munsif Raja Ram dated the 26th March 1907, though it would be binding upon the plaintiff had he been an adult, could be avoided by him on the ground that his next friend in that suit had been guilty of gross negligence in not putting forward the plea that the sale by her of any land in excess of 600 square yards was entirely without authority. The third judgment referred to was not a judgment inter-partes and has no bearing on the issue. The trial Court has decreed for the plaintiff.

The main question debated before us in this appeal has been whether the plaintiff is bound by the decision of Raja Ram Munsif. The sale of the property in dispute took place in January 1904 and according to the sale deed the total area sold was 648 plus 114 square yards, or 762 in the aggregate. The suit instituted by the mother of the plaintiff in 1906 on her own behalf and also on behalf of the minor was to the effect that she had transferred approximately 600 square yards to the defendant who subsequently took possession of an area in excess of the land sold. The Munsif found that the area sold as recorded in the deed of sale was incorrectly calculated, but that, determined by the length and breadth recited in the deed of sale and the boundaries therein given, the land in the possession of the vendee was only the land transferred to him. At the arguments stage it was contended that the sale of more than 600 square yards of land by the minor's mother was entirely without authority but the Munsif refused to adjudicate on that plea on the ground that it had been raised too late and the plaintiffs could bring a separate action upon it. The Munsif for these reasons dismissed the suit and the plaintiff's mother did not lodge an appeal against that decision.

Now, the vendee was a patwari who, of course, was familiar with the measurement of land, while the plaintiff's mother was a woman quite inexperienced in these matters. From the guardianship record we find that the estimated value of the land was Re. 1 per square yard, that the vendee secured it at the nominal rate of

annas ten. But if the real area transferred be calculated the real price secured was only eight annas per square yard. From this it is clear that the bargain secured by the vendee was undoubtedly favourable to him, and whether or not the plaintiff's mothere ontemplated, without knowledge of its exact measurement, the sale of the property described in the deed of sale, it was clearly her duty as next friend of her minor son to plead that the sale of approximately more than 600 square yards was unauthorized and consequently was not binding on the minor. We accordingly hold that the previous litigation before Munsif Raja Ram does not bind the minor and in bringing this suit he is not estopped by it.

From the foregoing it follows that 321 square yards of the minor's land was sold by his guardian without authority ahd the plaintiff is consequently entitled to recover it.

The appellant has also contended before us that in his plaint the plaintiff made no reference to the previous litigation between the parties and that consequently he was not entitled to plead his mother's negligence, but the matter was raised by the defendant in his pleas and was the chief subject of contention in the Court below. There was no specific issue on the point but the matter was one for argument not for evidence and the defendant has been in no way prejudiced by plaintiff's failure to refer to the earlier litigation in his plaint.

Another point urged is that the quondam minor derived benefit from the sale and should offer restitution. The suit, however, is not for cancellation of the whole transaction but only for the cancellation of the unauthorized portion of it. No doubt the shops which constituted a portion of the consideration for the land sold have improved in value but the unearned increment of the portion of the land sold which will remain in the possession of the defendant is also very considerable. Even after the satisfaction of the plaintiff's decree the defendant will remain in possession of 600 square yards for which he gave in cash and kind only Rs. 475.

For these reasons we concur in the conclusions of the Court below and dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 290

HARRISON, J.

Khair Din and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 2019 of 1925, Decided on 17th March 1926, reported by the S. J., Ludhiana, on 7th December 1925.

Public Gambling Act (3 *of* 1867), *S.* 5—*Police cannot seize money, etc., found on the persons of accused.*

The power given to police in the first part of S. 5 to seize instruments of gaming and money, etc., found in the house does not extend to the seizure of money recovered on the search of the persons found in the house. The search is limited to the recovery of instruments of gaming found on the person and, therefore, the police has no power to seize money found on the person of the accused : *A. I. R.* 1924 *Patna* 42 : 26 *Bom.* 641 ; 44 *Bom.* 686 ; 26 *All.* 270 ; and 41 *All.* 366, *Ref.* [P. 291, C. 2]

Hakumat Rai—for Petitioners.

Gobind Ram Khanna—for the Crown.

Facts.—Abdul Aziz and nine others were challaned by the police under S. 4 of Act III of 1867. Abdul Aziz was also challaned under S. 3 of the Act on the allegation that he was the keeper of the gaming house in which the accused were found. The accused gave various explanations regarding their presence in or about the house in question, but the learned Magistrate disbelieved their defence and convicted all the the accused under S. 4 of the Act.

Abdul Aziz was sentenced under S. 3 of the Act to pay a fine of Rs. 25 and under S. 4 of the Act to pay a fine of Rs. 20. All the other accused were sentenced to pay a fine of Rs. 30 each under Section 4 of Act III of 1867. The Magistrate also ordered the cards, dice and all moneys found in the house or on the accused at the time of the raid to be forfeited.

Grounds.—Only two of the convicts, namely, Khair Din and Mohan Lal have presented an application for revision of the order of the Magistrate and on their behalf it was urged : (1) that they had committed no offence, as the warrant on the authority of which the house in question was raided was defective and irregular, (2) that in any case the order of the Magistrate directing forfeiture of money found on the persons of the peti-

tioners was wrong. Before proceeding further, it may be stated that the order regarding forfeiture of money found on the persons of the petitioners is not appealable. The order of conviction in this case having been passed by a Magistrate of the 1st Class is clearly not appealable and the order of forfeiture having been passed under S. 8 of the Gambling Act and not under S. 520 of the Criminal P. C. is, therefore, not appealable as was held in *Queen-Empress* v. *Havia* (1).

After going through the record and hearing counsel for the parties, I have come to the conclusion that the contention of counsel for the appellant regarding the defective nature of the warrant is not well founded.

According to law, the officer issuing the warrant is to fix the period within which the warrant is to be executed. In the present case, the Superintendent of Police fixed this period at 15 days and the figure "15" was written in manuscript in the warrant. The learned counsel for petitioners contended that the figure "15" was not initialled by the Superintendent Police and that this figure might have been entered in the warrant by the Sub-Inspector subsequent to its being signed by the Superintendent of Police. There is no doubt that the figure "15" which is in manuscript in the warrant in question is not initialled by the Superintendent of Police but there are some other entries in the warrant which have been written in manuscript and which are not initialled by the Superintendent of Police. The Superintendent of Police is a responsible Officer and it may be psesumed that before signing the warrant he would see that it was complete in every respect, and from the statement of the Sub-Inspector it is clear that the warrant was complete before it was signed by the Superintendent of Police. Under these circumstances there is no force in the contention that the figure "15" was inserted in the warrant subsequent to its having been signed by the Superintendent of Police.

The contention that the house had not been proved to be a common gaming house was not pressed and thus the petitioners' contention No. 1, given above fails.

(1) [1886] 10 Bom. 196.

The second contention, however, appears to be sound. The order of forfeiture, as stated above, was passed under S. 8 of the Act. The seizure of articles directed to be forfeited is authorized by S. 5 of the Act and it remains to be seen whether that section authorized the police to seize money found on the persons of the accused being searched. A perusal of S. 5 shows that seizure may take place in two ways: (1) instruments of gaming and money, etc., found in the house may be seized by the police; (2) the house and the persons of its occupants may be searched for recovery of the instruments of gaming and the instruments of gaming so recovered may be seized by the police.

Thus it will appear that S. 5 does not authorize the police to search the persons of the occupants of the house, except for the recovery of instruments of gaming and that according to this section the police had no power to seize money on the persons of the petitioners.

The learned Public Prosecutor contended that according to S. 5, the police was authorized to seize instruments of gaming and cash, etc., found in the house and that the accused persons having been present in the house at the time of search, the money recovered from their possession was found in the house and was liable to be seized by the police under S. 5 of the Act. After careful consideration, I am of opinion that this contention is not sound. Had this contention been sound, there was no necessity for the Legislature after authorizing the Police to seize instruments of gaming and cash etc, found in the house to make a further provision for the search of the house and the search of the persons found therein. The fact that the Legislature considered it necessary to make a further provision for empowering the police to search the house and persons of its occupants, leaves no doubt in my mind that the power given to police in the first part of S. 5 to seize instruments of gaming and money etc, found in the house does not extend to the seizure of money recovered on the search of the persons found in the house. The search is clearly limited to the recovery of instruments of gaming and, therefore, the police had no power to seize money found on the persons of the petitioners. In this view, I am fortified by two rulings

of the Bombay High Court namely *Emperor* v. *Wallimussaji* (2) and *Emperor* v. *Sadashiv* (3) which are based on Bombay Act No. 4 of 1887, the provisions of which on the point at issue appear to be identical with those of Act 3 of 1867.

I, therefore, submit the records of the case to the High Court with the request that the order of the Magistrate directing the forfeiture of money found on the persons of the petitioners may be set aside and that orders may be passed as to the refund of Rs. 66/8/0 and Rs. 10/0/3 found on the persons of Khair Din and Mohan Lal, petitioners, respectively.

In this case, the learned Magistrate has committed another mistake, which I think it my duty to bring to the notice of the Honourable Judges for proper order. Abdul Aziz has been convicted under S. 3 of the Act and sentenced to pay a fine of Rs. 25/-. He has also been convicted under S. 4 of the Act and directed to pay a fine of Rs. 20/-. In my opinion, Abdul Aziz could not be convicted under both the sections.

He is said to be the keeper of the gaming house and therefore his conviction, in my opinion, under section 4 of the Act is wrong. I, therefore, submit that the conviction of Abdul Aziz under S. 4 of the Act may be set aside if the Honourable Judges think it proper.

Note: The fine has been paid.

Order.—A raid on a gaming house in Ludhiana City was made on the 2nd March 1925. Ten men were convicted under S. 4 and one Abdul Aziz was also convicted under S. 3, and they were all sentenced to fines. The sentences not being appealable, the learned Sessions Judge has sent up the cases and recommended revision on two grounds (1) that Abdul Aziz should only have been convicted under one section and (2) that the property discovered when the accused were searched was not shown to have been used for gaming, was wrongly confiscated by the Magistrate, and should now be returned to the owner.

It is obvious that the learned Sessions Judge is perfectly correct in the view he has taken on both points. In spite of this the District Magistrate has moved the Crown to resist the application and to oppose the doing of a simple act of justice being done. This appears to me to be a very curious proceeding. I can only suppose that neither the District Magistrate nor the Government Advocate has read the case himself.

So far as the conviction under S. 4 of Abdul Aziz is concerned counsel does not oppose its cancellation. It must obviously be cancelled. So far as the return of the money is concerned counsel quotes *A. I. R.* 1924 *Patna* 42. This ruling does not support him though it points out that if the money had been proved to have been used for gaming it would have been liable to forfeiture. The Magistrate held that the fact that it was dusty was sufficient to establish that it had been staked on a dusty floor. This is too far-fetched and I find that whatever may be suspected there is no sort of evidence that the money was used for gaming. The learned Sessions Judge has quoted the Bombay authorities on the subject, namely *Emperor* v. *Walli* (2) and *Emperor* v. *Sadashiv* (3), these being under the Bombay Act which is similar to the Public Gambling Act. To these should be added *A. I. R.* 1924 *Patna* 42, *Emperor* v. *Tota* (4) and *Tulla* v. *Emperor* (5).

I set aside the order directing the forfeiture of the sum of Rs. 66/8, and Rs. 10/0/3 found on the persons of Khair Din and Mohan Lal respectively and order that these sums be returned to them.

The conviction of Abdul Aziz under S. 4 is set aside. The fine of Rs. 20 imposed under that section, if paid, will be refunded.

Conviction set aside.

(2) [1901] 26 Bom. 641=4 Bom. L. R. 427.
(3) [1920] 44 Bom. 686=22 Bom. L. R. 197.
(4) [1904] 26 All. 270=(1904) A. W. N. 11.
(5) [1920] 41 All. 366=17 A.L.J. 368.

A. I. R. 1926 Lahore 292

ABDUL RAOOF AND HARRISON, JJ.

Bhai Jawahar Singh and Sons—Defendants—Appellants.

v.

Secretary of State — Plaintiff—Respondent.

First Appeal No. 1531 of 1921, Decided on 28th May 1925, from the decree of the Senior Sub-J., Lahore, D/- 31st May 1921

Appeal—Duty of printing documents is on the party for whom they are necessary and essential in appeal—Party impugning the correctness of a document must print it.

The party on whom the duty of printing documents falls is not the party which relies on the document in the sense that he produced it, but the party for whose case in appeal the document is necessary and essential, and it is as necessary and essential to an appellant who impugns the correctness of a document, or contends that it has not been correctly weighed and interpreted, that it should be printed as that the judgment, which he attacks, should be printed. The test is whether the appeal can proceed and can be argued without it, and whether the appeal is self-contained. If in addition to the documents considered by the lower Court in its judgment or referred to in the plaint other documents are required by the other side, it is for that side, which requires them, to have them printed.

[P. 296, C. 2]

Moti Sagar and *Durga Das*—for Appellants.

Noad and *Ram Lal*—for Respondent.

Harrison, J.—In this suit the Secretary of State sued firm Bhai Jawahar Singh and Sons, claiming damages for breach of a contract. He was given a decree for the full amount claimed of Rs. 24,328-11-1, and the defendant firm appeals.

The facts as stated in the plaint are that the Inspector-General of Prisons invited tenders for the supply of yarn suitable for the manufacture of prisoner's clothing, etc., etc., for a period of 12 months. In reply to this letter the defendant firm tendered. The tender was accepted and a formal agreement was executed on the 18th August 1917. The terms of the agreement were that the defendants were to supply cotton yarn to the various jails in the province in accordance with demands to be made by them. Several orders of October and November were not complied with and a letter was written on the 7th November drawing the attention of the defendant firm to this fact and threatening it that unless the goods were supplied they would be purchased in the open market and the difference would be charged to them.

Further defaults were made and on the 6th December the Inspector-General served a registered notice upon the defendants calling upon them to comply with the demands and pointing out the consequences which would follow upon failure to do so. To this the defendant firm replied by a letter dated the 14th December 1917, printed at page 62, in which they asserted that the plaintiff had broken the contract by ordering cotton which was not covered by the terms of that contract, demanded their security back and the payment of outstanding bills and recited categorically that under these circumstances they were compelled to rescind the contract. In the following month the Inspector-General issued instructions to the Superintendents of various Jails that, as the firm was unable to supply yarn, purchases might be made in the open market up till the date on which the contract would have terminated.

In the present suit the plaintiff claims damages representing the difference between the prices that were actually paid in the open market for the cotton required and the prices at which the defendants had contracted to supply. In their reply, the defendants traversed most of the allegations made by the plaintiff. They contended that the agreement was bad on account of vagueness, that the contention contained in their letter of the 14th December was quite correct, that it was the plaintiff who had broken the contract by ordering goods not covered by the terms of the contract and by delaying payment for the goods supplied, and that they themselves had committed no breach whatever.

They questioned the correctness of the plaintiff's allegation as to the purchase of the goods and the rates paid. In para. 5 of the plaint it had been stated that owing to a rise in the price of cotton yarn the defendants stopped supplying yarn to the jails. To this the defendants' reply was that:

> It is not admitted that the rate of yarn rose in the month of October 1917 and that the defendants accordingly stopped supplying goods. The rest of the paragraph is not denied.

This we can only read as meaning that they did stop supplying goods but that the reason was, was not as given in the plaint The defendants also took a point regarding what are called half counts, which was definitely dropped in appeal. On the 18th January 1919 Mr. Mahtab Singh, who was appearing for the plaintiff, stated that the defendants had broken the contract on the 14th December and refused to carry out the terms of the contract.

On these pleadings 15 issues were framed and the trial Court held that

a breach had been committed on the 14th December which entitled the plaintiff to claim damages, and that the amount of damages was proved by the evidence which consisted of the oral statements of various jailors and of the documents produced by them. It held that the agreement was not bad for vagueness and that the plaintiff had not committed any breach by ordering cotton for purposes not indicated in the contract.

On appeal the points pressed by counsel are that the agreemont was bad for vagueness, that the plaintiff did commit a breach by ordering goods not covered by the terms, that the defendants did not commit any breach and that this letter dated 14th December amounted to nothing more than an offer or notice intimating their intention not to carry out the terms of the contract, that this was a nullity until either acted upon or accepted by the plaintiff and as it was not so accepted nor acted upon, it had no effect whatsoever. He further contends that even if damages be decreed against him, the plaintiff has not proved the amount which he is liable to pay. The point regarding the vagueness of the terms of the contract is not seriously pressed. The contract is for an indefinite supply of cotton to be ascertained at subsequent dates. The quantities were subsequently ascertained as the requirements of the various jails materialize.

So far as the purpose for which the cotton was to be used is concerned, the defendants took their stand on the terms of the letter calling for tenders as recited in the plaint. This stated that cotton yarn was required for prisoners' clothing, etc., etc. In the letter printed at page 62, in which the defendants stated very clearly that they had no intention of carrying out the contract they omitted the words "etc., etc." and said that "the contract was limited to supply of cotton for the manufacture of prisoners' clothing only." This was not the case and the interpretation placed upon the invitation by the defendants themselves may be seen from their tender printed at page 4, the schedule at page 5 signed by them, and the agreement at page 6 in which they make no mention of the purposes for which the cotton was required and merely speak of "the said goods." In the schedule at page 5 one of the descriptions of supplies required is "bump yarn for ropes," and the defendants have been wholly unable to explain how this could be required for prisoners' clothing.

It is then urged that the words "etc., etc." must be read as meaning ejusdem generis. The requirements of prisoners, under this head so far as we know, are confined to clothing and woollen blankets and the words "etc., etc.," cannot therefore refer to their requirements. It is admitted by the plaintiff that he did order yarn for manufacturing muslins, dusters and other articles, and supplied these manufactured articles not only to other Government departments but also to the general public. We are of opinion that the words "etc., etc." cover all purposes for which cotton is required in the jails whether for the manufacture of goods or for internal consumption. It has not been contended that any unreasonable quantity of cotton was demanded nor that the defendants were prejudiced or injured in any way by the nature of the demands and the qualities required being of an unexpected or unprecedented description. We hold that the contract was good and valid. The questions remain of whether the contract has been broken, and if so, who is responsible for the breach.

The position taken by the defendants is that the preliminary stage consisting of their repeated failures to supply the goods ordered and the action taken by the plaintiff in writing to them on the 6th December 1917 must be ignored as mere preliminaries and that the first step towards the breach was committed by them in writing their letter of the 14th December 1917, in which they categorically refused to carry out the contract. This, it is pointed out, amounted only to a notice or offer under S. 39 and unless it was accepted or acted upon, it was wholly inoperative and void. The plaintiff on the other side contends that, even if this view be taken, he did act upon their letter, in that he stopped sending further demands and did supply his requirements from the open market. He contends that the fact that he did so piecemeal or on various dates throughout the year as requirements arose is wholly immaterial. We have been referred by counsel to *Bilaseram* v.

Ezekiel (1) *Rash Behary* v. *Nrittya Gopal* (2), and *Manindra Chandra* v. *Aswani Kumar* (3), and we agree with M. Moti Sagar that this position, as defined by him, is quite correct so far as the future requirements were concerned presuming always that this letter of the 14th of December amounts to a notice or offer under S. 39.

The plaintiff's claim may be divided into two halves, the first being the damages claimed on account of the high price of the goods purchased to supply the deficit caused by the failure of the defendants to carry out the orders received before the 14th of December, and the second consists of the damages claimed on account of the purchases made at high prices during the remainder of the year and it appears to be that while the plaintiff is entitled to the first he is not entitled to the second. On receiving this letter of the 14th of December the plaintiff had three courses open to him. He could write acknowledging its receipt and accepting the position as there defined, and so fulfil the requirements of S. 39. He could also act upon the letter by going into the open market and purchasing his requirements for the year, and in either case he could sue the defendants for damages, these damages being calculated at the date, i.e., at a future date on which the requirements would arise, this calculation being necessarily a matter of guess work. If he did not adopt either of these alternatives he could ignore the letter and treat the contract as still subsisting. But, if he did so, it must inure for the benefit of both sides, and S. 48 of the Contract Act would apply. It was not possible for him to go on accepting the offer of the 14th of December in instalments throughout the year. The various authorities quoted do not say definitely in so many words that he could not do so, but they make it quite clear, in our opinion, that this is the position. If he does not take action by word or deed he cannot keep the contract alive for his own purpose and treat it as rescinded so far as any benefit, which might accrue to the defendants, is concerned. In other words if he does not adopt either of the alternative courses, whereby he can put an end to the contract, he must inform the defendants of his requirements as they arise so as to enable them, if they wish, to repent and to carry out their contract so far as it affects the remaining instalments. We do not wish to be understood to lay down that the purchase must be made as one transaction and that reasonable latitude would not be allowed to the promisee in providing himself with the goods. This latitude would doubtless cover the purchase from several sellers extended over a reasonable time, but in our opinion it could not cover the facts of this case so far as it includes the waiting for the actual amounts to be ascertained and the extension of the purchases over many months.

In this case the plaintiff did not adopt any of the three courses open to him in its entirety. He accepted the offer of the 14th of December in so far as he went into the market and supplied his wants represented by the goods he had ordered and which the defendants had failed to supply. He might at the same time have supplied his future wants which would accrue during the rest of the year. But the fact that he did not do so does not, in our opinion, debar him from claiming damages on the amount of goods which he did buy there and then. It was unnecessary for him to communicate the fact of his purchase; his action in making the purchase was sufficient. We, therefore, find that he is entitled to the first part of his claim only.

The ultimate position of the plaintiff is that continued defaults were made which constituted a notice to him of the defendants not to be bound by the contract and not to carry out its provisions. He replied in his letter of the 6th December in which he had accepted the notice and left it open to the defendants to withdraw it by carrying out their part of the bargain. As explained in *Bilasi Ram* v. *Ezekiel* (1) this letter is not sufficiently definite by itself to terminate the contract, and even though the defendant by their reply of the 14th December, definitely refused to accept the opportunity given them that refusal cannot be treated as dating back in such a way as to render the unconditional acceptance contained in the letter of the 6th December an unconditional and absolute acceptance except to the extent described above. There, is, therefore, in our opinion no such de-

(1) [1916] 43 Cal. 305=20 C. W. N. 240=23 C.L.J. 62.
(2) [1906] 33 Cal. 477=3 C.L.J. 249.
(3) [1921] 48 Cal. 427=32 C.L.J. 168=25 C.W.N. 297.

finite acceptance and no such definite act on the part of the plaintiff as is required by S. 39. The contract was, therefore, kept alive so far as the late requirements are concerned.

As regards the measure of damages to which the plaintiff is entitled it is contended by counsel that the plaintiff is entitled to none as he has not followed the procedure laid down in the agreement and called upon the superintendents of the various jails to assess the damages, and after their doing so he has not allowed one month to the defendants in which to appeal against their decision to the Inspector-General. He relies on para 4 of the contract. We are of opinion that there is no force in this contention. It is not a question of a reference to arbitration. The Superintendents of the Jails or any other subordinates of the Secretary of State could only sue for damages in accordance with S. 74 of the Contract Act, and it is these damages which the plaintiff claimed.

Regarding the actual amount and the rates, etc., the defendants contend that their appeal must succeed because the respondent has failed to print all the documents on which he relies and quotes *Kartar Singh* v. *Labh Singh* (4) in support of this view. In our opinion this ruling does not place the interpretation, which they wish, on the rules regarding printing. In that case it is clearly stated that the District Judge considered one document only and rested his decision thereon. The Judges of this Court took a different view of the value of that document and this finally decided the case. The respondent wished to rely upon other documents which he had not asked to have printed and some of which were apparently named but not considered by the District Judge. In this case it is not a question of mere reference to the documents for the trial Court has clearly relied upon them and considered them in its judgment and based its decision upon them, and, therefore, we are of opinion that under Rule 1, Chapter XX, of the Rules and Orders of the High Court, Vol. V, it was the duty of the appellant to print these documents. In the second place the portion of this ruling which follows the decision regarding the one document ; is, in our opinion, an obiter dictum. The old rule was very clear and the recent amendment of 1922 runs as follows :

(1) (a) Plaint and Pleas (b) Such documents either referred to in the plaint as forming the basis of the suit or considered by the lower Court in its judgment as may be specified by either party in response to a notice within the period of 30 days etc.

And the party on whom the duty falls is not the party, which relies on the document in the sense that he produced it, but the party for whose case in appeal the document is necessary and essential and it is as necessary and essential to an appellant who impugns the correctness of a document or contends that it has not been correctly weighed and interpreted that it should be printed as that the judgment, which he attacks, should be printed. The test is whether the appeal can proceed and can be argued without it and whether the appeal is self-contained. What the appellant does in this case is to contend that the lower Court was wrong and must be held to have given a wrong decision, because the respondent did not have certain documents printed. If in addition to the documents considered by the lower Court in its judgment or referred to in the plaint other documents are required by the other side, it is for that side, which requires them, to have them printed. Counsel points to Rule 5 (1), the last two lines of which seem to contain a mistake. Whether they do or do not, the earlier part of the chapter is, in our opinion, quite clear. The defendants-appellants have not seen fit to have any of the documents printed which they wish to attack, and cannot therefore refer to them, and they are unable to show that damages awarded by the trial Court have not been correctly calculated.

The only question remaining is up to what purchases or rather damages on purchases of goods indented for before the 14th December are to be allowed. Counsel for the defendants has suggested that if the various pleas of vagueness, etc., are not successful purchases up to the 31st December should be allowed. We do not consider this would give a reasonable opportunity for the purchase of the goods and we take the 31st January 1918, as the last day on which the plaintiff was entitled to act and render the defendants liable. Before the 14th December the plaintiff had made good the de-

(4) A.I.R. 1923 Lah. 355.

faults of the defendants and acted upon their refusal to the extent of purchasing goods for which he had to pay Rs. 619-13 more than the contract rates. Between the 14th December and the 31st January he similarly purchased goods for which he had to pay Rs. 3,428-14 more than the contract price. While keeping in mind that the purchases are not to be allowed to exceed the indents we have not confined the purchases strictly to the identical jails and have allowed a purchase of the same amount as a previous indent even if shown against another jail. The final result is therefore that the plaintiff is entitled to Rs. 4,048-11. We accept the appeal of the defendants in so far as to reduce the amount of damages Rs. 4,048-11.

The defendants have succeeded on a highly technical point and the equities are entirely with the plaintiff, whose suit has failed to the extent of five-sixths because he did not observe the very strict and very technical requirements of the law. We leave the parties to bear their own costs throughout.

Appeal partly accepted.

A. I. R. 1926 Lahore 297

SHADI LAL, C. J.

Ram Saran Das and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Reference No. 1523 of 1925, Decided on 13th February 1926, made by the S. J., Karnal, on 8th September 1925.

Penal Code, S. 171-C—Preventing rival candidate from going out of his house for inducing voters is not offence.

Where the complainant, a candidate for election, was prevented from coming out of his house and going to the voters by his rival candidate and the latter's supporters who were picketing the former's house.

Held: that the accused, the rival candidate, is not guilty of an offence under S. 171-C.

[P 298 C 2]

Moti Sagar and *M. L. Puri*—for Petitioners.

Shamair Chand—for Complainants.

Facts.—On the night of the 13th of July 1925 Shikar Chand, one of the two rival candidates for a Municipal seat at Rohtak, sent a telegram to the Revenue Assistant that Har Sarup, his rival, and his agents and helpers were threatening his voters and obstructing them in coming out of their houses by picketing outside their doors in large numbers. On this a number of persons have been challaned by the police under Ss. 341, 342 and 143 and the case is being heard by the Tahsildar Magistrate, Second Class, of Rohtak.

Objection was taken to the prosecution by the accused that the case was not triable without the previous sanction of the Local Government under S. 196 of the Criminal P. C. This objection was overruled by the Magistrate and a petition for revision has now been presented to this Court.

Grounds.—I have heard Lala Sham Lal for the applicants. He points out that the offence described above falls within the purview of S. 171-C of the Indian Penal Code which lays down that

> whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election

and that

> whoever threatens any candidate or voter with injury of any kind shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter within the meaning of sub-S. (1).

He cites *Ram Nath* v. *Emperor* (1) in which it was held that

> where two provisions defining different offences, one specific and the other general, are applicable to a case, the specific provision ought to be applied in preference to the general one and that where the law says that it is a condition precedent to a prosecution in respect of certain offences that a sanction must be obtained from the Local Government, it is not open to any subordinate authority to override the provisions of the law by saying that the offence also falls under a different definition and that, therefore, the offender may be prosecuted without any sanction.

This ruling was brought to the notice of the Magistrate also, but he disagreed with it on the authority of *Ram Nath* v. *Emperor* (2) and *Ranchhod Sursang* v. *Emperor* (3). The former ruling has however been distinctly dissented from in *Ram Nath* v. *Emperor* (1), while in opposition to the Bombay case the applicant's counsel cites *Lekhraj* v. *Emperor* (4) in which it was held that

(1) A. I. R. 1925 All. 230.
(2) A. I. R. 1924 All. 684.
(3) A. I. R. 1924 Bom. 502.
(4) [1910] 31 P. R. 1910 Cr.=194 P. L. R. 1910.

in a case triable exclusively by a Court of Sessions, a Magistrate has no power to assume jurisdiction by framing charges of minor offences. In my opinion the case cited by the applicants' counsel, *Ram Nath* v. *Emperor* (1), is exactly in point and as an offence under S. 171-C is not triable by a Magistrate of the Second Class I think the Tahsildar (who is a Magistrate of the Second Class) should not have assumed jurisdiction by holding that the case also fell under Ss. 341, 342 and 143, which are all minor offences as compared with S. 171-C (having regard to the maximum sentence which can be passed under these sections).

As regards the argument that the obstruction in this case was not at the time of election but on the previous night the definition in S. 171-C (1) itself is clear. It does not lay down that the obstruction should be at the time of election but that whoever voluntarily interferes with the free exercise of any electoral right commits the offence of undue influence at an election. So far as I can see this includes an obstruction at a time preceding the election.

The case is, therefore, submitted to the High Court for revision with a recommendation that the case may be withdrawn from the Court of the Tahsildar and prosecution stopped until the complainant has obtained sanction of the Local Government for prosecution.

Order.—The question for determination is whether the Magistrate was precluded from taking cognizance of the case, because the sanction of the Local Government was not obtained under S. 196, Criminal P. C., for instituting the complaint. Now the case for the prosecution, as disclosed in the statement of the complainant Shikar Chand, is to the effect that on the night of the 12th July (not 13th July, as wrongly stated by the Sessions Judge), 1925, Shikar Chand, who was a candidate for election to the Municipal Committee at Rohtak, was prevented from coming out of his house and going to the voters by his rival candidate and the latter's supporters who were picketing the former's house. It must be remembered that there was no election on that night and that the election was to take place on the 13th July.

The facts do not make out any prima facie case that the accused committed the offence of undue influence at an election as defined in S. 171 C of the Indian Penal Code. It cannot be seriously contended that the accused interfered or attempted to interfere with the free exercise of an electoral right or threatened any candidate or voter with injury of any kind. Shikar Chand, no doubt, desired to go on the night in question to voters in order to induce them to cast their votes in his favour on the following day, and he was prevented by the action of the accused from canvassing their votes. The offence committed by the accused may or may not come under Ss. 341 and 342, Indian Penal Code, but I do not think that the allegations of the complainant bring the case within the purview of S. 171-C.

Upon this finding it is unnecessary to consider the question whether, where a person is accused of committing acts which constitute a grave offence requiring sanction under S. 196 and also a minor offence which requires no sanction, the omission to obtain a sanction precludes the Court from trying him for the minor offence. In the present case I am clear that upon the allegation of the complainant no offence requiring sanction was committed, and that there is no law which offers any obstacle to the trial of the accused by the Magistrate.

Order accordingly.

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* A. I. R. 1926 Lahore 298

MARTINEAU, J.

Achhru Mal—Petitioner.

v.

Emperor—Respondent.

Criminal Revision No. 1366 of 1925. Decided on 8th January 1926, reported by the Addl. S. J., Ferozepore.

* *Criminal P. C. (as amended 1923), S. 250—Order to show cause has only to be contained in order of discharge—Compensation order is necessarily subsequent.*

By S. 250 as before amendment, the order for payment of compensation had to be made by the order of discharge, but as amended it is only the order calling upon the complainant to show cause why he should not pay compensation that has to be contained in the order of discharge and the order for payment of compensation is necessarily a subsequent order: 57 *P. R.* 1905 *Cr., Dist.* [P 299 C 1]

Sundar Das—for Petitioner.

Judgment.—*Narpat Rai* v. *Emperor* (1) cited by the learned Additional Sessions Judge was a ruling under the Code of 1898. By S. 250 of that Code the order for payment of compensation had to be made by the order of discharge. The law has now been amended and by the present S. 250 it is only the order calling upon the complainant to show cause why he should not pay compensation which has to be contained in the order of discharge. The order for payment of compensation was necessarily a subsequent order. The Magistrate followed the correct procedure, and I decline to interfere. Let the records be returned.

Revision dismissed.

(1) [1905] 57 P. R. 1905 Cr.

A. I. R. 1926 Lahore 299

JAI LAL, J.

(*Firm*) *Gulab Ram Lehri Mal*—Plaintiffs—Appellants.

v.

Ganga Sarup and *another* — Defendants—Respondents.

Second Appeal No. 1893 of 1925, Decided on 3rd February 1926, from a decree of the Addl. Dist. J., Ferozepore, D/- 16th May 1925.

Evidence Act, S. 102—*Bond jointly executed by all defendants—One defendant admitting execution—Admission is presumptive proof of the recitals in the bond—Burden is on defendants to prove contrary.*

Where one of the defendants admits the execution of the bond alleged to be executed by all the defendants jointly, in respect of a partnership, such an admission is not conclusive, but it amounts to presumptive proof of the allegation of the plaintiff, and, therefore, the burden should be placed on the defendants to prove the non-existence of a partnership.

[P 299 C 2; P 300 C 1]

Shamair Chand—for Appellants.

Manohar Lal—for Respondents.

Judgment—The suit out of which this appeal has arisen was instituted by the plaintiff-appellant against the respondents and their brother Badri Das for the recovery of Rs. 505-0-6 alleged to be due on a bond executed by the defendants. Badri Das alone defended the suit. In the trial Court proceedings were ex parte against the respondents. Badri Das admitted execution of the bond, but denied receipt of consideration and also alleged that the bond was executed owing to undue influence exercised by the plaintiff. The bond recites that the three defendants are brothers and were partners in a business with the plaintiff that as a result of the settlement of the partnership accounts Rs. 4,000 were due from the defendants to the plaintiff and for this amount the bond was executed by all the three defendants. The learned District Judge reversing the decree of the trial Court has dismissed the suit as against the respondents holding that it had not been proved that they were partners in the business with their brother Badri Das. On the plea of undue influence he held against the defendants. The learned Judge also held that consideration for the bond had been proved so far as Badri Das was concerned and, therefore, the suit was decreed against him alone.

On appeal it is contended before me that in the face of the recitals in the bond to the effect that the three defendants were partners in the business, though ostensibly it was carried on in the name of the eldest brother Badri Das, the learned District Judge should have started with a presumption against the defendants, and that the proceedings against the defendants being ex parte, unless the plaintiff's evidence definitely proved that the recitals in the bond were wrong, the plaintiff's suit should have been decreed. In my opinion there is force in this contention. The respondents produced no evidence. The plaintiff's evidence does not disprove the existence of a partnership between the three defendants. The evidence, no doubt, is vague but then the plaintiff was not called upon to prove the existence of a partnership between the three defendants on the pleadings of Badri Das alone. The learned District Judge has rightly remarked that the onus should have been laid on the defendants to prove want of consideration.

As regards the admissions in the bond as to the existence of partnership the learned Judge says :

> It is, however, clear, that the admission has only some evidentiary value but that it is not conclusive.

Such an admission, no doubt, is not conclusive, but, in my opinion, it amounts

to presumptive proof of the allegation of the plaintiff, and, therefore, the burden should have been on the defendants to prove the non-existence of a partnership. Then the learned District Judge finally states

> that the partnership of Defendants Nos. 2 and 3 with the plaintiff was not established on the record, that there was no presumption to that effect and the material adduced militates strongly against the contention of the plaintiff.

Now the learned District Judge, after making an almost correct statement of the law, made a mistake in its application. As I have already stated the presumption being against the defendants in this case, and the proceedings being ex parte against them, they have failed to rebut the presumption, and as the evidence produced by the plaintiff did not prove the non-existence of a partnership between the defendants, the plaintiff was entitled to the decree prayed for. Accepting this appeal I set aside the decree of the learned District Judge and restore that of the trial Court with costs throughout.

Appeal allowed.

A. I. R. 1926 Lahore 300

HARRISON AND JAI LAL, JJ.

Ragha Ram and *another*—Plaintiffs—Appellants.

v.

Dewa Singh and *others*—Defendants—Respondents.

Second Appeal No. 391 of 1922, Decided on 4th March 1926, from the decree of the Dist. J., Hoshiarpur, D/- 24th November 1921.

Punjab Pre-emption Act, S. 15 (*b*) (2)—*Co-owner—Rival claimants—One having additional qualification of being occupancy tenant is not of a higher status.*

Where the two rival claimants are co-owners the fact of one of them having an additional inferior qualification of being occupancy tenant will not improve his status. [P. 301, C. 1]

Tek Chand—for Appellants.

Badri Das—for Respondents.

Judgment.—The same question is involved in these three connected appeals. The plaintiff is an owner in the estate, in which the land is situated, as is also the vendee. In addition to being an owner he is also an occupancy tenant in agricultural land in the estate. He, therefore, has two qualifications, of which one is superior and the other inferior. The vendee has the superior qualification but lacks the inferior. The contention is that on the strength of the additional inferior qualification the plaintiff has a right, to pre-empt. His suits have failed in both the lower Courts and the question has been argued before us by Mr. Tek Chand for the appellant, and Mr. Badri Das for the respondent. Both are agreed that there are only three rulings on this or a similar question, i. e., *Jaideo* v. *Bhagwan Das* (1), *Naba* v. *Pathan* (2), and *Khairdin* v. *Ghulam Mohiuddin* (3). Mr. Tek Chand contends that *Jaideo* v. *Bhagwan Das* (1), does does not lay down sound law and that it is to be inferred or deduced from 43 *P. R.* 1914 (2), and from the wording of S. (15) (b) and (c) that the additional inferior qualification strengthens the plaintiffs' claim. On the other hand it is pointed out that the word used is 'vest', and once the right has vested there is the end of the matter, and it cannot re-vest or additionally vest, and this is the view taken in *Jaideo* v. *Bhagwan Das* (1), which is a clear and conclusive authority. The section lays down the order in which pre-emptors stand, and once the place of a pre-emptor has been determined it cannot be affected by the fact that he does or does not hold any further or additional qualification, which in the absence of the first or main qualification could or would be taken into account. Mr. Tek Chand contends that it stands to reason that where we find the qualifications under one head equal we must look to any additional qualification in order to decide between the rival claimants, and he points to the fact that in S. 15 (b) a co-sharer, who is also an agnate is treated as superior even to a nearer agnate who takes the additional qualification and, therefore, he says we find credit given to a mere numerical superiority of qualifications. To us it appears that the wording of this sub-section points exactly to the contrary conclusion. The Legislature in S. 15 (b) (2) did provide for a composite or double qualifications in the case of an agnate, who

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(1) [1909] 82 P. W. R. (1909)=62 P. L. R. 1909.
(2) [1913] 60 P. R. 1913=53 P. L. R. 1913=72 P. W. R. 1913.
(3) [1914] 43 P. R. 1914=52 P. L. R. 1914=142 P. W. R. 1914.

is also a co-sharer, and the fact that it did not do so in the case of a co-owner who is also an occupancy tenant, shows, in our opinion, that it was not intended that the combination of these two qualifications should prevail over the simple qualifications of a co-owner. It is also true that there is some connexion between the co-sharer, and the agnate, that is to say, between the two qualifications when combined in the same person, whereas there is no connexion between the co-ownership and the occupancy tenancy. We hold, that the decision of the learned District Judge, is perfectly correct, and that no number of additional inferior qualifications can improve the status of the man claiming in virtue of belonging to a superior class. In both *Khair Din* v. *Ghulam Mohiuddin* (3) and *Naba* v. *Pathan* (2) the position was the reverse and the two claimants shared the inferior qualification, but one of them had a superior qualification and, naturally, in virtue of that superior qualification, he ousted the rival claimant.

We dismiss the appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 301

HARRISON, J.

Emperor—Petitioner.

v.

Salig Ram and *another*—Accused—Respondents.

Criminal Revision No. 1499 of 1925, Decided on 13th February 1926, against the order of the S. J., Amritsar, D/- 8th July 1925.

* *Criminal P. C., Ss.* 264, 265, 263 *and* 262—*Summary trial—No formal charge need be framed whether the case is appealable or not.*

The language of Ss. 264 and 265 when read with Ss. 262 and 263 makes it clear that in no summary trial whether it be appealable or non-appealable, need a formal charge in writing be framed. S. 264 (2), especially when read with the opening words of S. 265, makes it clear that the judgment and the judgment alone, embodying as it does, the substance of the evidence and the particulars mentioned in S. 263, is the self-contained record of the case, and apart from this record, there is no other, and what is more there is no document, which can be defined or described as a portion of a record ; *A. I. R.* 1924 *Cal.* 63, *Diss.* [P 301 C 2 ; P 302 C 1]

Ram Lal—for Petitioner.

Judgment.—Although this case is of small importance in itself, the question involved as to the procedure affects a very large number of Courts exercising summary powers in this province. The accused was found guilty after a summary trial under S. 381, and sentenced to three months' imprisonment, an appealable sentence. No written charge was drawn up. He appealed to the Sessions Judge, who followed *A. I. R.* 1924 *Cal.* 63 and ordered a re-trial.

Against this order the Crown has presented a petition for revision, and Diwan Ram Lal has drawn my attention to the wording of Ss. 262, 263, 264 and 265 of the Criminal Procedure Code, and also certain rulings ; Ratan Lal's Bombay High Court Unreported Cases page 768, 57 *I. C.* 454 ; 2 *Cr. L. J.* 375 and also to Volume 11, page 180, of the Rules and Orders of this Court, in which it is stated that the framing of a formal written charge is not necessary. The Calcutta ruling, which has been followed by the Sessions Judge is very clear, and it lays down that whereas in regard to non-appealable cases it is stated in so many words in S. 263 that no charge need be framed, in S. 264, which deals with appealable cases, there are no words to this effect, and this omission, when coupled with S. 262, is tantamount to a clear direction that the ordinary procedure in warrant cases is to be followed and a formal charge is to be framed. The ratio decidendi I understand to be the silence of S. 264, but this section is also silent regarding the preparation of a record of evidence except in so far that sub-S. (2) states that the judgment shall be the only record in such cases. In order to reconcile the words of S. 264 (2), with *A. I. R* 1924 *Cal.*, 63 it appears to me to be necessary to hold that the charge is not part of the record or that what is usually called the record of the evidence is no part of "the record" in the sense in which the words are used in S. 264 (2), or that, in spite of the wording of S. 264 (2), the silence of S. 264(1) regarding the charge and the record of the evidence necessitates the preparation of both, while S. 264 (2) forbids their incorporation into the record of the case. In my opinion sub-S. (2), especially when read with the opening words of S. 265, makes it clear that the judgment, and the judgment alone, embodying as it does the substance

of the evidence and the particulars mentioned in S. 263, is the self-contained record of the case, and apart from this record, there is no other, and what is more there is no document, which can be defined or described as a portion of a record.

It is clear from the unreported Division Bench judgment of the Bombay High Court that the contrary view to that contained in *A. I. R.* 1924 *Cal.* 63, was taken by the Judges of that Court, and in *Tittu Saha* v. *Emperor* (1) a judge of the Patna Court did the same. *Kuchi* v. *Emperor* (2) which is a judgment of the Burma Chief Court, deals with a kindred question of the record of evidence, and in our own Rules and Orders emphasis is laid on the necessity of charging the accused in an appealable summary case but it is explained that the charge need not be reduced to writing. With all respect to the Judges of the Calcutta High Court who gave the decision, which has been followed by the Sessions Judge of Amritsar, I find that the language of Ss. 264 and 265, when read with Ss. 262 and 263, makes it clear, although this is nowhere said in so many words, that in no summary trial, whether it be appealable or non-appealable, need a formal charge in writing be framed.

I, therefore, set aside the order of the Sessions Judge in this case and direct that the appeal be heard on the merits.

Retrial ordered.

(1) [1920]P.H.C.C. 283.
(2) [1900]3 L.B.R. 3=2 Cr. L.J. 375.

A. I. R. 1926 Lahore 302

MARTINEAU AND ZAFAR ALI, JJ.

Sardari Mal and *others*—Defendants—Appellants.

v.

Ganga Ram and *another*—Plaintiffs—Respondents.

Misc. Appeal No. 2084 of 1924, Decided on 6th May 1925, from an order of the Dist. J., Ferozepore, D/- 7th April 1924.

(a) *Mortgage by conditional sale—Mortgagor in possession but failing to redeem—Limitation for a suit by mortgagee for possession as owner begins from the expiry of the year of grace.*

Where a mortgag provided that the mortgagor was to cultivate as tenant and that if the mortgage was not redeemed in four years, the transaction would become a sale, and where on first notice of foreclosure being held invalid, a fresh notice was issued and a suit for possession as owner was instituted by the mortgagee.

Held: that limitation ran from the expiry of the year of grace after the latter foreclosure proceedings: 35 *P. R.* 1899 and 94 *P. R.* 1912, *Dist.*

(b) *Mortgage—Limitation (obiter).*

There is no time-limit for the foreclosure of a mortgage by conditional sale. [P 303, C 1]

Behari Lal and *Muhammad Tufail*—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.—The question arising in this appeal is one of limitation. In 1899 the defendants' father mortgaged land by two deeds to certain persons, who in 1902 transferred their rights to the plaintiffs. The mortgage deeds provided that the mortgagor was to cultivate the land as a tenant under the mortgagees paying certain rents, and that if he did not redeem the land in four years the mortgages would become sales. The first foreclosure proceedings taken by the plaintiffs proved infructuous, the notices of foreclosure being held by the High Court to be invalid. Fresh notices of foreclosure were issued in 1919, and in 1922 the plaintiffs brought the present suit for possession as owners.

The trial Court held that the suit, not having been brought within 12 years from 1903, when the plaintiffs' right to foreclose accrued, was barred by limitation, but the learned District Judge on appeal held that time ran only from the date of expiry of the year of grace under the perfected foreclosure proceedings, and that the suit was therefore within time.

In our opinion the learned District Judge's decision is correct, as the mortgagees were not, under the terms of the mortgages, entitled to possession after the period of four years if the mortgagor failed to redeem. The trial Court relied on *Moman* v. *Ishri Pershad* (1) and *Nand Lal* v. *Goojar* (2), but both those cases were distinguishable. In the former the mortgage-deed contained a proviso by which the mortgagee would be at liberty to take physical possession and terminate the tenancy if the interest remained unpaid for more than a year, and in the latter the mortgagee was en-

(1) [1899] 35 P. R. 1899.
(2) [1912] 94 P. R. 1912=237 P. L. R. 1912=178 P. W. R. 1912.

titled under the mortgage-deed to immediate possession from the date of the mortgage. There were no such provisions in the mortgage-deeds in the present case, but the mortgagor's possession was to continue even on his failure to redeem the land after the expiry of four years. There is, as observed by the learned District Judge, no time limit for the foreclosure of a mortgage by conditional sale, [*Nagar* v. *Saudagar* (3)], and it was therefore, not till the expiry of the year of grace after the foreclosure proceedings of 1919 that the mortgagor's right to possession determined. The suit is consequently within time and we dismiss the appeal with costs.

Appeal dismissed.

(3) [1908] 57 P. R. 1908=115 P. W. R. 1908.

A I. R. 1926 Lahore 303

DALIP SINGH, J.

Mt. Mangli and *others*—Defendants—Appellants.

v.

Pohu Ram and *others*—Plaintiffs—Respondents.

Misc. Second Appeal No. 1982 of 1925, Decided on 22nd February 1926, from the order of the Dist. J., Ferozepore, D/- 9th June 1925.

Civil P. C., O. 41, Rr. 4 and 23—Decree not on common ground—One plaintiff appealing—Appellate Court cannot remand whole case—Grounds of appeal covering whole decision makes no difference.

The appellate Court has no power to order remand, on appeal by one of the plaintiffs, the whole case including that of the non appealing plaintiffs, if the decree of the lower Court does not proceed on a ground common to all the plaintiffs, and it does not make any difference if the grounds of appeal cover the whole decision.

[P. 303, C. 2]

Shamair Chand—for Appellants.

Badri Das—for Respondents.

Dalip Singh, J.—The sole point in this appeal is whether O. 41, R. 4 applies to the facts of this case, and whether under that rule the District Judge had power to remand the whole case for decision. It appears that four plaintiffs sued for possession of certain property on the ground that they were the collaterals of the last male owner Munshi Ram and that one Mt. Mangli, who claimed to hold as the widow of Ram Chand, had no right to possession of the property.

The trial Court found that the plaintiffs had not proved that they were not collaterals of Munshi Ram and dismissed the suit. This was the only issue decided by the trial Court, though four other issues had also been framed.

One of the plaintiffs, Pohu Ram, appealed to the District Judge only to the extent of his share. He paid Court-fee only to that extent. The learned District Judge came to the conclusion that the pedigree table propounded by the plaintiffs had been proved, and accepted the appeal of Pohu Ram and remanded the whole case for decision on the ground that the decision proceeded on a point common to the case of all the plaintiffs. The defendants have appealed against the remand of the whole case.

In my opinion it is clear that the terms of O. 41, R. 4, do not apply to this case. The issue was whether the plaintiffs were or were not collaterals of Munshi Ram. Now, it is perfectly open to the Courts to hold that Pohu Ram was a collateral without proceeding to decide whether the other plaintiffs were or were not collaterals. It is true that the pedigree-table propounded covered the case of all the plaintiffs, but it was not necessary for the purposes of the appeal of Pohu Ram to decide whether the whole of that pedigree-table was correct. It was perfectly sufficient to hold that qua Pohu Ram it was correct. The rights of the collaterals were clearly separate rights with regard to their own shares and I cannot hold that the learned District Judge was empowered by the mere fact that he accepted the whole of the evidence originally led by the plaintiffs to prove their case to confer jurisdiction on himself to remand the whole case including that of the plaintiffs who had not appealed. There has been a change in the present Code and the words are no longer " decision appealed against," but 'decree appealed from', and further it is laid down that

> any one of the plaintiffs may appeal from the whole decree and thereupon the appellate Court may reverse, etc.

In this case there was no appeal from the whole decree. It does not, in my opinion, make any difference that the grounds of the appeal cover the whole decision.

I, therefore, accept this appeal and vary the order of the learned District

Judge to this extent that the case will be remanded for decision on the remaining issues only as to the share of Pohu Ram, namely, one-third. The respondents shall pay the costs of the appellants for this appeal. The other costs will abide the event.

Appeal accepted.

A. I. R. 1926 Lahore 304(1)

BROADWAY, J.

Banwari and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1443 of 1925, Decided on 15th January 1926. from an order of the Dist. Mag., Rohtak, D/- 20th June 1925.

Criminal P. C., Ss. 350-A, 15 and 16—Quorum must be present throughout the whole proceedings.

A trial by a Bench of Magistrates is bad if the quorum of Magistrates constituting the Bench is not present throughout the whole of the proceedings. [P 304, C 2]

Shamair Chand—for Petitioners.

Judgment.—An offence under S. 323, Indian Penal Code, said to have been committed by Banwari and others, was tried by a Bench of Honorary Magistrates and resulted in a conviction of the persons so tried. Their appeals having been rejected by the District Magistrate they have come up to this Court under S. 439, Criminal P. C., through Mr. Shamair Chand.

It has been urged that the trial has been vitiated by the fact that the provisions of S. 350-A, Criminal P. C., have been lost sight of. That section is to the effect that :

No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Ss. 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

In the present case the trial opened on the 17th of March 1925 when three members were present whom I will designate as A, B and C. The next hearing was on the 24th March 1925 at which A and B were present. The third hearing was on the 14th of April 1925 when B and C were present. B and C were also present at the hearing on the 29th April 1925. At the two subsequent hearings all three A, B and C were present.

From the above it will be seen that of the three Magistrates A, B and C, B alone has been present throughout the proceedings. The quorum of the Bench consisted of two and in these circumstances the learned counsel's contention must prevail and it must be held that the trial was bad as contravening the provisions of S. 350-A, Criminal P.C.

I, therefore, accept the petition and set aside the convictions and the sentences. The District Magistrate will send this case to some Magistrate having jurisdiction with the direction that it should be disposed of as quickly as possible.

Petition accepted.

A. I. R. 1926 Lahore 304(2)

HARRISON, J.

Rikhi Kesh—Petitioner.

v.

Mela Ram—Respondent.

Misc. Civil Case No. 573 of 1925, Decided on 15th January 1926, for transfer of the appeal from the Court of the Dist. J., Amritsar.

Civil P. C., S. 10—Appeal before the Dist. Judge—Another connected first appeal before High Court between same parties—High Court may order transfer of former before itself without any security.

Where an appeal is pending before the District Judge and a connected first appeal between the same parties is pending in High Court, the High Court may order the transfer of the appeal before the District Judge to be heard with the appeal pending before it without any security as S. 10 does not contemplate the giving of any security for such transfer. [P 304, C 2, P 305, C 1]

Dev Raj Sawhney—for Petitioner.

Moti Sagar and *Har Parshad*—for Respondent.

Harrison, J.—An appeal is pending before the District Judge of Amritsar between Rikhi Kesh and Mela Ram. A connected First Appeal No. 1974 of 1925 between the same parties is pending in this Court, and Mr. Dev Raj Sawhney applies to have his appeal before the District Judge of Amritsar transferred to this Court. Mr. Moti Sagar has no objection but wishes the order to be made conditional (1) on the appellant giving an

undertaking that he will make no structural alterations in the house in dispute pending the hearing of the appeal, and (2) on security being given by the appellant for the rent in case a decree be passed in a subsequent proceeding claiming such rent.

Regarding No. 1. Mr. Sawhney for the petitioner agrees to give the undertaking asked for, and this will be done.

As to No. 2: Mr. Sawhney contends that S. 10 does not contemplate the giving of any security and moreover, in the ordinary course of events if the respondent were to be successful in the Court of the District Judge and in consequence of that success were to institute proceedings for his ejectment or for recovery of rent from him, such proceedings would naturally be stayed on account of the connected first appeal now pending in this Court and Mr. Moti Sagar's client would be no better off than he will be if this appeal be transferred. I think there is great force in this contention and I accept the application for transfer and direct that this appeal be heard together with First Appeal No. 1974 of 1925.

Application accepted.

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* A. I. R. 1926 Lahore 305

CAMPBELL, J.

Behram—Accused—Petitioner.

v.

Emperor—Oppsite Party.

Criminal Revision No. 1504 of 1925, Decided on 24th December 1925, from the order of the District Magistrate, Gurgaon, D/- 7th August 1925.

* (a) *Criminal P. C. (amended 1923), Ss. 195, 559 and 476—Complaint under S. 476—Successor in office of the Magistrate before whom offence is committed can make complaint in respect of the offence.*

Court under S. 195 (c) includes a successor in office of the Magistrate before whom an offence is committed; therefore when an offence is committed in respect of which sanction is required, before a particular Magistrate presiding the Court, his successor in office can make a complaint in respect of that offence.

The same thing applies to a Court of Naib Tahsildar in Punjab, as by Punjab Government Notification No. 1536, dated 8th November 1889, all Naib Tahsildars are ex officio created Magistrates of the 3rd Class. 25 *P. R.* 1889, *held obsolete.* [P 306 C 1]

* (b) *Criminal P. C. (amended 1923), Ss. 195 and 476—Sanction under S. 476—High Court will not interfere in revision except in exceptional circumstances on grounds of public policy or likelihood of conviction.*

As the choice of instituting a prosecution is no more placed in the hands of private persons, and no prosecution can be instituted for th offences specified in S. 195 which have been committed in or in relation to a proceeding in a Court unless the Court itself prefers a complaint, and the person who is the subject of the complaint has a definite right of appeal to a superio Court against the institution of the complaint, High Court, unless the circumstances are altogether outside the ordinary, will not examine in revision the merits of the complaint with a view to discovering whether it is likely to result in a convictian, nor should the High Court go into the question of public policy as the withdrawal of complaint on that ground would be likely to prejudice the accused in taking away the chance of clearing his character. [P 306 C 2]

Parkash Chand—for Petitioner.

D. R. Sawhney—for the Crown.

Raj Krishen—for Complainant.

Judgment.—This judgment will dispose of five revision applications, Nos. 1504-1508 of 1925. They relate to five complaints instituted under S. 476 of the Criminal Procedure Code by Chaudhri Rahim Bakhsh, Naib Tahsildar and Magistrate, 3rd Class, Gurgaon District.

The petitioner Rasul Bakhsh instituted proceedings under S. 448 of the Indian Penal Code by complaint against Ali Jan, and the other petitioners were his witnesses. The trial was held by Munshi Sardar Ali, Naib Tahsildar, who acquitted Ali Jan. Ali Jan applied to Pandit Mool Chand, the successor of Munshi Safdar Ali, for sanction to prosecute under Ss. 193 and 211 of the Penal Code, and this was granted, apparently because the Magistrate did not realize that the new Criminal Procedure Code had abolished the system of granting sanction under S. 195. Pandit Mool Chand's order was set aside on appeal. By that time he had been replaced by Chaudhri Rahim Bakhsh, to whom the case was remitted and Chaudhri Rahim Bakhsh drew up complaints under S. 476 of the present Code against all the petitioners. Appeals were preferred to the District Magistrate under S. 476-B, but the learned District Magistrate refused to withdraw the complaints.

The first objection made is based on the ruling *Phina Singh* v. *Empress* (1)

(1) [1889] 25 P. R. 1889 Cr.

which has been followed subsequently on many occasions in this Province. It was there held, with reference to S. 195 of the former Code that there is no Court of a Magistrate of the First Class as a permanent Court with a perpetual succession of Judges and each Magistrate of the Frst Class has a separate Court. I am asked to hold that Chaudhri Rahim Bakhsh did not preside over the same Court as Munshi Safdar Ali presided over, and that the alleged offence, therefore, was not committed in or in relation to a proceeding in his Court. The learned Public Prosecutor has rejoined that the new Code contains a new section (S. 559) which renders *Phina Singh* v. *Empress* (1), and the subsequent rulings obsolete. It appears to me that this is correct; for by that section subject to the other provisions of the Code, the powers of a Magistrate may be exercised by his successor in office, and there are no other provisions of the Code which would prevent the rule being applied to S. 476 of the Criminal Procedure Code. S. 559 in its sub-S. (2) speaks of what is to be done when there is any doubt as to who is the successor in office of a Magistrate and directs that such doubt should be determined by order in writing of the District Magistrate. In this case it seems to me that there is no doubt since by Punjab Government Notification No. 1536, dated the 8th November 1889, all Naib Tahsildars are ex-officio created Magistrates of the Third class. In any event, in the order now under examination the learned District Magistrate has spoken expressly of Pandit Mool Chand and Chaudhri Rahim Bakhsh as the successors of Munshi Safdar Ali.

The second point taken is that Chaudhri Rahim Bakhsh recorded no finding within the meaning of S. 476 as it is at present enacted ; but the finding is clearly expressed in the complaint itself, and I see no irregularity in this having been done.

It is further argued that the prosecutions are not likely to be successful, and that they are not in the interests of public policy. In this connexion the change in the Code of Criminal Procedure effected in 1923 has to be borne in mind. Formerly, when S. 195 enabled a private person to obtain sanction to institute a prosecution under sections such as 193 and 211 of the Penal Code, and when no appeal was provided for from an order by a Magistrate under S. 476, it was sometimes desirable for the High Court in revision to examine the prospect of successful prosecution, because sanction was frequently used merely as a means of blackmail and orders under section 476 were passed occasionally by inexperienced Magistrates. Now, however, the choice of instituting a prosecution is not placed in the hands of private persons. No prosecution can be instituted for the offences specified in S. 195 which have been committed in or in relation to a proceeding in a Court unless the Court itself prefers a complaint, and the person who is the subject of the complaint has a definite right of appeal to a superior Court against the institution of the complaint. This being the situation, it does not seem to me to be the function of this Court, unless the circumstances are altogether outside the ordinary, to examine in revision the merits of the complaint with a view to discovering whether it is likely to result in a conviction. To do so is the task of the Magistrate before whom the complaint is laid, and there is nothing to prevent him from dismissing it without issuing process to the accused person. If this Court were in revision to undertake an investigation into the merits of every such case as the present, it is quite possible that some findings highly prejudicial to the accused person at the trial might be recorded.

Similarly, as regards the question of a prosecution being in accordance with public policy, when a Magistrate presiding over a Court and a responsible Court of appeal are agreed that a prosecution is necessary, unless the case is one which has peculiar features (which is not the fact here), it would be extremely difficult for this Court to declare that the prosecution is not in the interests of public policy. Furthermore, if this Court refuses, as I think it should in all ordinary cases, to enter into the merits of the complaint, an order directing the withdrawal of the complaint on the score of public policy would not appear to be in the interests of the accused person. He would be deprived of the only means available, in the shape of a trial, of clearing his character

which otherwise would remain affected by the fact of the complaint having been made and endorsed by the Court of appeal.

I find no ground for interference in the present cases and dismiss the petitions.

Revisions dismissed.

A. I. R. 1926 Lahore 307

SCOTT-SMITH AND MARTINEAU, JJ.

Durga Das—Plaintiff—Appellant.

v.

Kundan Lal and *others*—Defendants—Respondents.

First Appeal No. 627 of 1921, Decided on 26th February 1925, from a decree of the Senior Sub-J., Hoshiarpur, D/- 23rd December 1920.

Provincial Insolvency Act (3 *of* 1907), *S.* 36—*Suit to establish a claim on mortgage-deed by secured creditor—Plaintiff must prove good faith and consideration of the mortgage.*

In a suit by a secured creditor to establish his claim on a mortgage deed, having regard to S. 36, the onus is on the plaintiff to prove that the mortgage is effected in good faith and for valuable consideration. [P 308 C 1]

Sheo Narain and *Badri Das*—for Appellant.

Fakir Chand, *Kundan Lal* and *Sardha Ram Parsa Das*—for Respondents.

Judgment.—Sunder Singh of Bhairowal in the Hoshiarpur District applied to be adjudicated insolvent on the 21st of July 1915, and was so adjudicated on the 1st of December of the same year. In the insolvency proceedings Durga Das, plaintiff-appellant,claimed to be a secured creditor of Sunder Singh under a mortgage-deed relating to two houses and two shops for Rs. 3,825, dated the 9th of May 1914. The creditors opposed this application saying that the mortgage was without consideration and had been effected in order to defraud the other creditors. A full enquiry was not made into the parties' allegations in those proceedings and the Court referred Durga Das to a civil suit. He accordingly brought the suit out of which the present appeal arises in order to establish his claim on the mortgage-deed in question as a secured creditor.

The lower Court found that with the exception of Rs. 602 paid before the Sub-Registrar at the time of registration the rest of the consideration was not proved. It accordingly gave him a declaratory decree to the effect that the property was under mortgage with appellant for Rs. 602 only with interest at 8 per cent. per annam less Rs. 12 as the annual rent of the property plus Rs. 50 on account of repairs.

From this decree the plaintiff appeals and asks that the whole of the amount due under the mortgage-deed be declared to be a valid charge upon the property together with interest and Rs. 175 on account of repairs. The appeal as regards the additional sum claimed for repairs was, however, not pressed in arguments before us.

The consideration for the mortgage-deed was : (1) Rs. 2,000 due on a promissory note said to have been executed by Sunder Singh on the 10th of February 1912 ; (2) Rs. 800 due on a second promissory note said to have been executed by him on the 13th of November 1913; and (3) Rs. 360 on account of a third promissory note being the interest due on the former two executed by him on the 10th of February 1914. In addition to this there was (4) a sum of Rs. 63 due on account of interest on the three promissory notes up to the date of the execution of the mortgage together with (5) Rs. 602 paid before the Sub-Registrar. The deed was written by a petition writer at Hoshiarpur. The attesting witnesses and the scribe have been examined as witnesses and it has been found by the lower Court that the mortgage-deed was only executed and this point has not been disputed before us. The lower Court has in its judgment fully described the financial position of plaintiff-appellant and his father Khurram Rai (D-W. No. 7) before, and at or about the time when the promissory notes are said to have been executed. It is perfectly clear that the income of these two persons had not been such as would probably have enabled them to save sufficient sums from which advances of Rs. 2,800 in cash could have been made in the year 1912. It is contended by counsel for the appellant that it is not proved that the plaintiff and his father had not other income. In this connexion, however, we must remember that the mortgage-deed was executed within two years of the date upon which Sunder Singh was adjudged insolvent,

and, therefore, having regard to S. 36 of the Provincial Insolvency Act of 1907 the onus was on the plaintiff to prove that the mortgage was effected in good faith and for valuable consideration. We, therefore, are of opinion that it was for the plaintiff to show conclusively that he was in a position to lend the money which he says he lent in 1912 to Sunder Singh.

Counsel contends that consideration for the promissory notes of 10th of February and 13th of November 1912 is proved by Sunder Singh's statement in the insolvency case and by the incorporation of the sums due on the promissory notes as part of the consideration for the mortgage deed. Sunder Singh is dead and his statement made in the insolvency proceedings has, therefore, been admitted in evidence under Ss. 32 and 33 of the Indian Evidence Act. It is marked as Ex. P-7 and is printed at pages 8 and 9 of the paper-book. In this he has stated that the promissory notes are in his own handwriting and that the amount entered therein was taken by him in cash. In cross-examination he said that he possessed a rokar bahi but had not got it at that time, i. e., on the 5th of June 1916, when his statement was recorded. He admitted that the amounts of all the three promissory notes were entered in his bahi.

As regards the promissory note for Rs. 360 we have the evidence of Uttam Singh (P. W. No. 5). His statement was that five or six years ago Sunder Singh asked him to get the matter of interest due on the other promissory notes settled with Durga Das. He accordingly took Sunder Singh to Durga Das in Rajpur quarter at Delhi where he lived at the time and there Sunder Singh executed a promissory note for Rs. 360 on account of interest due in favour of Durga Das. This witness has been disbelieved by the lower Court for reasons fully given in its judgment at page 38 of the paper-book, and we agree that his evidence is not entitled to credit. There is no other evidence that consideration for these promissory notes was really paid except this statement of Sunder Singh.

The lower Court in its judgment (see page 37) has shown how on the 13th of June 1914 a decree for Rs. 1,476 was passed against Sunder Singh and also how in the beginning of 1915 two suits were instituted against him in which decrees for over Rs. 18,000 and over Rs. 11,000 were passed against him. Counsel for the appellant contends that these decrees do not show that Sunder Singh was financially embarrassed in May 1914, when the mortgage-deed was written. It is, however, prima facie probable that the debts about which these decrees were passed were incurred some time previously and appellant has not shown by the production of any evidence that the debts were incurred subsequent to the execution of the mortgage-deed. It is, however, further contended by Pandit Sheo Narain on behalf of the appellant that, even if Sunder Singh was financially embarrassed in 1914, it is not proved that he was so embarrassed at the time when the promissory notes were executed in 1912. It is true that there is no evidence on this point, but on the other hand there is no evidence that the promissory notes were executed on the dates on which they purport to have been executed beyond the statement of Sunder Singh himself. They could have been executed at any time and antedated. It must also be remembered that Sunder Singh's good faith was being challenged in the insolvency proceedings and there his statement must be received with caution. Again it is a very significant fact which is strongly pressed by counsel for the respondents, that Durga Das himself has not gone into the witness-box. He could have done this and could have deposed to having advanced the money on the two promissory notes. He could have explained where he got the money from. Another important point is that Sunder Singh's account books have never been produced either in the insolvency Court or in the lower Court. It has been said that Durga Das had no power to produce them. He might, however, have called Sunder Singh's sons as witnesses and given them notices to produce the account books if they had them. He made no attempt to do this. It is not proved that plaintiff or his father possessed any land or other immovable property from which they derived any income. Plaintiff could have materially assisted the Court by tendering himself as a witness but he has not done this. In other words he has not produced the best evidence which could have been produced in support of his case. In our opinion the lower Court

has rightly held that he has not discharged the onus which lay upon him in regard to the promissory notes of 1912, and we dismiss his appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 309

BROADWAY, J.

Dulla and *another* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1759 of 1925, Decided on 29th January 1926, from an order of the Addl. S. J., Hoshiarpur, D/- 6th August 1925.

* (a) *Criminal P. C., S. 428—Further evidence—Co-accused cannot be examined as a witness though he has not appealed.*

A criminal appeal is a continuation of the criminal case and, therefore, the evidence of a co-accused as a witness, although he has not appealed, ought not to be recorded. [P 309 C 2]

* (b) *Criminal P. C., S. 428—Prosecution can be allowed to give further evidence if justice requires.*

Intention of the Legislature was to empower an appellate Court to see that justice is done between the prosecutor and the person prosecuted, and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this section and allow prosecution to give further evidence. But it must record its reasons for taking such action. [P 310 C 1]

Abdul Aziz—for Petitioners.

Judgment.—On the night of the 17th May 1925, a burglary was committed in the village Barian Kalan and the house belonging to Ghaya, Nihala and Nand Ram was broken into. As the result of the police investigation that followed three persons, Bachint Singh, Dulla and Bulanda, were sent up for trial under S. 457, Indian Penal Code. They were convicted. Bachint Singh was dealt with under S. 562, Criminal P. C., because he admitted his guilt and made a full confession, at the same time producing what he said was his share of the property looted and Dulla and Bulanda were sentenced to one year's rigorous imprisonment each. They preferred an appeal to the Additional Sessions Judge, who, on the 29th June 1925, recorded a detailed order giving his reasons for the necessity for taking further evidence. For that purpose the case was sent down to the Magistrate who, in addition to the other evidence, proceeded to examine Bachint Singh, who had not appealed, as a witness and after complying with the order of the learned Sessions Judge returned the case. On the 6th August 1925, the appeal was dismissed, and Dulla and Bulanda have come up to this Court under S. 439, Indian Penal Code, through Mr. Abdul Aziz.

Two points have been urged before me by the learned Advocate. Firstly, that the examination of Bachint Singh as a witness was not warranted by law and that his evidence should be eliminated from consideration. Secondly that the procedure of the Additional Sessions Judge in ordering fresh evidence to be recorded was illegal. So far as the first point is concerned, in my opinion, Mr. Abdul Aziz's contention is sound. A criminal appeal is a continuation of the criminal case as was held in *Queen-Empress* v. *Subbayya* (1). Bachint Singh and the two petitioners being jointly tried, the mere fact that Bachint Singh has not appealed made no difference. It is true that the confession made by Bachint Singh could be taken into consideration against the two appellants, and it may be urged that the fact that Bachint Singh was examined as a witness and objected to cross-examination on the part of the petitioners gave the latter an opportunity of shaking Bachint Singh's statement. But neverthless the procedure adopted was wrong and the evidence of Bachint Singh as a witness ought not to have been referred to by the Additional Sessions Judge. As to the second point: S. 428 gives an appellate Court wide discretion. That section says that in dealing with an appeal under Ch. 33 an appellate Court, if it finds additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate, All that is necessary is that an appellate Court, when directing the taking of further evidence should record its reasons. In the present case the Additional Sessions Judge has complied fully with the provisions of law and has recorded the reasons which induced him to adopt the course he took.

(1) [1889] 12 Mad. 451.

Mr. Abdul Aziz next urged that it was not the intention of the Legislature to enable an appellate Court under S. 428, Criminal P. C., to give the prosecution an opportunity of supplementing their case by the production of fresh evidence or filling up lacunae by those methods. It appears to me that the intention of the Legislature was to empower an appellate Court to see that justice is done between the prosecutor and the person prosecuted; and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section.

There remains finally the consideration whether in the present case the learned Additional Sessions Judge would have maintained the conviction, but for the fact that he was considerably influenced by the statement made by Bachint Singh on oath. After a careful consideration of the judgment under revision there seems to me little doubt that the Additional Sessions Judge has been very greatly influenced by the testimony of Bachint Singh as a witness. After giving his reasons for considering that Bachint Singh had every reason to speak the truth and no reason whatever for telling a lie he goes on to say that there is strong independent corroboration of his (Bachint Singh's) statement afforded by the recovery of stolen property in pursuance of information elicited from both the appellants.

I, therefore, accept this petition and return the case to the Sessions Judge for a re-hearing of the appeal. The evidence of Bachint Singh taken as a witness is to be eliminated from consideration and the appeal will be heard on the evidence properly recorded together with the statement of the various accused persons.

Petition allowed.

A. I. R. 1926 Lahore 310

HARRISON AND JAI LAL, JJ.

Partap Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 135 of 1925, Decided on 15th May 1925, from the order of the S. J., Sialkot, D/- 18th December 1924.

(a) *Evidence Act, S.* 32 (1)—*Dying declaration certified by its recorder in Court to be correct is admissible in proof of its contents.*

A dying declaration recorded by Head Constable, who certified in Court that he had recorded it correctly, is admissible in evidence in proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said; *A. I. R.* 1922 *Cal.* 382, *Foll.*

[P 311 C 2, P 312 C 1]

(b) *Criminal trial — Identification parade — Statements of officers conducting the parade are admissible as to the witnesses having identified and are sufficent.*

Where the witnesses themselves do not in all cases repeat in Court that they picked out certain men at an identification parade, the statements of officers who conducted the parade are admissible to show that the witnesses had so picked out the men, and it is unnecessary for the witnesses to have told the officer who conducted the parade what part each man took in the riot. It is sufficient if it is shown that the witnesses knew what they were doing and understood that they were identifying the men who took part in the riot; *A. I. R.* 1922 *Cal.* 382, *Foll.*; *A. I. R.* 1925 *Lah.* 19, *Dist.* [P 312 C 2]

B. R. Puri—for Appellants.

Dalip Singh—for Opposite Party.

Harrison, J. — A very serious riot took place on the 12th April 1924 at village Mahar in the Sialkot District in which three men — Maula Dad, Iman Din and Nawab, son of Umra—were killed, and four men—Umar Din, Hussain Baksh Nawabh son of Bulanda and Bakha — were injured: Hussain Bakhsh having two fingers cut off and having lost in consequence the use of both hands. Twenty men were sent up for trial, of whom four were discharged by the committing Magistrate, eight were convicted by the Sessions Judge, and eight were acquitted. It is also said that four absconders took part in the riot.

Of the men convicted six— Partap Singh, Kartar Singh, Ajab Singh, Ganda Singh, son of Jiwan Singh, Amar Singh and Ganda Singh, son of Khushal Singh —have been sentenced to death. Sharm Singh, son of Jawind Singh, and Bhan Singh, son of Atar Singh, have been sentenced to transportation for life. All have appealed, and the case is also before us for consideration of the question of the confirmation of the death sentences.

After hearing the arguments addressed to us by the learned counsel for the accused and the Crown we accepted the appeals of Bhan Singh, son of Atar Singh, and Ganda Singh, son of Khushal Singh, finding that the evidence was not sufficient to justify their conviction. After further consideration we have come to the conclusion that although there is a

considerable amount of evidence against Sharm Singh and Amar Singh there is a certain element of doubt in their cases also.

In the case of Sharm Singh, Hussain Bakhsh—the most important witness—did not identify him at the parade held in jail though he, subsequently, picked him out in Court, and, although he, Sharm Singh, was identified by Nawab, son of Bulanda, and Bakha, the remaining evidence against him is not sufficient to establish beyond all reasonable doubt that he actually took part in the riot.

The case of Amar Singh is similar : he was identified neither by Hussain Bakhsh nor by Ahmad Din, and the remaining evidence in his case also is not conclusive. We acquit both these men.

The facts are that a large "bhangar" party consisting of some 20 men armed with chhavis, gandasas and lathis and headed, it is said, by Sohan Singh, Zaildar, who has not been sent up for trial, came from village Bhula to village Mahar. They marched to the house of Maula Dad, where he was sitting with Ahmad Din and Hussain Bakhsh, his brothers, and Imam Din, his cousin. They deliberately picked a quarrel and attacked first Hussain Bakhsh and then his companions. They killed Maula Dad and injured the others. Imam Din ran away to the house of one Sivaja, and was pursued by the attacking party. At this house two men, called Nawab, tried to protect him. Of these Nawab, son of Umra, was fatally injured and Nawab, son of Bulanda, was beaten but survived. Imam Din died in consequence of his wounds.

The medical evidence shows that Maula Dad, who was killed, had four incised wounds on his head and six others on his body : Imam Din had two incised wounds on the head and twelve blows from a lathi, and was so seriously injured that he could not be carried to the hospital. Nawab, son of Umra, had three injuries, his leg having been cut right through, his forearm broken and his head fractured. Ahmad Din had eight injuries, Nawab 13 and Bakha four. Two of the accused, Partap Singh and Kartar Singh, were found in jail to have been injured—Kartar Singh having an incised wound on the back of the head and Partap Singh four injuries caused by a blunt weapon. Both counsel for the accused and counsel for the Crown rely on the fact of these two men having been injured, the latter pointing out that the medical evidence shows that the injuries must have been inflicted at or about the time of the riot, and that no satisfactory explanation has been given as to how they were caused, the former urging that there must have been a general melee, and that it is only fair to presume that it was the members of the village Mahar who began the quarrel.

We will first deal with the general criticisms which have been made on the evidence produced by the prosecution,and will then deal with the case of each accused.

The first point, and one to which due importance must be attached, is that the leader of the bhangar party is said to have been Sohan Singh, Zaildar, who has not been sent up for trial, and counsel urges with considerable force that it was presumably found in the course of the investigation that he had been falsely implicated because of his prominent position, and that this fact must be taken as discrediting the whole of the evidence of the prosecution. We have given due weight to this contention, and have treated the evidence with extreme caution throughout.

In addition to the eye-witnesses who have given evidence in Court certain statements were recorded with a view to their being used as dying declarations. These were the statements of Hussain Baksh Ahmad Din, and Nawab, son of Umra. Out of these men only Nawab, son of Umra, died, and it is only his statement which can be treated or considered to be a dying declaration. This was recorded by Muhammad Bashir, Head Constable, who certified in Court that he had recorded it correctly, and that Nawab was in his senses at the time. Counsel contends that inasmuch as Muhammad Bashir did not repeat in his own words what Nawab said to him this statement is inadmissible. In *Ghazi* v. *Crown* (1) and *Abdul Jalil* v. *Empress* (2) it was laid down that such statements must be proved, and this would appear to show that if proved they are admissible. We also find that it has been clearly laid down in *Emperor* v. *Balaram Das* (3)

(1) [1911] 17 P. R. 1911 Cr.=48 P. W. R. 1911 Cr.
(2) [1886] 13 P. R. 1886 Cr.
(3) A. I. R. 1922 Cal. 382.

that such a statement is admissible in proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said. In Ss. 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document. If it is merely a qusetion of a man refreshing his memory the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what has been written. Section 160 deals with the case where in spite of having written or read a document under the circumstances described in S. 159 the witness has got no specific recollection of the facts therein recorded, but is sure that they were correctly recorded.

Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence: vide *Mylapore Krishnasami* v. *Emperor* (4). This is what has happened here. The surrounding circumstances, and more especially the length of the period which intervened between the recording of the statement and the trial of the case, rendered it impossible for the constable to recollect and repeat the words used. His statement therefore should be treated in exactly the same way as if he had prefaced it by stating categorically that he could not remember what the deceased had said. Section 160 of the Evidence Act applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify to the effect that he recorded correctly what the deponent said at the time. The words of the section are "although he (the witness) has no specific recollection of the facts themselves." Whether he has such recollection or not is a question of fact to be established either by his own statement or as a natural, necessary, and unavoidable conclusion from all the surrounding circumstances. If the fact be established the section applies. We therefore find, following *Emperor* v. *Balaram Das* (3), that this evidence is certainly admissible.

(4) [1909] 32 Mad. 384.

The next point on which the counsel has laid stress is the evidence of identification dealing with the two parades, which were held at village Kalaswala and in jail. At the first of these parades Accused Nos. 1--6 were not present, the obvious reason being, as found by the learned Sessions Judge, with whom we agree, that it was considered unnecessary to include them in this first parade as they and their names were already known and the parade was conducted not with a view to see which men out of those who were arrested could be identified by the witnesses but to see which men out of a large number of over 250 the witness could pick out as having taken part in the riot. The criticism amounts to this: that the witnesses themselves do not in all cases repeat in Court that they picked out certain men, that the evidence on the subject consists of the statements of officers who conducted the parade and who tell us what happened. This, counsel urges, is secondary or corroborative and not primary evidence, and therefore by itself has no value. Relying on the same ruling, which we have quoted above, we find that this evidence is admissible.

A further criticism is that the witnesses are not stated to have told the officer who conducted the parade what part each man took in the riot. Thfs, in our opinion, was unnecessary. It has to be shown that the witnesses knew what they were doing and understood that they were identifying the men who took part in the riot, and this has, in our opinion, been shown to have happened. Sardar Hazara Singh, Tahsildar, says that he told them to pick out the persons present in the riot. The evidence is quite sufficient, and it was unnecessary for him to record at the time or to examine the witnesses as to the part played by each individual. The facts are not the same as those of *Lal Singh* v. *Crown* (5) on which counsel relies, for there the notes were merely referred to and nothing more, and the necessary facts were not established. (The judgment then dealt with the evidence against each of the four remaining appellants, and dismissed their appeals.)

Appeal of four appellants accepted, others dismissed.

(5) A. I. R. 1925 Lah. 19.

* A. I. R. 1926 Lahore 313

ZAFAR ALI, J.

H. Mansel Pleydell of Simla—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 236 of 1926, Decided on 7th April 1926, from the order of the S. J., Ambala, D/- 27th February 1926.

(a) *Evidence Act, S. 45—Expert.*

An opinion of an expert witness not based on any well defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it : 11 *W. R.* 25 *(Cr.) Ref.* [P, 315, C, 2]

(b) *Practice — Criminal—Appeal by accused against conviction—Findings in favour of prosecution can be set aside if based on erroneous presumptions.*

In an appeal by accused against his conviction findings on side issues in favour of prosecution based on palpably erroneous assumptions cannot be allowed to stand. [P. 316, C. 2]

* (c) *Penal Code, S. 304, para. 2—Kicking abdomen, breaking two ribs and causing rupture of spleen—Offence is one of murder.*

Presumably everybody knows that the abdomen is a most delicate and vulnerable part of the human body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal he should be presumed to have done so with the knowledge that he, by so kicking, was likely to cause death. [P. 317, C, 1]

J. Cammel and *Dalip Singh*—for Appellant.

M. Sleem—for Respondent.

Judgment.—On the night between the 3rd and 4th September 1925 a rickshaw coolie of Simla, Jageswar by name and aged about 26, met a violent death. There are several rickshaw stands in Simla and each stand has a chaudhri of its own. The stand to which Jageshar belonged is known as the Chalet Stand and Salig Ram is the Chaudhri of that stand. According to the prosecution version Jageshar died at about 4 a. m. and between 4-30 and 5 a. m. Salig Ram in company with Sandhuru who is the Chaudhri of another stand, called at the residence of Lala Mohan Lal (P. W. 11) and managed to have an interview with him while he was still in bed and told him the following tale.

There was a dinner overnight at the Banswali Kothi (Yates Place) and some of my rickshaws were taken there. One of my coolies was kicked by the occupier of the house (Mr. Mansel Pleydell, Controller of the Military Canteen Board) and then the coolie was taken to the Chotta Simla police station but the police refused to take the report. He was then brought to the Chalet Stand where he has died.

From the above it would appear that the Chotta Simla police within whose jurisdiction the assault occurred having refused to take the report the Chaudhris were at a loss to know what other action they could take. Lala Mohan Lal is a vakil and member of the Punjab Legislative Council and is also Vice-President of the Simla Municipal Committee. All rickshaws are under the control of the Committee and the Chaudhris knew Lala Mohan Lal. He was the nearest member of the Municipal Committee to whom they could go in that predicament for guidance and advice. He directed them to go to the Sadar police station, and shortly after that he rang up the Superintendent of Police on the telepone and communicated to him what he had been told by Salig Ram. In the meantime the Chaudhris arrived at the Sadar police station and laid information there at 6 a. m. After receiving the information Amar Singh Sub-Inspector (P. W. 36), telephoned it to Muhamad Ikram Khan, Sub-Inspector of Chhota Simla (P. W. 37), and then proceeded to the Chalet Stand where Jageshar lay dead. He arrived there at about 6-30 a. m. and first drew up the inquest report and a statement of the injuries which the deceased bore and with these two documents he despatched the body for post-mortem examination. Inspector Meakins and Police Sergant Tyler (P. W. 35) also joined the investigation, and the examination of the coolies who had been at the scene of the occurrence was proceeding when at about 9-45 a. m. a European gentleman passed that way in a rickshaw and one of the coolies, namely Shub Karan (P. W. 12) called out "woh sahib hai" (there goes the Sahib) Sergant Tyler galloped after the rickshaw and recognized the occupant thereof as Mr. Mansel Pleydell. One of the European witnesses examined by the police that very morning was Mr. Browne who with his wife had dined at Yates Place the preceding night. At about 10 a. m. the Sub-Inspector (P. W. 36) prepared a statement of the injury which Shub Karan (P. W. 12) bore and sent him with that statement to the Civil Surgeon (Col. Hallilay), but the latter refused to record that injury and the explanation for doing so that he gave

in the witness box was to the effect that the injury was so insignificant that it could hardly be called an injury. He however performed the autopsy that very day and what the autopsy revealed will be stated later. The Sub-Inspector examined that morning Rikhia (P. W. 9), Salig Ram (P. W. 10), Shub Karan (P. W. 12), Tega (P. W. 13) and Kesru (P. W. 14) and incorporated their statements in the inquest report which, as already stated, was sent to the Civil Surgeon with the body of the deceased. At about 12 noon the Sub-Inspectors Amar Singh and Mahammad Ikram Khan (P. Ws. 36 and 37) visited Yates Place and found there two broken flowers in one flower-bed and four or five broken flowers in another. It was stated that the deceased had fallen down in those beds.

The next day, i. e. on the 5th September an identification parade was held in the presence of Mr. H. B. Anderson, Additional District Magistrate, and in that parade four witnesses identified Mr. Mansel Pleydell as the assailant of the deceased. These witnesses are Rikhia (P. W. 9), Shub Karan (P. W. 12) Tega (P. W. 13) and Kesho or Kesru (P. W. 14).

After completing the investigation the police sent up Mr. Mansel Pleydell on a charge under S. 304 of the Indian Penal Code and the Magistrate (Mr. Isar) after a long and exhaustive enquiry in which some defence witnesses were also examined, committed him to the Court of Sessions. In that Court he was tried with the aid of four European assessors. Disagreeing with the assessors, two of whom gave the accused the benefit of doubt and two were of opinion that he was guilty of simple hurt, the learned Sessions Judge has convicted him of culpable homicide not amounting to murder and has sentenced him under Part II of S. 304 of the Indian Penal Code to rigorous imprisonment for eighteen months and to pay a fine of Rs. 4,000.

The evidence against him is briefly as below :

On the night of the 3rd September there was a dinner party at Yates Place to which the appellant had invited his subordinates in the Army Canteen Board and their wives. Mr. Clendenning and Mr. and Mrs. Cooper were already staying in the house. The remaining guests, six in number, came in six rickshaws and there being four coolies with each rickshaw there were 24 coolies in all. Mr. and Mrs. Browne who lived at the Carlton Hotel, were the first to arrive. The coolies with their rickshaws were Rikhia (P. W. 9), Tega (P. W. 13), Jageshar, deceased, and Shub Karan (P. W. 12), Kesru (P. W. 14), Khazana (P. W. 15), Dheru (P. W. 18) and Sidhu (P. W. 16). On alighting at the porch of Yates Place at about 8 p. m. Mr. Browne told the coolies that he wanted them again at 10 o'clock. Hearing this five out of the eight coolies left to take their meal at the Chalet Stand and to bring food for the three who remained behind. These three were Sidhu, Kesru and Jageshar, deceased. At about 10 p. m. the former five came back and then Jageshar as well as the other two took the food that had been brought for them. In front of the porch of the house there is a wooden porch and to one side of that outer wooden porch the six rickshaws were parked in the open. Jageshar went to sleep by the step in the outer wooden porch. Four other coolies also went to sleep under that very porch towards the outer side of it and Rikhia also sat in that porch. The rest of the coolies sat near their rickshaws.

At about 12-30 or 1 a. m. the appellant appeared in the inner porch, switched on the light and called out "Browne Sahib ki rickshaw". All the coolies except Jageshar got up. Jageshar was rising when the appellant gave him a kick. After receiving the kick he got up, but with considerable exertion and then with great difficulty he moved to where the rickshaw was standing and there he fell down. Shub Karan was lighting up the rickshaw lamp at that time. The appellant came up and after giving a kick to Shub Karan he began kicking Jageshar. As he was doing so Mrs. Browne came out and stood on the step of the outer porch. Rikhia appealed to her saying "The Sahib is beating our man, save him." She went back at once into the house. Subsequently the appellant saw Mrs. Browne and her husband into their rickshaws and they were taken off to the Carlton Hotel by only three coolies each. Jageshar could not move. So Rikhia stayed behind to look after him. He lifted up Jageshar and took him along to the footpath in the compound of Yates

Place which goes to the Barnes Court Road. A bearer came up there and told him to take Jageshar to the police station. It transpired during the police investigation that that bearer was Mansar Ali (P. W. 17). Leaving Jageshar on the roadside Rikhia proceeded to the Chalet Stand to fetch a rickshaw for him. But he had not gone beyond the Patiala House when four of his comrades, namely, Tega, Khazana, Sindhu and Shub Karan, met him coming from the front with a rickshaw. The six coolies who had taken back the Brownes from Yates Place had after dropping them at the Hotel gone to the Chalet Stand and informed Salig Ram that the Sahib of the Banswali Kothi had beaten Jageshar and that Jageshar was not fit to walk. It was therefore Salig Ram who had sent the said four coolies with a rickshaw to fetch Jageshar. They took Jageshar first to the Chhota Simla police station but the constables there to whom they gave information of the occurrence told them to take Jageshar to the hospital and to come in the morning for report if they should like to do so. The coolies then took Jageshar to the Chalet Stand and put him on a bed. He died at about 4 a. m.

According to the above account of the incidents of the fateful night the deceased took his evening meal at 10 or 10-30 p. m., received the injuries between 12-30 and 1 a. m. and died at about 4 a. m. Thus there was an interval of two or three hours between the meal and the assault and that of three or three and a half hours between the assault and death. But from the undigested condition of the food found in the stomach of the deceased and the nature of the injury to the spleen and haemorrhage thereform which was the cause of death the Civil Surgeon formed the opinion (1) "that the deceased must have taken his meal within an hour of his death," and (2) "that death occurred within an hour of receiving the injury to the spleen." If this opinion were accepted as correct and decisive it would follow that the prosecution evidence as to longer intervals between the said incidents is false, and further that there was no interval between the taking of the meal and the assault if the death took place within one hour after the assault. As this opinion was destructive of the prosecution theory the Crown examined two more medical officers to test it and they did not corroborate it The defence also examined two other medical officers and thus the number of medical officers examined in this case is five. These are :

(1) Lieutenant-Colonel H. Hallilay I. M. S., Civil Surgeon, Simla.

(2) Major P. B. Bharucha, I. M. S., L. R. C. P., M. R. C. S., Fellow of the Royal College of Surgeons, England, and Professor of Anatomy, King Edward Medical College, Lahore.

(3) Major J. J. Harper Nelson, I. M. S., M. B. C. H. B. of Edinburgh with First Class Honours M. D. of Edinburgh with Honours : F. R. C. S (Edin.) and Professor of Clinical Medicine, King Edward Medical College, Lahore.

(4) Lieutenant-Colonel G. I. Davys, I. M. S., M. D., Bachelor in Surgery, D. Ph. H., D. T. M. and H., B. A. in Science, Fellow of the Chemical Society of England, in charge of Military Food Laboratory, Kasauli, and

(5) Major A. H. Heslop, R. A.M.C., Bachelor of Medicine and Surgery, Fellow of the Royal College of Surgeons of England, Civil Surgeon Kasauli

(Here the divergent opinions were narrated.)

As regards the intervals between the taking of the meal and assault and death the opinions of Major Bharucha and Major Harper Nelson were at variance with that of Colonel Halliday and Colonel Davys and corroborated the direct evidence on this point. It is difficult to understand how a layman could choose between the conflicting opinions of these medical officers who were all doctors of great attainments and experience. The reasonable course for the Court to adopt was to accept that opinion which was not in conflict with the direct evidence. But the learned Sessions Judge adopted the opposite course and discredited the direct evidence on the strength of the opinion against it, and not stopping short at that he evolved a theory of his own to bring the times of these incidents into harmony with that opinion. But as an opinion of an expert witness not based on any well-defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it. In XI W.R. page 25 (Criminal) the following remarks occur on the evidential value of medical opinions :

Dr. Duncan may have given his evidence like an intelligent man, but it is not the proper way to try a case to rely on mere theories of medical men, or skilled witnesses of any sort against facts positively proved. The evidence of a medical man, or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and

imperfect. New and previously unobserved phenomena which, till they have been recorded are supposed to be impossible, are constantly being noticed.

I fully endorse the above and am of opinion that the learned Sessions Judge should not have discredited direct evidence on the strength of the opinion of a medical witness, especially when it was contradicted by the opinion of two other medical witnesses equally competent to form an opinion.

It was common ground that the learned Sessions Judge was not justified in travelling out of the record into the realm of conjectures to draw conclusions contrary to the evidence. But having accepted the opinion of Colonel Hallilay the learned Judge found that he could not reconcile it with the evidence and this coupled with his conviction that the accused did kick the coolie and cause his death, landed him in a dilemma. The accused's plea that he was the victim of a conspiracy appeared to him to be preposterous and he rejected it finding that it was not substantiated and was groundless. To extricate himself from the difficult position of his own creation the learned Judge made an egregious mistake inasmuch as he disbelieved the prosecution evidence on a point which was not controverted but was fully supported by the defence. This led him to erroneous conclusions that he would not have come to if he had not fallen into this error which will be described presently.

According to the evidence of the Brownes who were produced as defence witnesses before the committing Magistrate and were examined at the trial as Court witnesses the time of their departure from Yates Place was about 12-30 a.m. Mrs. Browne deposed "I and my husband were the first to leave. It was about half past twelve. As I looked at my watch it was exactly half past twelve." Mr. Browne deposed "I and my wife left Yates Place about 12-30. I had looked at my watch before leaving so I know more or less the time." Mrs. Cooper and Mr. Dunn had also deposed that the Brownes left after 12-30. The coolies' story was that the accused was kicking the deceased when Mrs. Browne came out and stood on the step of the outer porch. So the time of the assault was about 12-30 and that being fixed, the times of taking the meal and of death should have been determined relatively to that. But the learned Sessions Judge first fixed the meal time at 10-15 or 10-30 p. m. and then he fixed the times of assault and death at 11 and 12 p. m. respectively which times he observed fitted in with Colonel Hallilay's opinion. The reasons that he has assigned for disbelieving all the European as well as Indian witnesses on this point could not be supported by the counsel on either side and so need not be stated here to be refuted. But it may be remarked here that the learned Judge made contradictory observations on this point. In the first place he wrote as follows :

Later on we find in the committing Court 12-30 a.m. being given as the time apparently in order to coincide with the statements of the accused's guests which were taken on the 4th September. They (coolies) probably thought that if there was a conflict of times between themselves and the European guests they would have little chance of being believed, so they made the time of the Brownes' departure (i.e. the time of the assault) to coincide with that given by the Brownes and others.

This remark was not well founded because the coolies had been examined by the police before Mr. Browne, but strangest of all the learned Judge concluded by saying.

there is every reason to believe that the time agreed upon about 12-30 or a little later was communicated to the Brownes and the other guests before they were questioned by the police on the morning and afternoon of the 4th.

It is difficult to guess who had agreed to fix the time of assault at 12-30 and who communicated it to the Brownes and other guests.

Having come to the conclusion that the assault was committed at 11 p.m. and that the coolie died at twelve midnight the learned Judge proceeded to find why the coolies gave later hours of those events. As was natural his erroneous premises led him to wrong conclusions. The learned counsel for the appellant contends that the findings of the learned Judge, which are against the prosecution should not be interfered with and that on those findings the appellant was entitled to an acquittal. But in an appeal by accused against his conviction findings on side issues based on palpably erroneous assumptions cannot be allowed to stand. After finding that the coolie had died at 12 midnight the learned Judge proceeded to argue that the witnesses falsely stated that he died at 4 a.m. in order that they might not be

taken to task for the delay in reporting and that the coolies held consultations and were tutored to state false incidents to give colour to their story. (The judgment then discussed the value of prosecution evidence as regards the identity of the assailant and proceeded.) Having regard to all the facts and circumstances of the case I come to the conclusion that the finding of the learned Sessions Judge that the injuries suffered by the deceased were inflicted by the appellant is correct.

There remains the question: What was the offence committed? Presumably everybody knows that the abdomen is a most delicate and vulnerable part of the human body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal he should be presumed to have done so with the knowledge that he by so kicking was likely to cause death. Counsel for the appellant points out that in one place the learned Sessions Judge remarked in his judgment that "the accused went back to the house not realizing the very serious injury that he had inflicted" and contends that in view of that remark it was not possible to find that the accused kicked with the knowledge that he was likely to cause death. But it is difficult to say what the accused's feelings were immediately after the assault, and no inference can be based on what he did after that. I hold that he has been rightly convicted under S. 304-II of the Indian Penal Code and the sentence not being severe I dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Lahore 317

CAMPBELL, J.

Emperor—Petitioner.

v.

Faiz Talib—Accused—Respondent.

Criminal Revision Petition No. 1849 of 1925, Decided on 13th February 1926.

Criminal P. C. (as amended in 1923), S. 562—All offences are within its scope—Section should not be resorted to for offences under Punjab Excise Act (1 of 1914), S. 61.

Although after the amendment of the Code in 1923, S. 562 is no longer confined to offences under the I. P. C., but extends to all offences. Still in an offence under S. 61 of the Punjab Excise Act, S. 562 should not be resorted to, as such an offence is not usually the 'first offence. as contemplated by S. 562 : 19 *P. R.* 1916 *Cr., Appr.*

Des Raj Sawhney—for Petitioner.

Judgment.—In this case Faiz Talib, a sepoy in the Indian Army, was found in possession of 2 seers and 11 chhataks charas when travelling by rail in the Attock District to Delhi. He was tried and convicted of an offence under S. 61 of the Excise Act and the Magistrate sentenced him to 3 months' rigorous imprisonment believing his story that he had purchased in transborder territory a year's supply of charas for his own use. The convict appealed to the learned Sessions Judge who upheld the conviction but set aside the sentence and released the prisoner under S. 562 on his finding security for one year.

The Crown has petitioned for revision on the ground that the application of S. 562 was inappropriate.

It has been suggested by the learned Public Prosecutor that S. 562 was not intended by the Legislature to be used in cases of offences against the revenue. But the terms of that section as at present enacted are against such a supposition since in its revised form the words "Indian Penal Code" have been omitted, and presumably omitted deliberately. Before the Code was amended in 1923 S. 562 was confined to offences under the Indian Penal Code. Now, all offenees are within its scope.

It is further argued that in an offence of this character S. 562 should not have been resorted to for the reasons given i *Emperor* v. *Sajan Singh* (1). I agree with this contention. As already stated the accused was in possession of 2 seers and 11 chhataks of charas, the limit of private possession being 3 tolas and his plea that he had secured at a small cost a year's supply and, therefore, wished to take advantage of the fact does not impress me as one showing effective cause against the exaction of a substantive penalty. The learned Public Prosecutor does not press for the sentence of imprisonment but I consider that a fine is called for.

I accept the petition and set aside the order of the learned Sessions Judge. The conviction is maintained and the convict shall pay a fine of Rs. 50 or in default undergo two months' rigorous imprisonment.

Petition accepted.

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(1) [1916] 19 P. R. 1916 Cr.=144 P. L. R. 1916 =41 P. W. R. 1916 Cr.

* A. I. R. 1926 Lahore 318

HARRISON AND JAI LAL, JJ.

Firm Kanwar Bhan-Sukha Nand — Plaintiffs—Appellants.

v.

Firm Ganpat Rai-Ram Jiwan—Defendants—Respondents.

Second Appeal No. 145 of 1922, Decided on 17th March 1926, from the decree of the Dist. J., Delhi, D/- 13th October 1921.

(a) *Evidence Act, S.* 102—*Contract—Assumption is in favour of legality—Onus of proving that parties did not intend to perform is on party alleging so.*

The ordinary presumption is in favour of the legality of a contract and it is for those, who assert that it was not intended to perform the contract in the manner recited therein, to prove their assertion. [P 318 C 2]

* (b) *Contract Act, S.* 30—*Wagering contract—It should be proved that delivery was not intended and that there was agreement not to enforce delivery — Speculative contract is not necessarily wagering.*

In order to prove that a transaction is a wagering one it is necessary to prove that no delivery was originally intended and also that it was agreed between the parties that neither party would be entitled to enforce the actual delivery of goods contracted for. The mere fact that the transaction was a speculative one does not make it a wagering one. [P 319 C 1]

* (c) *Civil P. C., O.* 6, *R.* 6—*Suit for damages for breach of contract—An averment that plaintiff was ready and willing to perform his part of the contract must be implied—Cantract Act, S.* 51.

Where plaintiffs bring a suit for damages for breach of a contract, in the pleadings of the plaintiffs as contained in the plaint an avernment of the performance of the conditions precedent, that is to say, readiness and willingness of the plaintiffs to perform their part of the contract, must be implied and it is for the defendants if they contest that fact to raise the matter expressly in their pleadings. It would then be necessary for the plaintiffs to prove affirmatively that they were ready and willing to perform their part of the contract. [P 319 C 2]

(d) *Contract Act, S.* 51—"*Ready and willing*" —*Contract to purchase goods—Suit for damages for breach of contract—Goods may not be in plaintiff's actual possession on the agreed date of delivery—It is sufficient if he had control over sufficient quantity of goods.*

In a suit for breach of contract to purchase goods, it is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control over the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so, in other words, that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser. [P.319, C.2]

Tek Chand and *Anant Ram Khosla*—for Appellants.

Sardha Ram—for Respondents.

Judgment.—On the 31st January 1920 and the 12th of February 1920 the appellants agreed to sell 400 tolas of gold to the defendants to be delivered on the 13th of March 1920. On the last mentioned date they asked the defendants to take delivery of the gold on payment of the agreed price. The defendants not having taken delivery of the gold on the 19th of April 1920 the appellants instituted the suit out of which this second appeal arises for the recovery of Rs. 1,733/8/- being damages alleged to be suffered by them owing to the breach by the defendants. The defendants' plea was that the contract was a wagering one and that therefore the plaintiffs were not entitled to recover any damages. The trial Court held that the contract was not a wagering one and gave the plaintiffs a decree for Rs. 1350/10/- with proportionate costs against the defendants.

On appeal the District Judge held that the contract was a wagering one. He also held that it had not been shown that "the plaintiffs were able and willing to deliver the gold on the due date."

Before us both these conclusions are attacked by the counsel for the appellants. It appears from the judgment of the District Judge that he was of the opinion that the main issue in the case was "whether it was agreed that actual delivery would be given and that payment of the price would be given" and that the second issue "whether the transactions were badni" arose only if issue No. 1 had been decided in favour of the plaintiffs. With this view we do not agree. The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was intended to perform the contract in the manner recited therein to prove their assertion. There is, thus no force in the contention of the counsel for the respondents that the finding of the District Judge is one of fact and therefore binding on this Court.

We have examined that record and find that there is absolutely no evidence on the record to prove that the transaction was badni. The defendants themselves did not go into the witness-box and no other evidence was produced. The only facts from which the inference as to the illegal nature of the transaction is drawn by the District Judge are :

(a) That neither of the parties ordinarily deal in gold ; and

(b) that in previous transactions the parties merely settled by payment of differences.

We have no evidence as to the nature, extent, number or the period of those transactions. In our opinion these facts were wholly insufficient to prove that this transaction was badni. In order to prove that a transaction is a wagering one it was necessary for the defendants to prove that no delivery was originally intended and also that it was agreed between the parties, at the time when the contract was entered into, that neither party would be entitled to enforce the actual delivery of gold : *Kundan Mal* v. *Qadir Ahmud* (1). The mere fact that the transaction was a speculative one does not make it a wagering one : *Bhagwan Das* v. *Barjorje* (2).

We hold, therefore, that the respondents have failed to prove that the transactions, which were the subject of the suit in this case, were badni. This finding, however, does not conclude the case as the learned District Judge has further held that the plaintiffs had not shown that they were able and willing to deliver. In this connexion we note that the defendants did not raise an express plea that the plaintiffs were not ready and willing to perform their part of the contract on the due date and no issue was framed by the trial Court on this point, but the learned counsel for the respondents contends that in order to make out a complete cause of action it was necessary for the plaintiffs to allege in their plaint that they were ready and willing to perform their part of the contract and that unless this allegation was made and proved by them the plaintiffs were not entitled to a decree for damages for breach of the contract. No objection was taken to the plaint being defective or incomplete in the absence of an allegation of readiness and willingness by the plaintiffs, but we are of opinion that it was not necessary for the plaintiffs to make an express allegation in the plaint as to their readiness and willingness.

The learned counsel for the respondents relied upon certain authorities which support his contention, but O. 6, R. 6, of the present Civil Procedure Code is a complete answer to his contention. It is now provided in that rule that any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleadings by the plaintiffs or defendant, as the case may be and subject thereto an averment of the performance or occurence of all conditions precedent or necessary for the case of the plaintiff or defendant shall be implied in his pleadings. It is quite clear from this that in the pleadings of the plaintiffs as contained in the plaint an averment of the performance of the conditions precedent, that is to say, readiness and willingness of the plaintiffs to perform their part of the contract, must be implied and it was for the defendants if they contested that fact to raise the matter expressly in their pleadings. It would then have been necessary for the plaintiffs to prove affirmatively that they were ready and willing to perform their part of the contract.

The expression "readiness and willingness" as used in S. 51 of the Contract Act has been the subject of discussion in a larger number of rulings. We will, however, mention only two of them, here, I. L. R. 1 *Cal.* 264 and *I. L. R.* 47, *Cal.* 458. It appears from these that is is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so. in other words, that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser. Applying this test we hold that the plaintiffs in this case were ready and willing to perform their part of the contract. It appears from the evidence on the record that there was plenty of gold in the market of Delhi on the due date and that delivery of large quantities was given by dealers in performance of other contracts to their purchasers. It also has been established that the market rate of gold on that day was lower than the contract rates between the plaintiffs and the defendants in this case. The District Judge has held that the plaintiffs "stood to make a profit by actually buying gold at the market price on due date and selling it at the

(1) A.I.R. 1924 Nag. 290.
(2) [1918] 42 Bom. 373=45 I.A.29 (P. C.).

contract rates to the defendants." On that finding of fact in our opinion the District Judge should have held that the plaintiffs were in a position to perform their part of the contract and taking this fact with another that the plaintiffs actually called upon the defendants to take delivery of the gold on the due date, the proper finding should have been that the plaintiffs were able and willing to deliver the gold. Under S. 93 of the Contract Act it was for the purchasers in this case to apply for delivery on tendering the agreed price. This they failed to do. They were therefore liable to pay damages to the plaintiffs owing to their breach of their part of the contract.

We accept this appeal set aside the decree of the learned District Judge and restore that of the Subordinate Judge with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 320

JAI LAL, J.

Abdul Rab and *others*—Plaintiffs and Defendants—Petitioners.

v.

Rahim Bakhsh—Defendant—Respondent.

Civil Petition No. 523 of 1925, Decided on 8th February 1926, for review of the order of Jai Lal, J., in Civil Misc. Appeal No. 113 of 1925, Decided on 22nd June 1925.

Legal Practitioner—Fees can be fixed by Court in appeal from order in miscellaneous proceedings.

Where an appeal is expressly from an order passed in miscellaneous proceedings and it is withdrawn on an objection that the order was not final one and that consequently it was not appealable, it is in the discretion of the Court to fix the fees of counsel as in miscellaneous proceedings. [P. 320, C. 2]

Mool Chand—for Petitioners.

Moti Sagar, *Shamair Chand* and *Sardha Ram*—for Respondent.

Jai Lal, J.—A preliminary decree for partition of immovable property was granted against the appellant. Before a final decree was drawn up some proposals were sanctioned by the Senior Subordinate Judge as to the allotment of certain properties to the respective parties. The appellant filed an appeal in this Court from an order passed by the trial Court sanctioning such an allotment. The value for purposes of jurisdiction was mentioned as Rs. 80,795-10-8. This was the value of the original suit. A Court-fee stamp of Rs. 4 was affixed to the memorandum of appeal. The appeal was expressly stated to be from an order and the prayer was "to set aside the order of the lower Court under S. 47 of the Civil P. C."

When the appeal came up for hearing on an objection by the respondents that no final decree having been drawn up, the appeal was incompetent, it was withdrawn by the appellant. It was consequently dismissed with costs. On the report of the office I fixed Rs. 100 as the fees of the respondents. An application was made by the respondents asking me to review my order fixing the fees on the ground that the fees awarded were too low and that I had no jurisdiction to fix the fees. It was contended in the course of arguments that the fee should have been awarded ad valorem as in a regular appeal from decree and that this was not an appeal from an order passed in miscellaneous proceedings. The learned counsel for the appellant, on the other hand, contended that his appeal was expressly from an order passed under S. 47 of the Civil P. C. and was covered by R. 8 of Ch. XVII on page 42 of the Rules and Orders of this Court, Vol. V, and that in any case R. 15 gave me full power to fix the fees. In my opinion the contention of the learned counsel for the appellant is correct.

The appeal was expressly from an order passed in miscellaneous proceedings; it was withdrawn on an objection that the order was not final on and that consequently it was not appealable. It follows therefore it was in my discretion to fix the fees of counsel as in miscellaneous proeeedings. That being so the present application does not lie and is hereby dismissed. The parties will bear their own costs.

Application dismissed.

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* A. I. R. 1926 Lahore 321

CAMPBELL, J.

Bago—Defendant—Appellant.

v.

Roshan Beg—Plaintiff—Respondent.

Misc. Civil Appeal No. 1895 of 1924, Decided on 28th January 1925, from the order of the Dist. J., Ferozepore, D/- 22nd May 1924.

* *(a) Land Acquisition Act, Ss. 30 and 11—Application for enquiry into the claims of different claimants made before award but adjudicated upon after award—Such adjudication is without jurisdiction—Collector should refer the question under S. 30.*

Where an application was presented to the Collector some days prior to his making an award to investigate the claims of different claimants but the same was enquired into after the award was made:

Held: that Collector's adjudication after enquiry was without jurisdiction.

Held further: that the order passed on such application cannot be an order on an application for review or modification of the award since it was on an application presented before the award was made and therefore the Collector, if he was not able to pass orders upon that application before he made his award, should have referred the question to the Court under S. 30. [P 322 C 2]

* *(b) Land Acquisition Act, S. 31 (2), Proviso 3 and S. 18—No reference made under S. 18—Civil suit by any party interested in the compensation money to recover his lawful share is not barred.*

Although a person accepts without any protest payment of the amount apportioned and tendered to him by the Collector and thereby, by the second proviso to S. 31 (2) he disentitles himself from making an application for a reference under S. 18, still that person is not exonerated from his liability to a civil suit under Proviso 3 to S. 31 (2), for the words "nothing herein contained" in the third proviso must cover everything that has gone before, including the second proviso.

[P 325 C 2]

Fakir Chand—for Appellant.

Kanshi Ram—for Respondent.

Judgment.—Certain land was owned jointly by two brothers, Roshan Beg and Khandal Beg. The latter died leaving a widow, and the revenue records showed the land was owned jointly by Roshan Beg and Mt. Bago, the widow. Steps were then taken by Government to acquire this land under the Land Acquisition Act. On the 11th of November 1922, Roshan Beg presented an application in writing to the Land Acquisition Collector stating that Mt. Bago held a half share in the land as a life-tenant in lieu of maintenance and that she was not entitled to any part of the price to be paid by Government for it. He asked that the whole price should be paid to him or else half the money deposited in some Bank and the interest given to Mt. Bago for so long as she lived.

On the 14th of November 1922 the Collector delivered his formal award under S. 11 of the Act in which he made no mention of the dispute between Roshan Beg and Mt. Bago. In the award statement of the same date the Collector entered the price of this land, namely, Rs. 1,451-13-6, as apportioned equally between Roshan Beg and Mt. Bago, viz., Rs. 725-9-9 to each. Other statements attached to the award show that Rs. 725-9-9 was paid to Roshan Beg on the 15th of November and that Mt. Bago's money was entered as undisbursed owing to non-attendance.

On the 15th of November, but not before, the Collector proceeded to enquire into Roshan Beg's petition of the 11th of November and on that day he recorded Mt. Bago's statement claiming that half of the compensation should be paid to her because she and Roshan Beg were in separate possession of definite halves of the land. The order passed by the Collector on the same day, the 15th of November, was that the amount due to Mt. Bago was to be kept in deposit and that the record of a criminal case in which Roshan Beg's son had been sentenced to death should be sent for.

Thereafter there were various adjournments, and it was not until the 23rd of February 1923, that the application came before the Collector for final decision. By that time the six weeks within which Roshan Beg could have applied for a reference to the Court under S. 18 had expired. Counsel appeared before the Collector for both Mt. Bago and Roshan Beg, and apparently arguments centred round the question whether the application of the 11th of November could be taken as one for a reference to the Court under S. 18. The Collector decided that it could not, because it did not expressly ask that the matter should be referred to the Court. He might also very well have added a second reason that the application had been presented before the award had been made. The Collector wound up his order by saying.

I see no reason to go beyond the entries in the revenue papers and direct that the award may be divided in accordance with those entries.

On the 10th of March 1923, Roshan Beg instituted the suit, of which this second appeal is the result, to recover from Mt. Bago Rs. 725-9-9. The trial Court held that such a suit did not lie in view of the terms of the Land Acquisition Act and certain rulings which will be discussed presently. This decision was reversed on appeal by the learned District Judge who took the view that since the Collector's award did not adjudicate upon the claim of Roshan Beg against Mt. Bago he was entitled to maintain a suit for recovery of the money in a civil Court. The appeal accordingly was accepted and the suit was remanded for decision on the merits. Mt. Bago has come to this Court on second appeal and her claim that the trial Court had no jurisdiction to entertain the suit is supported by a decision of the Calcutta High Court printed as *Saithesh Chandra Sarkar* v. *Bejoy Chand* (1).

The relevant provisions of the Land Acquisition Act are as follows: Under S. 9 the Collector is obliged to serve notice of the intended acquisition on all persons known to be interested and to call upon them to appear and state amongst other matters the nature of their respective interests in the land. Presumably in response to such notice Roshan Beg put in his written application of the 11th of November. Under S. 11, on the day fixed for enquiry the Collector is directed to proceed to enquire, into various matters including the respective interests of the persons claiming the compensation and to make an award under his hand of the true area of the land, the compensation which in his opinion should be allowed for the land, and the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information whether or not they have respectively appeared before him. S. 12 then lays down that that award shall be filed in the Collector's office and shall be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. S. 18 of the Act provides that any person interested who has not accepted the award may, by written application to the Collector require that the matter be referred by the Collector for the determination of the Court, and this is to be done within six weeks of the date of the award if the person was present or represented before the Collector when the award was made. Under S. 30, when the amount of compensation has been settled under S. 11, if any dispute arises as to the apportionment, the Collector may refer such dispute to the decision of the Court. S. 31 requires the Collector to tender payment of the compensation awarded by him to the persons interested and in the second sub-section it is provided that if they do not consent to receive the payment, or if there be a dispute the Collector must deposit the amount of the compensation in the Court to which a reference under S. 18 would be submitted There are three provisos to this subsection. and the third is that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

It will be observed that in the present case the Collector made his award under interests of Roshan Beg and Mt. Bago, a question which was raised before him four days previously by Roshan Beg. It appears then from the law above quoted that his adjudication, after enquiry dated the 23rd of February 1923, was made without jurisdiction. Neither learned counsel before me claims that this order can be read as part of the award. It cannot be an order on an application for review or modification of the award since it was on an application presented before the award was made. Apparently, therefore, the Collector, if he was not able to pass orders upon Roshan Beg's application of the 11th of November before he made his award, should have referred the question to the Court under S. 30.

So far as the true award of the 14th of November is concerned it contained an apportionment of the compensation between Mt. Bago and Roshan Beg, but the apportionment was made without any enquiry into their respective interests, such as S. 11 directs the Collector to make.

(1) A.I.R. 1922 Cal. 4.

Most, if not all, of the rulings on the question whether disputes about the apportionment between private persons of compensation awarded under the Land Acquisition Act can be the subject of ordinary civil suits refer to the earliest case on the subject, *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) which is a decision by their Lordships of the Privy Council. In those days the Act in force was X of 1870 which did not empower the Collector to decide any questions of apportionment of compensation, but obliged him in S. 38, if any dispute arose as to apportionment when the amount of compensation had been settled, to refer such dispute to the decision of the Court. S. 40 of the Act contained a proviso in practically the same words as the proviso to the present S. 31 (2) quoted above. In the case before their Lordships there had been a dispute between two parties about the apportionment of the compensation. The Collector had referred it to the Court and the Court had made an adjudication. One of the parties then brought another suit to set aside that adjudication. It was held that the proviso referred to above applied only to persons whose rights had not been adjudicated upon in pursuance of Ss. 38 and 39, namely, the sections requiring the Collector to refer disputes about apportionment to the Court and the Court to decide them. The judgment wound up.

> Their Lordships are of opinion that the provisions in this Act for the settling of compensation are intended to be final; and that the amount and distribution of the compensation having been settled in this case by a competent Court, and the decision not having been appealed against, the settlement is final, and the present suit cannot be maintained.

Earlier in the judgment when explaining the necessity for the proviso in the Act their Lordships observed:

> But it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance; and, therefore, a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money.

This ruling has been considered and interpreted in three decisions of the Calcutta High Court *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3), *Bhandi Singh* v. *Ramadhin Rai* (4) and *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1); and by the Punjab Chief Court in *Sher Khan* v. *Samsher Khan* (5) which was followed in *Amolak Shah* v. *Charan Das* (6).

Rajah Nilmoni Singh v. *Ram Bandhu Rai* (2) is a case almost exactly parallel to the present case. There the plaintiff sued to recover compensation awarded under the Land Acquisition Act against the person who actually received the money. It was ruled that she (the plaintiff was a female was not precluded from maintaining the suit merely by reason of her having appeared before the Collector in the acquisition proceedings, that the award of the Collector, who under S. 11 is, no doubt, authorized to deal with the question of apportionment, is declared by S. 12 of the Act to be final only as between the Collector on the one hand and the body of claimants on the other and not as between the claimants inter se that a claimant is not precluded from advancing his or her claim against another claimant by suit in the civil Court as provided by the last proviso to S. 31 (2) of the Act, and that to hold that he or she is so precluded would be to extend the doctrine of constructive res judicata a great deal too far. The learned Judges considered that this view was in accordance with that taken by their Lordships of the Privy Council in *Raja Nilmoni Singh* v. *Ram Bandku Rai* (2) and interpreted that decision in its allusions to Ss. 38 and 39 of the old Act as referring strictly to an adjudication of a civil Court upon a reference by the Collector.

The same view was adopted and expressed more elaborately by Mr. Justice Mookerji in *Bhandi Singh* v. *Ramadhin Rai* (4) with reference to S.18 he observed that there was a difference between an objection relating to the measurement of the land or the amount of the compensation and one relating to the apportionment of the compensation among persons interested and that a question of the latter character could be determined either by a reference as comtemplated by S. 18 or else by a suit at the instance of a person who might lawfully be entitled as against another. This he

(2) [1881] 7 Cal. 388=8 I.A. 90=10 C.L.R. 393 =4 Sar. 234 (P.C).
(3) [1902] 7 C.W.N. 538.
(4) [1905] 2 C.L.J. 359=10 C.W.N. 991.
(5) [1905] 37 P.R. (1905)=35 P.L.R. 1905.
(6) [1912] 52 P.R. 1913=14 P.L.R. 1912 Sup =17 I.C. 684=16 P.W.R. 1913.

pointed out was a question with which the Collector would have no concern whatsoever and he held that by reason of the 3rd proviso to S. 31 (2) the Land Acquisition Judge and the ordinary Court have practically concurrent jurisdiction to decide disputes about the apportionment of compensation. What he apprehended to be the rule deducible from *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) was that if a litigant had made his choice and availed himself of a reference to the Court under S. 18, he could not again ask for an opportunity to litigate the same matter in the ordinary Court.

Both these decisions were dissented from in *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1). So far as *Bhandi Singh* v. *Ramadhin Rai* (4) was concerned the learned Judge pointed out with truth that in the particular case before him it was unnecessary for Mr. Justice Mookerji to consider whether the Special Court under the Land Acquisition Act and the ordinary civil Courts have or have not concurrent jurisdiction. With every deference, however, I do not think that their dissent from what was held in *Srimati Punnabati Dai* v. *Rajah Padmanund Singh Bahadur* (3) is very convincing. The learned Judges seem to have proceeded very largely upon what they considered it would be reasonable to hold was the intention of the Legislature when providing a special remedy in the Land Acquisition Court, whereas with all respect I venture to think that they should have looked rather to the actual terms of the Act then to the probable intention of the Legislature. They emphasized the second passage quoted above from *Kaja Nilmoni Singh* v. *Ram Bandhu Rai* (2) commencing "But it may happen, and frequently does happen." and they held that the application of the proviso to S. 31 (2) must be limited to cases where the person is under disability or is not served with notice of the proceedings before the Collector. They further expressed the opinion that the reason why their Lordships of the Judicial Committee referred to the adjudication under Ss. 38 and 39 of the old Act was that the Collector was then bound to refer any question of apportionment to the Court and that question had to be decided by the civil Court. The case before them was whether a party served with notice under S. 9 who did not appear at all in the land acquisition proceedings and did not apply for any reference under S. 18 of the Act could afterwards maintrain a suit in the ordinary civil Court to recover compensation paid to another person. They decided that he could not do so because the proviso to S. 31 (2) has a strictly limited application and because it would not be reasonable to hold that the Ligislature, having provided a special, remedy in the Land Acquisition Court, intended to make it optional with a party to apply for a reference or to institute a suit in the ordinary civil Court. *Sher Khan* v. *Shamsher Khan* (5) is a Division Bench ruling and the facts of the case are not stated explicitly in the judgment. It was one of contentions between two claimants for the apportionment of compensation, and it was held that, since the plaintiffs' claim had been adjudicated on by the Collector and they did not within the prescribed time avail themselves of their right to demand reference to the Court under S. 18, they had exhausted their remedy and their separate suit in civil Court had been rightly dismissed. *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) was cited as authority for the view that the proviso to S. 31 (2) does not permit a person whose claim had been adjudicated upon in the manner pointed out by the Act, to have that claim re-opened and again heard in another suit. This case and *Amolok Shah* v. *Charan Das* (6) are distinguishable from the present case since in my view there has been no lawful adjudication by the Collector between Roshan Beg and Mt. Bago. If no definite point for decision had been put before him in the shape of Roshan Beg's application his apportionment might have been regular, but under S. 11 he was bound to make an enquiry into any question which arose regarding the interest of the several persons entitled to compensation and he did not do so in respect of the question raised by Roshan Beg until after he had made his award.

It remains to notice a Division Bench ruling of the High Court, *Chandu Lal* v. *Mt. Ladli Begam* (7), in which it was held that where a Collector in his award had not adjudicated upon the claim of

(1) [1919] 83 P. R' 1919=49 I. C. 657=18 P. W. R. 1919.

the plaintiff the latter's suit in a civil Court for her proportionate share in the amount of compensation allowed was competent notwithstanding that she did not apply for a reference to the Court under S. 18 of the Act. The plaintiff in that case had not appeared before the Collector at all and it is not stated whether notice had issued to her. She herself asserted that she had had no knowledge of the acquisition proceedings. The learned Judge ruled that the proviso to S. 31 (2) clearly applied to such a case ; they distinguished *Sher Khan* v. *Shamsher Khan* (5) and *Amolak Shah* v. *Charan Das* (6) and they cited with approval *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3).

This last decision is not quite so directly in point as the learned District Judge took it to be, since in the present case Roshan Beg did receive notice and appear before the Collector and he is recorded as having accepted payment of a less amount than he now claims without protest other than what is contained in his previous application of 11th November. But the judgment fortifies me in my preference for what was laid down in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3) as against *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1). With some diffidence I suggest that the learned Judge, who decided the latter case, in considering the intention of the Legislature might have reflected upon the possibility of the Legislature, when framing the proviso to S. 31 (2) having intended that the comparatively important Court of the District Judge need not in every instance be saddled with the task of deciding every question arising between private individuals about the apportionment of petty sums, and that such individuals should be permitted to take their dispute to an inferior and possibly cheaper Court. After all the words in S. 18 are "may require" and not "shall require," and the expression "any person" in the third proviso to S. 31 (2) does not in my humble judgment, carry the restricted meaning put upon it by the learned Judge, since the rest of the sub-section which the third proviso qualifies relates definitely to persons who have actually appeared before the Collector. In the present instance let it be taken that Roshan Beg accepted without any protest payment of the amount apportioned and tendered to him by the Collector. By the second proviso to S. 31 (2) he thereby disentitled himself from making an application for a reference under S. 18, but under the third proviso nothing contained in the second proviso can affect the liability of Mt. Bago, another person interested, to pay to Roshan Beg any part of the compensation to which he is lawfully entitled. And by what other means than by a suit in a civil Court could Roshan Beg, who is shut out from a remedy under S. 18, enforce that liability ? The words "nothing herein contained" in the third proviso must, it seems to me, cover everything that has gone before, including the second proviso.

If Roshan Beg accepted payment under protest, then the Collector prevented him from seeking any remedy under S.18 by retaining the petition of the 11th November for his own subsequent decision and by failing to pass orders upon it until after the time limit for an application for a reference had expired. It is to be noted too that the disputed amount which was withheld from Mt. Bago was deposited in the Treasury and not in the Court under S. 31 (2). All the equities, then, are in favour of Roshan Beg being permitted to sue in an ordinary Court to establish his claim.

There is of course a conflict between the view taken in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3) and that taken in the two Punjab rulings : *Sher Khan* v. *Shamsher Khan* (4) and *Amolak Shah* v. *Charan Das* (6). The former is that the jurisdiction of the oridinary civil Courts is ousted only when the claim of the aggrieved party has already been before the District Court on a reference under S. 18 or S. 30 of the Land Acquisition Act. The latter refuses such party any relief in a civil Court if his claim has been adjudicated upon by the Collector and there has been no reference to the District Court. This divergence requires no examination in the present case, because for the reason above stated, I do not consider that the Collector's award of the 14th November was an adjudication of Roshan Beg's claim. I hold that the decision of the learned District Judge was correct and I dismiss the appealwith costs.

Appeal dismissed.

✻ A. I. R. 1926 Lahore 326

MARTINEAU, J.

Achhru Ram and *others*—Accused—Petitioners.

v.

Emperor—Respondent.

Criminal Revision No. 1684 of 1925, Decided on 23rd December 1925, from the order of the S. J., Karnal, D/- 18th August 1925.

✻ *Penal Code, S. 99 — Public servant, acting illegally in the discharge of his duty, S. 99 applies—Income-tax officer acts illegally in forcibly entering a firm to inspect account—Income-Tax Act, Ss. 22 (4) and 23 (4).*

Although an Income-Tax officer is empowered under S. 22 (4) of the Income-Tax Act to serve the proprietors of a firm with a notice to produce their accounts, there is no provision of law by which he can insist on their producing the accounts if they decline to comply with the notice. He has no authority under the Act to enter the firm's premises in order to inspect the accounts, or to remain on the premises for that purpose against the will of the proprietors, and if he does so he commits criminal trespass and the proprietors have a right to forcibly turn him out as S 99, Penal Code, would not deprive them of their right of private defence. [P. 326, C. 2, P 327, C. 1]

Aziz Ahmad and *Balwant Rai* — for Petitioners.

Anant Ram—for Complainant.

Judgment.— The petitioners, who have been charged by a Magistrate at Karnal with offences under Ss. 353 and 147, Indian Penal Code, apply to have the charges quashed on the ground that the statement of Sardar Gurbakhsh Singh on whose report the proceedings against them were initiated, shows that they committed no offence.

The material facts as they appear from the statement in question are as follows : Sardar Gurbakhsh Singh, who is an Income-Tax Officer, went on the morning of the 13th January last to inspect the accounts of the cotton factory belonging to the firm of Rikhi Ram-Kundan Lal at Kaithal, with a view to assessing the firm with income-tax. He went into the factory, where he met Lala Achhru Ram and Lala Ram Gopal, sons of the proprietors of the factory. He asked Lala Ram Gopal to show him the accounts, and Lala Ram Gopal went into the office room and brought out three books, which he handed to the Inspector who was with Sardar Gurbakhsh Singh, and the Inspector made them over to the orderly. Sardar Gurbakhsh Singh then proceeded with the Inspector, the orderly and Lala Ram Gopal towards the gate with the object of examining the books at the Dak Bungalow. Lala Achhru Ram, however, called Lala Ram Gopal and spoke to him, and the latter then came back to Sardar Gurbakhsh Singh and said they could not show the books in the absence of the munim and asked to be given a few days' time. Sardar Gurbakhsh Singh agreed to give time till the 21st or 22nd January, but asked Lala Ram Gopal to make a statement with regard to the date or to put in a formal application so that the time might be extended. Lala Achhru Ram said that they would not do this, and asked for the return of the bahis, which he said Sardar Gurbakhsh Singh had no power to take. Sardar Gurbakhsh Singh remonstrated with him and Lala Ram Gopal, but to no purpose, and he then got the Instpector to draw up an order under S. 37 (b) of the Income-Tax Act, in which they were required to produce at once all the accounts for the years 1922-23 and 1923-24 for examination. The order was presented to Lala Achhru Ram and Lala Ram Gopal, but they refused to take it, and on its being read out to them Lala Achhru Ram forcibly took the three bahis from Sardar Gurbakhsh Singh's orderly. Sardar Gurbaksh Singh told the Inspector to go and ask the Deputy Superintendent of Police to make Lala Achhru Ram and Lala Ram Gopal understand their legal position. The Inspector went away, while Sardar Gurbakhsh Singh and the orderly waited in the factory. Lala Achhru Ram ordered Sardar Gurbakhsh Singh to leave the factory. The latter replied that he would not leave as he had come there in the discharge of his official duties. Lala Achhru Ram repeated his order once or twice, and then called a number of palladars and got them to turn Sardar Gurbakhsh Singh out by force. It is that forcible ejection of Sardar Gurbakhsh Singh from the premises that forms the basis of the charges framed by the Magistrate.

Now although Sardar Gurbakhsh Singh was empowered under S. 22 (4) of the Income-Tax Act to serve the proprietors of the firm with a notice to produce their accounts there is no provision of law by which he could insist on their producing the accounts if they declined

to comply with the notice, but the procedure to be followed in that event is laid down in S. 23 (4) of the Act. Nor had Sardar Gurbakhsh Singh any authority under the Act to enter the firm's premises in order to inspect the accounts, or to remain on the premises for that purpose against the will of the proprietors. He put himself in the wrong in two ways after Lala Achhru Ram had taken back the account books from the orderly, first, by sending for the Deputy Superintendent of Police with the apparent intention of intimidating Lala Achhru Ram; and, secondly, by remaining on the premises after Lala Achhru Ram had told him to leave. His act appears to have amounted to criminal trespass, and Lala Achhru Ram was within his rights in forcibly turning him out when he refused to leave. S. 99 would not deprive Lala Achhru Ram of his right of private defence, as Sardar Gurbakhsh Singh's proceedings were wholly illegal, and he was not acting in good faith under colour of his office. On this point see *Haq Dad* v. *Crown* (1).

Holding, therefore, that the petitioners committed no offence I accept their application and quash the charges framed by the Magistrate.

Revision accepted.

(1) A. I. R. 1926 Lah. 19.

A. I. R. 1926 Lahore 327

MARTINEAU, J.

Municipal Committee, Ludhiana—Defendant—Appellant.

v.

Labhu Ram—Plaintiff—Respondent.

Second Appeal No. 2440 of 1924, Decided on 31st March 1925, from a decree of the Dist.-J., Ludhiana, D/- 5th July 1924.

Punjab Municipal Act (3 *of* 1911), *S.* 173—*Municipal Committee is entitled to have removed summarily superstructure on takhtposh in front of a shop.*

Where a takhtposh is placed on the drain in front of a person's shop, the superstructure on the takhtposh is a moveable encroachment over the drain and is, therefore, an encroachment which the Municipal Committee is entitled under S. 173 (2) to have summarily removed.

[P. 327, C. 2]

Niaz Mohammad—for Appellant.

Badri Das and *Balwant Rai*—for Respondent.

Judgment.—The plaintiff had in front of his shop in Ludhiana a takhtposh for which he had been obtaining the permission of the Municipal Committee each year. He applied for the renewal of the permission for the year 1922-23, but in the meantime it was found that he had erected a superstructure on the takhtposh and he was served with a notice to remove it, whereupon he sued for an injunction to restrain the Municipal Committee from having it removed. The Courts below have decided in his favour, holding that the Committee was not competent to have the superstructure removed summarily. The Municipal Committee has preferred a second appeal in this Court.

The Municipal Committee is entitled under S. 173 (*z*) of the Punjab Municipal Act to remove or cause to be removed summarily any moveable encroachment or overhanging structure such as is described in S. 173 (1) of the Act, and the only question is whether the superstructure on the plaintiff's takhtposh is such an encroachment or structure.

Section 173 (1) relates to moveable encroachment in front of any building upon the ground level of any street, or over or on any sewer, drain, or watercourse, or any moveable overhanging structure projecting into the street at a point above the said ground level. Now the takhtposh is placed on the drain in front of the plaintiff's shop and it seems to me clear that the superstructure on the takhtposh is a moveable encroachment over the drain and is, therefore, an encroachment which, having been placed on the takhtposh without permission, the Committee is entitled under S. 173 (2) to have it summarily removed. Moreover, as the Committee could at any time require the plaintiff to remove the takhtposh itself an injunction in regard to the superstructure would be useless and on that account also the suit must fail.

I accordingly accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 328

CAMPBELL AND ZAFAR ALI, JJ.

Firm Budhu Mal-Parma Nand—Plaintiffs—Appellants.

v.

Gokal Chand and *others*—Defendants—Respondents.

First Appeal No. 1504 of 1924, Decided on 7th January 1926, from the order of the Senior Sub-J., Ambala, D/- 30th May 1924.

(a) *Negotiable Instruments Act, S. 76 (d)—No presentment is necessary if drawer and drawee are same.*

When the drawer and the drawee of a hundi are the same person, no presentation on due date is necessary, as, from the nature of the case, the drawer cannot suffer damage from the want of such presentation and thus S. 76, Cl. (d), of the Negotiable Instruments Act applies. 45 *All.* 554 *Foll.*

It is not necessary for the plaintiffs to make a specific reference in their pleas to S. 76 (d).

[P 328 C 2]

(b) *Evidence Act, S. 114—Negotiable Instruments Act—Granting hundi for debt due is presumably only conditional payment and returning of bond for debt due does not rebut presumption.*

It is a question of fact to be decided in each particular case whether the parties intended the subsequent hundi to be an absolute or a conditional payment of the original debt, and the presumption is that the effect of giving or taking of bill or note is that the debt was conditionally paid. This presumption is not rebutted by the fact that previous promissory notes for the original debt were returned. 4 *Lah.* 151, *Foll.* [P 328 C 2]

Sheo Narain, Shamair Chand and *Sagar Chand*—for Appellants.

Judgment.—The parties to this suit are the firm Budhu Mal Parma Nand plaintiffs and (1) Gokal Chand (2) Hari Chand (3) Puran Chand and (4) (5), and (6) the three minor sons of Gokal Chand, defendants. The suit was based on three hundis all dated the 4th June 1922 (1) for Rs. 2,500 due after 245 days (2) for Rs. 2,500 due after 355 days and (3) for Rs. 250 payable after 300 days. The suit was instituted on 29th May 1923.

The lower Court dismissed the suit on the grounds that there was no proper presentation of the first two hundis on the dates of maturity, that the third hundi was not properly stamped and so was inadmissible in evidence and that the plaintiffs could not fall back upon the original consideration for it because the plaintiffs intended the hundi to be an absolute payment of the previous debt.

In appeal it is argued in respect of the first two hundis that presentation was not necessary because the drawers were themselves the drawees. These hundis were signed by Hari Chand for himself and Gokal Chand and by Puran Chand and they were drawn upon Janki Dass Bishambar Dass. The defendants Gokal Chand and Hari Chand pleaded that they themselves were the sole owners of the firm Janki Das Bishambar Dass. Puran Chand's plea was that he signed the hundis merely as witness, a point which, as our judgment will show, is yet to be decided.

We agree with the finding of the lower Court that the hundis were not presented but it was held in I L. R. XLV. *All.* 554 that when the drawer and the drawee of a hundi are the same person no presentation on due date is necessary as from the nature of the case the drawer cannot suffer damage from the want of such presentation and thus S. 76, Cl. (d) of the Negotiable Instruments Act applies The learned subordinate Judge has observed in his judgment that the plaintiffs did not rely on S. 76 (d) and did not show that the defendants could not suffer any damage owing to non-presentation, but it seems to us that the inability of the drawer to suffer damage is obvious and that it was not necessary for the plaintiffs to make a specific reference in their pleas to S. 76 (d). We hold on the first issue that no presentation of the hundi was necessary.

As regards the third hundi for Rs. 250 we again disagree with the learned Senior Subordinate Judge who correctly stated that it is a question of fact to be decided in each particular case whether the parties intended the subsequent hundi to be an absolute or a conditional payment of the original debt, and that the presumption was that the effect of giving or taking of a bill or note was that the debt was conditionally paid. The learned Subordinate Judge considered that this presumption was rebutted in the present case by the fact that previous promissory notes for the original debt were returned to the defendants. According to the plaintiffs' statement in the lower Court which was admitted by the defendants, matters commenced by two loans by the plaintiffs to the defendants as proprietors of the firm Janki Dass Bishambar Dass, the first of Rs. 4,000 and the 2nd of Rs. 6,000. Promissory notes were taken and the defendants made certain payments both of

interest and principal. On the 4th June 1922, Rs. 5,250 remained due from the defendants and they received back the promissory notes and executed the hundis in suit according to which they were to pay up the amount within the period fixed in the hundis. In our opinion the principles of law applicable are laid down in I L. R. 4 *Lah*. 151 and we think that the learned Subordinate Judge has overlooked the improbability of the plaintiffs' agreeing to take a mere piece of waste paper as an absolute payment of a portion of their debt. The intention of the parties seems to us to have been to grant time to the defendants in lieu of making them liable on promissory notes payable on demand. We hold, therefore on issue No. 11 that the plaintiffs can revert to the original and make it the basis of their claim in respect of Rs. 250 of the third hundi.

The suit has been determined by the lower Court on these two preliminary points. We accept the appeal and setting aside the judgment of the lower Court we remand the suit for a fresh decision on the other issue under O. 41, R. 23, Civil Procedure Code, P. 5. The stamp on appeal will be refunded and costs will be costs in the cause. The question whether the suit was premature or unduly precipitate in regard to the second hundi payable after 355 days and the effect of such being the case remains open. The above order applies only to the three defendants Gokal Chand, Hari Chand and Puran Chand, since before us the plaintiffs have withdrawn their appeal against the three minors, Miwan Mal, Brij Lal, and Bihari Lal, and so far as they are concerned the dismissal of the suit by the trial Court will stand.

Appeal accepted.

A. I. R. 1926 Lahore 329

BROADWAY, J.

Parman Nand and *another*—Defendants—Appellants.

v.

Salig Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 1027 of 1925, Decided on 27th January 1926, from a decree of the Dist. J., Hoshiarpur, D/- 19th January 1925.

Civil P.C., O. 22, Rr 11 and 10—One respondent dying before filing of appeal—Application to substitute his legal representatives is incompetent.

R. 10 relates to an assigment, creation or devolution of any interest during the pendency of a suit, the object being to bring the person having the proper legal right on to the record so as to be able to continue the suit. R. 11 provides for the same thing being done when an interest is assigned, created or devolves during the pendency of an appeal. So where a respondent dies before the institution of appeal, an application to treat other respondents as his legal representatives on the ground that the interest of the deceased has passed to them before the filing of appeal does not lie. *A. I. R.* 1924 *Mad.* 56, *Foll.*

[P 330, C 1]

Dev Raj Sawhney—for Appellants.

Shamair Chand—for Respondents.

Judgment.—Tulsa was one of the several plaintiffs who instituted a suit for possession of a certain site and the recovery of a sum of Rs. 30 as chakota rent due thereafter. All the plaintiffs were granted a joint decree for possession of the site in question and for the sum of Rs. 15 and costs on the 11th June 1924. The defendants preferred an appeal to the learned District Judge making all the decree-holders including Tulsa, respondents. The decree of the trial Court was confirmed with certain modifications on the 19th January 1925. The defendants then preferred a second appeal to this Court which was filed on the 22nd April 1925.

On the 4th November 1925 Mr. Shamair Chand on behalf of the plaintiffs-respondents filed an affidavit pointing out that Tulsa had died on the 17th April 1925 and that he had left him surviving a son. It was also urged that the appeal must fail as having abated. The case came up for hearing on the 30th November 1925 before Mr. Justice Dalip Singh when Mr. Shamair Chand for the respondents raised the above preliminary objection to the hearing of the appeal. It was then stated by Mr. Dev Raj Sawhney that Tulsa's interest in the property in suit had come to an end some time about the 4th January 1924 and had been acquired by the sons of Nihala who are already respondents on the record. He asked for time in order that the necessary affidavit could be put in. Time was given to him and the case came up before me on the 4th January 1926 when Mr. Rashid who was appearing for Mr. Dev Raj Sawhney stated that he had received the affidavit the evening

before and required further time. Time was allowed and the case has now come up for disposal.

There is before me an application purporting to be made under O. 22, R. 10, Civil. P. C. in which for the defendants-appellants it is prayed that the sons of Nihala should be treated as the legal representatives of the Tulsa whose right and interest in the suit property had come to an end two years previously and that the appeal should be allowed to proceed. It is not denied that Tulsa has left a son and indeed Mr. Dev Raj Sawhney has frankly admitted that if the decree be treated as a joint decree and if it be held that the appeal has abated against Tulsa the entire appeal must fail. Mr. Shamair Chand pointed out that what is sought to be done in the present case is to amend the cause title of the appeal by substituting the names of the legal representatives of Tulsa who had died before the appeal was filed. He has drawn my attention to the case of *Govinda Kaviraj* v. *Gauranga Saw* (1) where a Division Bench of the Madras High Court held that such an application was incompetent.

Mr. Dev Raj Sawhney for the appellants has contended that inasmuch as Tulsa no longer had any right in the property for the reason that in January 1924 a partition had taken place between the plaintiffs-respondents under which Tulsa's right in the suit property had come to an end the decree passed in favour of Tulsa and confirmed on appeal should really be regarded as a nullity and that, therefore, his son could succeed to nothing on Tulsa's death so far as the present property is concerned. In this view I am unable to concur. R. 10 of O. 22 relates to an assignment, creation or devolution of any interest during the pendency of a suit, the object being to bring the person having the proper legal right on to the record so as to be able to continue the suit. R. 11 provides for the same thing being done when an interest is assigned, created or devolves during the pendency of an appeal.

In the present case if there was any partition as alleged by the appellants it took place during the pendency of the suit. Nevertheless Tulsa was granted a joint decree. In the appeal preferred against that decree Tulsa was made a party by the defendants-appellants and nothing was mentioned of this partition during the appeal which was allowed to proceed to the end. Again, when the second appeal was preferred, Tulsa was made a party although at the date of the filing of the appeal he had died. It seems to me that the Madras case cited above is to the point and the procedure sought to be adopted now is not warranted and I must therefore, refuse this application.

As it is not denied that Tulsa died on the 17th April 1925, and as no application has been filed to bring his legal representative on to this record, (that legal representative admittedly being his son) the appeal as against him has abated, and as the decree is a joint one admittedly the entire appeal must abate. I hold accordingly and dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1924 Mad. 56.

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* A. I. R. 1926 Lahore 330

ADDISON, J.

Chaudhri Kanhya Ram—Defendant—Appellant.

v.

Firm Dina Nath Hardial Mall—Plaintiff—Respondent.

Misc. First Appeal No. 2904 of 1925, Decided on 12th Feburary 1926, from the order of the Sub-J., 1st Class, Delhi, D/- 31 August 1925.

* *Civil P. C., O. 38, R. 5—Properly within or without jurisdiction can be attached.*

The new Code meaus that an attachment before judgment can be of property within or without the jurisdiction of the Court. [P 331, C 2]

Sardha Ram Kapur—for Appellant.

Shamair Chand—for Respondent.

Addison, J.—Plaintiff firm Dina Nath Hardial Mal of Delhi sued Kewal Ram Kahnay Ram, etc. defendants, residing in Mianganj, Aligarh, in the United Provinces, for Rs. 6,250 for groceries supplied to the firm of Indar Mal-Tulsi Mal. It was also alleged in the plaint that after the purchase the firm had changed its names to Kahnay Ram-Panna Lal, and after that again this name. On the 18th of August 1925, the plaintiffs filed an application asking for attachment before judgment of the moveable and immovable property of the defendants. In this application it was stated

that the name of the firm had been changed and the property was being wasted.

The Court ordered that an injunction should issue against the defendants not to transfer any moveable or immovable property till further orders. Two days later the plaintiffs again applied for attachment before jndgment of the groceries in the shop styled Kahnay Ram Chaudhri in Mianganj, Aligarh, and also a residential house belonging to the defendants in Sarai Behram Bag. It was submitted that if the defendants' property was not attached before judgment they would alienate the entire moveable and immovable property. The affidavit was to the effect that the firm had changed its name and that they were wasting their property both moveable and immoveable, and had already disposed of some, and that they would dispose of the rest when they heard of this suit.

Accordingly on the 20th August, acting under O. 38, R. 5, Code of Civil Procedure, the Court ordered the conditional attachment before judgment of the groceries in the shop styled Kahnay Ram Chaudri, and the house in Sarai Behram Bag. It also ordered that notice should issue to the defendants calling on them to furnish security by the 31st August to the effect that they, when called upon, would produce their property mentioned in the application or a portion thereof sufficient to meet payment of the sum claimed. On the 31st August the Court passed another order to the effect that if the defendants furnished reliable security the order of attachment before judgment would be set aside. This practically meant that under O. 38, R. 6, the defendants were held not to have shown cause why security should not be furnished and the conditional order of attachment was made final subject however to the condition that the attachment would be withdrawn at any time when the security was furnished. It might also be noted that injunction issued to the defendants not to alienate any property, but most of the injunctions seem not to have been served.

An appeal has been filed by Kahnay Ram, defendant, against the attachment before judgment of the groceries in question and of the house in Sarai Behram Bag belonging to him. The first argument advanced was that the Court had no jurisdiction to attach the groceries and the house as they were without its jurisdiction. This view was taken by the Calcutta High Court in *Surendra Nath* v. *Bansi Badan* (1) and by the Upper Burma Judicial Commissioner's Court in *Bhai Khan* v. *Des Raj* (2). A different view, however, was taken by the Lower Burma Chief Court in *Somasundaram* v. *Muthuveerappa* (3), where it was pointed out that the corresponding S. 483 of the Old Code had been modified by the omission of the words "within the jurisdiction of the Court" from the new section "O. 38, R. 5." The view taken in the latter case is the one accepted by Mulla in his Civil Procedure Code in the commentary under O. 38, R. 6 and in Sircar's Code of Civil Procedure, 6th edition, at page 1612. It seems to me that the new Code meant that an attachment before judgment could be of property within or without the jurisdiction of the Court, and I so hold.

It was next urged that it had not been established that the defendant was about to dispose of the whole or any part of this property with intent to obstruct or delay the execution of the decree that might be passed against him. It was held in *Chandrika Prashad* v. *Hira Lal* (4) that the power to attach before judgment was not meant to be exercised lightly or without clear proof of the existence of the mischief aimed at as the consequence might be serious and embarassing. The power should be exercised only when the Court is satisfied not only that the defendant was about to dispose of his property but also that his object in so doing was to obstruct or delay the execution of any decree that might be passed against him. It was held in *Khoka Marwari* v. *Ram Chandra* (5) that there must be definite evidence to satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property and it was not sufficient to make any general allegation. See also *Nowroji* v. *Deccan Bank* (6)

Now, in the case before me, I do not think it can be said that the groceries

(1) [1916] 24 C. L. J. 533=36 I. C. 457.
(2) [1914] 25 I. C. 771.
(3) [1911] 4 Bur L. T. 89=10 I. C. 794.
(4) A. I. R. 1924 Patna 312.
(5) [1918] 44 I. C. 240.
(6) [1921] 5 Bom. 1256=63 I. C. 958=23 Bom. L. R. 550.

were being sold in order to obstruct or delay the execution of any decree that may be passed. They are being sold in the ordinary course of business and it has not been established that their sale is with the object defined in O. 38, R. 5. For this reason the appeal must be partly accepted and the groceries in the shop styled Kahnay Ram Chaudhri which have been attached before judgment must be released from attachment.

It is different as regards the house in Sarai Behram Bag which has been attached. There is an affidavit that the defendants have been changing the name of their firm and that they are taking steps to dispose of their property. I think that for this reason the attachment before judgment of this house should be maintained as ordered by the lower Court unless security is given as stated in its order. Before me the learned counsel for the appellant said that he had no objection to this part of the order. The appeal, therefore, as regards the attachment before judgment of the house in Sarai Behram Bag is dismissed.

There will be no order as to costs.

Appeal partly accepted.

A. I. R. 1926 Lahore 332

CAMPBELL, J.

Maula Bux—Defendant—Appellant.

v.

Chanan Mal and *others*—Plaintiffs—Respondents.

Miscellaneous Second Appeal No. 2569 of 1925, Decided on 17th February 1926, from the order of the Dist. J., Gurdaspur, D/- 19th June 1925.

Civil P. C., O. 22, Rr. 3 and 4—Appellate Court must have all persons before it.

A Court hearing an appeal must have before it all persons whose interests might be affected by the decree in appeal. [P. 332, C. 2]

Chandra Gupta and *Faqir Chand*—for Appellant.

Nand Lal—for Respondents.

Campbell, J.—In this case four plaintiffs obtained a decree against Maula Bakhsh, defendant, for mandatory injunction restraining him from opening windows in the southern wall of his house No. 6220 under construction situate in Batala City. Maula Bakhsh appealed to the District Court. During the pendency of the appeal one of the plaintiffs, Bhagat Ram, died and application was not made in time to substitute his legal representatives on the record. The learned District Judge rejected an application to set aside the abatement of the appeal against Bhagat Ram and dismissed the appeal in toto on account of the abatement.

In second appeal it is argued : firstly, that the abatement against Bhagat Ram should have been set aside ; and, secondly that in spite of it the appeal could have proceeded against the remaining respondents.

No sufficient cause was alleged in the affidavit accompanying Maula Baksh's application to set aside the abatement and the application was rightly refused. On the other point the test is whether appeal could have been preferred by Maula Bakhsh without joining Bhagat Ram as a respondent. In that case Bhagat Ram would have had, as his legal representatives now have, a final decree in their favour that the defendant is not to open windows in the wall of his house, and it would be impossible for a fresh decree to be passed in appeal against the surviving respondents altering the decree under appeal which would result in any effectual relief for the appellant. Furthermore, a Court hearing an appeal must have before it all persons whose interests might be affected by the decree in appeal.

The argument addressed to me that Bhagat Ram and all the several plaintiffs could have instituted separate suits for the injunction, and therefore an appeal could proceed against any one of them without the others, has no force. The joint suit has been brought and has resulted in a decree, and to examine the correctness of that decree as regards the surviving plaintiff-respondents in the face of the absolute decree in favour of the representatives of Bhagat Ram would be altogether nugatory. The lower appellate Court was correct in dismissing the appeal. The appeal fails and is dimissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 333

SCOTT-SMITH AND LE ROSSIGNOL, JJ.

Iqbal Singh and *others*—Defendants—Appellants.

v.

Jang Bahadur Singh and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No 915 of 1919, Decided on 25th November 1924, from a decree of the Senior Sub-J., Gujranwala D/- 7th March 1919.

(a) *Hindu Law—Nucleus very small—No presumption arises that property was acquired with that nucleus*

Where the nucleus of ancestral property is very small there cannot be any presumption that any subsequent acquisitions were made with the assistance of that nucleus: 29 *All.* 244 (*P. C.*) : *A. I. R.* 1923 *All.* 574 *Dist.* [P 334 C 2, P 335 C 1]

(b) *Hindu Law—Ancestral property—Member not intending to blend self-acquisitions with joint family property—Such acquisitions are not joint family property.*

Where the member of a joint Hindu family does not intend to blend his self-acquisitions with the ancestral property but he always treats them as his own over which he has full disposing power the self-acquired property is not to be considered as joint family property. [P 335 C 2]

(c) *Pensions Act* (23 *of* 1871), *S.* 6—*Suit relating to grant of land revenue is not cognizable by civil Court except on certificate under S.* 6.

The suit relating to a grant of land revenue by the British Government cannot be taken cognizance of except upon a certificate from the Collector under S. 6. [P 336 C 1]

Tek Chand, *Gokal Chand Narang* and *Amir Nath Chopra*—for Appellants.

Fakir Chand and *Balwant Rai* for *Mehar Chand*—for Respondents.

Judgment.—In the suit out of which the present appeals arise plaintiff Kaban Singh, son of Dayal Singh, sued for a declaration that he was entitled to certain properties and debts mentioned in his fathers' Will dated the 10th of September 1906. He also sued for the recovery of a sum of Rs. 877-5-4 of jagir money which he said had been wrongly paid to his brothers, Wasakha Singh and Waryam Singh, the defendants. The Court below gave him a decree for the declaration as prayed but dismissed the suit for jagir money as barred by time under Art. 62 of the Schedule to the Limitation Act. From this order separate appeals were filed by the sons of Wasakha Singh, who has died, and by Waryam Singh and his daughter, Mt Indar Kaur and plaintiff has filed cross-objections as to the part of the suit dismissed.

The parties are Bhandari Khattries of Butala in the Gujranwala District and are admittedly governed by Hindu Law. Sardar Dayal Singh was one of the four sons of Sardar Ganda Singh who was a rais in the Sikh times and held a personal jagir of Rs. 18,000 per annum in addition to one of Rs. 15,000 for the maintenance of 60 Sawars. Ganda Singh was killed during the 1st Sikh War in 1845. Dayal Singh was 13 years old at that time. The jagir was continued by the Sikhs to the sons of Ganda Singh. After the annexation of the Punjab the British Government in 1850 considered the claims of Ganda Singh's sons and having regard to their position and influence assigned a jagir of Rs. 2,500 per annum to each son for his life and declared that the sons of each of them should after their death enjoy a jagir of Rs. 625 per annum. Dayal Singh admittedly had a share in certain ancestral property described in para. 2 of the plaint. He was an Honorary Magistrate and an Honorary Sub-Registrar: but these posts brought him no income. His income was derived from his share in the ancestral property and from his jagir of Rs. 2,500 per annum. His sons were members of a joint Hindu family: but according to the plaintiff's case Wasakha Singh separated in Sambat 1922 corresponding to 1865 A. D. at which time he took a share in the moveable property.

On the 26th May 1894 Dayal Singh made a Will in which he devised the whole of his property to his three sons and recited that Wasakha Singh had separated from him in Sambat 1922. On the same day Wasakha Singh executed a deed of release or faraghkhati printed at page 9 of the paper-book in which he recited that he had received his share in certain properties of his father ancestral and self acquired, that he had taken possession of the same and that he had claim to no other property. He also recited that he had received certain cash and ornaments and that he had no further claim to the moveable property of his father. On the 24th of September 1896 Waryam Singh executed a deed of release (pages 10-12 of the paper-book) in favour of his father in which he said

that he had received Rs. 8,000 on account of his share in the moveable property and that he had no claim to any other moveable property possessed by his father with the exception of a share in the clothes, utensils and other articles valued Rs. 2,000.

Subsequent to the Will of 1894 Dayal Singh agreed to mutation of his lands in the villages of Wazirke and Killa Dev being effected in equal shares in the names of Waryam Singh and Kahan Singh. These mutations were in accordance with the terms of the Will. The proprietary rights were mutated and that clear meaning of the mutation is that Waryam Singh and Kahan Singh became the proprietors in place of Dayal Singh. Some other mutations were entered in the register with the object of transferring certain properties to all the three sons, but were refused because Sardar Dayal Singh would not agree to them,

On the 25th of September 1896 Waryam Singh executed a Will in favour of Kahan Singh but subsequently revoked this and in 1912 executed a Will in favour of Wasakha Singh. On the 10th September 1906 Dayal Singh executed a second Will by which he revoked that of 1894. By it he gave shares to Wasakha Singh and Waryam Singh in what he described as the only ancestral property and not to Kahan Singh. The property which he had previously mutated in favour of Waryam Singh and Kahan Singh he referred to as his own and bequeathed it to Kahan Singh only. In 1907 Dayal Singh applied to the revenue authorities to cancel the mutations which he had agreed to in regard to Kila Dev and Wazirke properties, but the revenue authorities rejected his application. In 1909 Dayal Singh died and the Revenue Authorities sanctioned mutation of the lands left by him in favour of his three sons in equal shares (His Lordship then discussed the evidence and held that Dayal Singh's income from ancestral property was only some Rs. 37 but that he enjoyed a jagir of Rs. 2,500. and that jagir enjoyed by Sardar Dayal Singh was his self-acquired property.) The next point urged by Mr. Tek Chand was that as there was a nucleus of ancestral property in the hands of Dayal Singh, all the property subsequently acquired by him should be held to be acquired with the help of this nucleus and must. therefore, be considered to be joint family property.

He referred to the Privy Council case reported in *Lal Bahadur* v. *Kanhaya Lal* (1) in which it was held that the share taken on partition by the father of the plaintiffs, and defendant was ancestral property in which from their birth his sons acquired an interest : that there being a nucleus of ancestral property the onus was upon the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds that such onus had not been discharged ; that on the contrary the evidence showed that there was a common stock of the whole family into which each member voluntarily threw what he might otherwise have claimed as self-acquired and that the property purchased by, or with the assistance of the joint funds was joint property. In that case their Lordships finally held to be established that there was considerable nucleus of ancestral property in the hands of the father after the partition and the onus was therefore, on the respondent to prove that his subsequently acquired property was his separate estate: see page 255 of the report. In the present case the nucleus of ancestral property was quite negligible and we, therefore, consider it to be distinguishable from the Privy Council case.

The latter was followed subsequently by the Allahabad High Court in the case reported in *Sukhnandan* v. *Brijnandan* (2). There also it was found established by the evidence that there was a nucleus of joint family property with the assistance of which the subsequent acquisitions had been made and that in consequence the property in dispute must be hold to be joint property. Their Lordships said that.

> Where there is a nucleus of ancestral family property, with the assistance of which subsequent acquisitions have been made, the burden of proving that any particular property is separate lies on the person who asserts it.

In the present case, considering how very small the nucleus of ancestral property was, we do not consider that there could be any presumption that any

(1) [1907] 29 All. 244=34 I. A. 65=11 C. W. N, 417=4 A, L. J, 227=9 Bom. L. R, 597=5 C. L. J. 340=17 M. L. J. 228 (P. C.).
(2) A. I. R. 1923 All. 574.

subsequent acquisitions were made with the assistance of that nucleus. We have, therefore, no difficulty in holding that the whole of the property left by Dayal Singh, with the exception of that detailed in para. 2 of the plaint, was his self-acquired property with which he could deal as he pleased.

A good deal of argument was addressed to us as to whether it was proved that Wasakha Singh had separated from the family in 1865. We may say at once that there is no clear evidence of any such separation. The assertion by Dayal Singh in his Will of 1894 that there was such a separation is not admissible in evidence againt Wasakha Singh or his representatives. Wasakha Singh executed a deed of release on the same day as his father executed a Will and there can be little doubt that he knew of the contents of the Will. Reading both documents together it appears probable that Wasakha Singh was living separate from his father before 1894, but there is no clear proof of final separation. Mr. Tek Chand has strongly urgued that the family was a joint Hindu family up till 1906 and that, therefore, the presumption is that the property acquired by Dayal Singh became joint property. He has referred to us to a case reported as *Rajani Kanta Pal* v. *Jaga Mohan Pal* (3) in which it was held that where a member of a joint Hindu family blends his self-acquired property with property of the joint family either by bringing his self-acquired property into a joint family account, or by bringing the joint family property into his separate account, the effect is that all the property so blended becomes joint family property.

A similar view was taken in *Suraj Narain* v. *Ratan Lal* (4). The present case is, in our opinion, clearly distinguishable. Here there are no indications whatsoever that Dayal Singh ever intended that the property acquired by him should be treated as joint family property. There was no joint account in which Dayal Singh blended his income with receipts and payments on joint account as in the Allahabad case. Wasakha Singh held various Government appointments and eventually became a Naib-Tahsildar and a Tahsildar, but he was on sick leave from 1890 till he was invalided and had to retire in 1895. Waryam Singh was also employed as a Tahsildar in Kashmir. There is no evidence at all to show that they acquired any property and there is no satisfactory evidence as pointed out by the trial Court to the effect that they contributed any of their earnings to joint funds. On the other hand, there are many indications to show that Dayal Singh always treated his acquisitions as his own separate property.

We may refer in this connexion specially to the Will executed by him and to the deeds of release of Wasakha Singh and Waryam Singh which show that they did not dispute their father's power to will away the whole of his property. Other instances in which Dayal Singh treated the property as his own are the mutations of his lands at Wazirke and Killa Dev which he caused to be made in the name of Waryam Singh and Kahan Singh. Again, when mutations of other lands were entered up to be made in favour of all his sons he objected to the same and the mutations were rejected by the revenue authorities.

In our opinion all the circumstances of the case and the conduct of Dayal Singh and his sons show clearly that Dayal Singh never intended to blend his self-acquisitions with the ancestral property, but that he always treated them as his own over which he had full disposing power. Any initial presumption in favour of the view that the property is the joint family property has, in our opinion, been amply rebutted.

It is, therefore, clear that when he made his Will in 1906 Dayal Singh had full power to dispose of all his self-acquired property with the exception of the land situated in Wazirke and Killa Dev the proprietary rights of which he had already disposed of in his lifetime. The mutation entry relating to the Killa Dev land will be found at pages 122 to 127 of the paper-book and that in regard to the Wazirke land at pages 210 to 215. These clearly show that Dayal Singh transferred his proprietary rights in the land in the favour of Kahan Singh and Waryam Singh in equal shares and in accordance with the terms of the Will executed by him in 1894. Having once divested himself of his rights in these properties he could not revoke his act-

(3) A. I. R. 1923 P. C. 57 (P. C.).
(4) [1917] 40 All. 159=40 I. C. 988=44 I. A. 201 (P. C.).

and will them away in 1906. His Will of 1906, therefore, so far as it affects the half-share of Warayam Singh in these two properties, is of no effect.

Item No. 8 in para. 9 of the plaint is 800 kanals of land situated at Sahran. It is pointed out by the counsel for the appellants and respondents' counsel also agrees that the area of 800 kanals is a mistake. The sale deed by virtue of which Dayal Singh, along with three others acquired land at Saharan will be found at page 32 of the paper-book. It shows that 932 kanals was sold in which Dayal Singh's ¼th share would be 232 kanals; the mutation of this land which was effected on Dayal Singh's death will be found at page 163 of the paper-book and shows that his share amounted to 204 kanals only. Lala Fakir Chand concedes that a correction may be made in the decree and that his client will be satisfied if he gets whatever land was possessed by Dayal Singh in this village.

The cross-objections of the plaintiff Kahan Singh relate to ⅔rds share in the jagir money for kharif 1909 which was paid by the Collector to his brothers. He claims that under the terms of the Will it should have been paid to him. Now this money was not due to Dayal Singh at the time of his death but would have become due to him in December 1909. There is, therefore, much force in Mr. Tek Chand's contention that Dayal Singh could not will away property which was not owned by him at the time of his death. The lower Court dismissed the claim to this sum of money on the ground that it was barred by time.

Without deciding whether the claim was barred by time or not, we are clear that the civil Court could not entertain this claim at all without a certificate from the Collector granted under S. 6 of the Pensions Act, XXIII of 1871. S. 4 of that Act is:

> Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any other former Government.

It is clear to us that the suit, so far as this sum of money is concerned, relates to a grant of land revenue conferred upon Dayal Singh by the British Government and, therefore, in accordance with S. 6 the civil Court could not take cognizance of the claim except upon a certificate from the Collector, Deputy Commissioner or other officers authorized in that behalf to the effect that the case might be tried. The cross-objections of the plaintiff as regards this sum of money must, therefore, be dismissed on this ground alone.

The appeals are accepted to this extent only that the decree of the lower Court will be varied, and the declaration will be to the effect that the plaintiff is proprietor of the property and outstanding debts mentioned in the Will and in paras. 7 and 9 of the plaint except so far as Waryam Singh's half-share in the property situated on Killa Dev and Wazirke is concerned. As regards land at Saharan No. (8) of the decree will be amended and instead of the words "800 kanals of land" the words "All the land left by Sardar Dayal Singh" will be substituted.

As appellants have succeeded in part in this Court, and as the cross-objections have failed, we think it equitable that the parties should bear their own costs in both Courts, and we order accordingly.

Appeal partly accepted.

A I. R. 1926 Lahore 336

FFORDE, J.

Labh Singh—Accused—Appellant.

v.

The Crown—Opposite Party.

Criminal Appeal No. 921 of 1925, Decided on 12th March 1926, from the order of the 1st Class Mag., Lahore, D/- 31st July 1923.

Penal Code—S. 75—One previous conviction does not necessarily make accused habitual criminal.

One previous conviction does not necessarily mean that the convict is an habitual criminal though a subsequent offence, shortly upon release from jail, is certainly a matter which entitles the trial Court to impose a more severe sentence than would be the case if there has been no other conviction. [P. 337, C. 1]

Nand Lal—for Appellant.

Fforde, J.—Labh Singh and Mathra Das have been convicted by the First Class Magistrate with S. 30 powers of an offence under S. 457 of the Indian Penal Code. Labh Singh has, under the enhanced provisions of S. 75 of the Indian Penal Code, been sentenced to seven years' rigorous imprisonment with three months' solitary confinement and has

further, under S. 565 of the Criminal Procedure Code been ordered on release to notify his residence for the maximum term of five years. Mathra Das, who appeals through jail, has been sentenced to two years' rigorous imprisonment with three months' solitary confinement.

The case against both appellants has been amply proved. I need add nothing to the reasons given by the learned Magistrate for coming to his conclusion that the guilt of the appellant has been established.

The only question is that of the sentence upon Labh Singh. It appears that he was previously convicted in 1922 when he received 18 months' rigorous imprisonment. One previous conviction does not necessarily mean that the convict is a habitual criminal, though a subsequent offence, shortly upon release from jail, is certainly a matter which entitles the trial Court to impose a more severe sentence than would be the case if there has been no other conviction. I think, however, that the present sentence is, under the circumstances, rather too severe, and I, accordingly, reduce it to one of five years' rigorous imprisonment and set aside the order for notification under S. 565 of the Criminal Procedure Code. In other respects both appeals are dismissed.

Sentence reduced.

A. I. R. 1926 Lahore 337

BRODWAY AND FFORDE, JJ.

Durga Datt-Jagan Nath of Delhi—Defendants—Appellants.

v.

R. J. Wood and Co. of Delhi—Plaintiffs—Respondents.

First Appeal No. 1854 of 1925, Decided on 25th February 1926, from a decree of the 1st Class Sub-J., Delhi, D/- 22nd June 1925.

Practice—Procedure—Suit for damages—Preliminary decree should not be passed—Decree—Civil P. C. O., 20.

In suits for damages for failure to take delivery of goods ordered, no preliminary decree should be passed. [P. 332, C. 2]

Sardha Ram—for Appellants.

Mehr Chand—for Respondents.

1926 L/43 & 44

Broadway, J.—This appeal has arisen in the following circumstances: The plaintiff, a firm known as Messrs. R. J. Wood and Co., Delhi, claimed a sum of Rs. 19,000 as damages from the defendant firm of Messrs. Durga Datt-Jagan Nath. also of Delhi, for failure to take delivery of goods ordered. The trial Court, after hearing such evidence as the parties cared to lead on the 22nd of June 1925, passed an order to the following effect:

> Accordingly a preliminary decree is passed for recovery of the amount to be calculated as above with full costs of the suit and with interest on the principal decretal amount at Rs. 6 per cent. per annum till realization from the date of the suit. Parties to appear before me on 4th July 1925 so that the damages may be correctly assessed on the lines indicated above.

This is clearly an interlocutory order. A preliminary decree was, however, drawn up in its terms; and against that prelimin ary decree the defendants preferred this appeal through Mr. Sardha Ram. The appeal was first filed on ten rupee stamp, the learned vakil for the appellant noting at the foot of the memorandum of appeal that the suit being one for damages and not for accounts, no preliminary decree should have been passed. For that reason he claimed exemption from filing Court-fee on the full amount. The office apparently objected and the deficiency has been made good.

It is perfectly clear that in suits of this nature no preliminary decree should be passed and the learned vakil's contention as to this in the note referred to above was perfectly sound. It is however, urged that as no decree at all should have been passed and as the case for the appellant is very strong on the merits this Court should overlook the gross irregularity committed by the trial Court and merely direct that Court to send up a report as to what the actual amount due according to the terms of the preliminary decree would come to. I do not think we should be justified in acceding to this request. In my opinion the proper order in this case is to accept the appeal to set aside the preliminary decree and return the case to the Court below for disposal in accordance with law. As, however, the error is due solely to the conduct of the Court, and as the decree passed purports to be a preliminary one, I think that the appellant should be re-

paid his Court-fees. Other costs in this Court must follow the event.

Fforde, J.—I agree. If we were to accede to Mr. Sardha Ram's suggestion as to the mode in which this alleged decree should be treated, we would be deliberately encouraging confusion in the administration of justice and perpetuating illegality.

Case returned.

A. I. R. 1926 Lahore 338

BROADWAY AND FFORDE, JJ.

Jai Karan and *others*—Defendants—Appellants.

v.

Nathu Ram and *another*—Plaintiffs—Respondents.

Second Appeal No. 308 of 1922, Decided on 2nd March 1926, from the decree of the Dist. J., Hoshiarpur, D/- 25th October 1921.

(a) *Jurisdiction—Civil and revenue Court—Institution of suit in civil Court—Existence of occupancy tenancy is to be decided by revenue Court.*

When in a suit instituted in a civil Court a plea is raised which necessitates a decision as to whether an occupancy tenancy exists, that question has to be decided by a revenue Court. [P. 339, C. 1]

(b) *Occupancy holding—Principle of survivorship applies to joint tenancy only.*

There is a distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares have been specified and it is only in the case of a joint tenancy that the principle of survivorship applies. [P. 339, C. 2]

Mehr Chand and *Mahajan*—for Appellants.

Badri Dass and *Jagan Nath Bhandari*—for Respondents.

Broadway, J.—This second appeal has arisen in the following circumstances: The plaintiffs Nathu Ram and Amar Nath sued the defendants Jai Karan and others for possession of certain land. It appears that this land had been held by a woman, Parchono, as occupancy tenant under the plaintiffs. Parchono had sold her rights in the occupancy holding to two brothers Biba and Nithal Chand. In the deed of conveyance Biba was shown as having bought 1/3rd and Nihal Chand 2/3rds of the entire holding. Biba died without leaving a widow or any issue. Nihal Chand's descendants claimed to take Biba's 1/3rd share by right of survivorship and were recorded in the revenue papers as occupancy tenants of the entire holding. The plaintiffs alleged that the tenancy was a tenancy-in-common and not a joint tenancy, and that on the death of Biba without issue the occupancy tenancy qua his (Biba's) 1/3rd share became extinguised. The Courts below concurred in dismissing the plaintiff's suit on the ground that the tenancy being a tenancy-in-common the defendants could not succeed by right of survivorship to Biba's 1/3rd share. Against that decision this second appeal has been preferred through Messrs. Tek Chand and Mehr Chand Mahajan.

Before the trial Court an objection was raised to the effect that the civil Courts had no jurisdiction to try the suit. This question was put in issue and decided against the defendants. The trial Court in this connexion remarked: "Counsel for the defendants has also not pressed it (this issue) at all." In the appeal by the defendants to the learned District Judge the question of jurisdiction was again raised in the grounds, but was not argued at the bar. In the memorandum of appeal filed in this court the question of jurisdiction was not raised, but at the hearing Mr. Mehr Chand Mahajan asked to be allowed to argue it as an additional ground. He was permitted to do so and referred to various authorities in support of this contention. The chief one of these is *Wadhawa* v. *Hassi* (1). In that decision the suit then under consideration was held to fall within the jurisdiction of the revenue Courts. There as is clear from the report, the question was as to the nature of the tenancy, that is to say, whether the tenancy was an occupancy one or not. In *Mihan Singh* v. *Bhagwan Kuar* (2) Shah Din, J., held that having regard to the proviso to sub-S. (3) of S. 77 of the Punjab Tenancy Act (added by Punjab Act 111 of 1912) the question whether the defendants were occupancy tenants of the land concerned having arisen in the suit should have been referred for decision to a revenue Court. The same learned Judge in *Ghulam* v. *Jowala*

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(1) [1915] 73 P. R. 1915=111 P. L. R. 1915=29 I. C. 778=64 P. W. R. 1915.

(2) [1916] 111 P. R. 1916=37 I. C. 390.

Singh (3), a case the facts of which are very similar to the case now before us, held that the civil courts had jurisdiction, the reason being that no question as to the existence of an occupancy tenancy had arisen in the suit which related only to the devolution of the occupancy tenancy. He referred to *Mihan Singh* v. *Mt. Bhagwan Kaur* (2) and distinguished it. Reference was not made, however, to *Wadhawa* v. *Mt. Hassi* (1). A similar question arose in *Parabh Dayal* v. *Mt. Radho* a case to be found only in *A. I. R.* 1924 *Lah.* 636 where Mr. Justice Abdul Rao of while saying that he was inclined to agree with the view expressed in *Ghulam* v. *Jawala Singh* (3), felt himself bound by the Division Bench decision in *Wadhaw* v. *Mt. Hassi* (1).

Mr. Badri Dass, on behalf of the respondents emphasized that in the present case there was no question involved as to the existence of the occupancy tenancy, the question being only as to whether the defendants-appellants had succeeded by right of survivorship to Biba's 1/3rd share of the holding. He further contended that the question of jurisdiction had to be decided entirely on the allegations in the plaint. In support of his contention he cited inter alia, *Karam Dad* v. *Husain Bakhsh* (4). No doubt this proposition is to a large extent correct, but having regard to the proviso to S. 77 (3) referred to above, it is perfectly clear to my mind that when in a suit instituted in a civil Court a plea is raised which necessitates a decision as to whether an occupancy tenancy exists that question has to be decided by a revenue Court.

In the present case, however, after a consideration of all the authorities I am of opinion that the facts of this case are quite different from those in *Wadhawa* v. *Mt. Hassi* (1) and that no question as to the existence of an occupancy tenancy requires decision. All that has to be decided in this case is whether on the death of Biba without issue the defendants-appellants are entitled to succeed to his 1/3rd share. Turning to this question it has been found by the Courts below that there was no joint tenancy as between Biba and Nihal Chand, the position between the two brothers being that of a tenancy-in-common. This is a question of fact and Mr. Mehr Chand has not attempted to challenge it. He has urged, however, that the real way to regard the case is to hold that Biba and his brother formed one "tenant" and qua the landlord the occupancy tenancy continued in regard to the entire holding. He further contended that an occupancy tenancy was not a true joint tenancy and that even assuming that it was a tenancy-in-common the right of survivorship entitled the defendants-appellants to succeed. In this connexion he referred to *Mohru* v. *Mutsaddi* (5) ; *Agar Singh* v. *Dhana* (6) and *Chanda Singh* v. *Jiwan Singh* (7). It is true that some of the remarks made by the Financial Commissioners support Mr. Mehr Chand's contention, but after a careful examination of the judgments in those cases it seems to me that all that was decided in each case was that there had been no partition of the joint tenancy. On the other hand Mr. Justice Chevis in *Hako* v. *Sultan Muhammad Khan* (8) and *Uttami* v. *Nihal Chand* (9), after a consideration of the authorities already referred to, came to the conclusion that there was a distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares had been specified, and that it was only in the case of joint tenancy that the principle of survivorship applied. This view appears to me to be correct. There can in my opinion be no doubt that when Parchono sold her occupancy holding to Biba and Nihal Chand, Biba purchasing 1/3rd and Nihal 2/3rds of the entire estate, the tenancy became a tenancy-in-common and that the principle of survivorship did not apply. The view taken by the Courts below is therefore correct and I would dismiss this appeal with costs.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

(3) [1918] 130 P. L. R. 1918=103 P. R. 1918 =48 I. C. 363=179 P. W. R. 1918.
(4) [1920] 56 I. C. 458.
(5) [1894] 109 P. R. 1894 (F. B.).
(6) [1903]11 P. L. R 1903=6 P. R. 1902. Rev.
(7) [1917] 6 P. R. 1917=42 I. C. 87=5 P. W. R. 1917 Rev.
(8) [1921] 60 I. C. 513.
(9) [1921] 60 I. C. 862.

A. I. R. 1926 Lahore 340

LEROSSIGNOL AND FFORDE, JJ.

Hakam Rai—Plaintiff—Appellant.

v.

Ganga Ram and *another*—Defendants—Respondents.

First Appeal No. 1181 of 1922, Decided on 16th December 1925, from the decree of the Senior Sub-J., Gujranwala, D/- 20th January 1922.

(a) *Partnership — Dissolution — No written agreement—Plaintiff must prove existence of partnership—In absence of direct evidence, it is to be proved by correspondence, admissions, etc.*

Where there is no written agreement of partnership, it is necessary for the plaintiff to show that the conduct of the parties towards one another, the mode in which they have dealt with one another, and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule, in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees, by admissions, and so forth. [P. 340, C. 2]

(b) *Partnership—Partners in one firm do not become partners in the other by simply advancing money to discharge liabilities.*

Where one firm was helping another firm by advancing money to discharge a portion of their income-tax liabilities, it is not a sufficient proof that the partners in the one concern are necessarily partners in the other. [P. 341, C. 1]

M. L. Puri and *Bal Kishan*—for Appellant.

Jagan Nath Aggarwal and *Jagan Nath Bhandari*—for Respondents.

Fforde, J. — Plaintiff - appellant brought the suit out of which this appeal arises for the dissolution of partnership of a firm called Ganga Ram-Gokal Chand. The defendant Ganga Ram is a brother of the appellant and the defendant Gokal Chand is the son of Ganga Ram.

The defence is that the appellant is not and never was a partner in the firm in question. The suit was dismissed on the ground : (1) that it was barred by O. 2, R. 2 ; and (2) that the plaintiff had not shown that he was a partner of this firm.

It appears that the parties to the present appeal were partners in certain saltpetre works at Chhapanwali and Gujranwala. The appellant brought a suit for dissolution of partnership in each of these undertakings, but subsequently he admitted that there was only one partnership in respect of the saltpetre works, namely, the Chhapanwali concern, and that the Gujranwala undertaking was merely a branch of the Chhapanwali business. A decree has been given for the dissolution of the partnership in the Chhapanwali enterprise and it has been agreed that the accounts of the Gujranwala concern shall be taken in that dissolution matter.

The firm of Ganga Ram-Gokal Chand was formed for the purpose of carrying on moneylending and real estate business. The onus is upon the appellant to show that he is a partner in this business. There is no written agreement of partnership and, therefore, it is necessary for the plaintiff to show that the conduct of the parties towards one another, the mode in which they have dealt with one another, and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees, by admissions, and so forth.

In the present case there is no such evidence and the plaintiff is driven to rely upon two circumstances which, he claims, show that he supplied capital for the working of this firm and was a sleeping partner in it. One of these circumstances is that Ganga Ram had drawn certain sums from the Chhapanwali business and transferred these sums to the Ganga Ram-Gokal Chand firm. The appellant alleges thas these sums were portions of the Chhapanwali capital, and accordingly is the joint capital of himself and the respondents, and this shows that he has contributed working capital to the Ganga Ram-Gokal Chand concern. The answer to this, however, is that the sums drawn from the Chhapanwali business were drawn by Ganga Ram himself' debited to himself alone, and placed by him in the Ganga Ram-Gokal Chand concern. The only inference to be drawn from this circumstance is that Ganga Ram was drawing some of his own money out of the Chhapanwali partnership in order to help and finance his other enterprise. There is no evidence that the appellant himself

put any money whatsoever into this latter concern.

The other circumstance relied on by the appellant is a vague statement by Gokal Chand made on cross-examination, that the Ganga Ram-Gokal Chand firm paid for a number of years some money to the Chhapanwali factory as income-tax. This may mean that the Ganga Ram-Gokal Chand firm were helping the Chhapanwali business by advancing money to discharge a portion of their income-tax liabilities, but it is not a sufficient proof that the partners in the one concern are necessarily partners in the other.

These are the only two circumstances which can possibly be relied upon by the appellant as establishing his contention that the Ganga Ram-Gokal Chand enterprise is a branch of the main trading concern at Chhapanwali.

In our opinion this evidence is wholly insufficient to establish the partnership. Agreeing as we do, therefore, with the trial Court that the appellant has not shown himself to be a partner in the firm of Ganga Ram-Gokal Chand, we dismiss the appeal with costs.

Appeal dismissed.

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* * A. I. R. 1926 Lahore 341

BROADWAY AND FFORDE, JJ.

Firm Narasingh Das-Baldeo Das — Plaintiffs—Appellants.

v.

G. I. P. Ry—Defendant—Respondent.

Second Appeal No. 2781 of 1923, Decided on 16th February 1926, against the decree of the Dist. J., Delhi, D/- 25th August 1923.

* * *Railways Act, S. 72—Risk Notes B and H—Loss by fire — Railway is not liable even though fire is caused by wilful neglect of Company's servants.*

The intention of the Risk Notes is clearly to protect the Railway Company from loss of any kind arising out of fire whether that fire is caused accidentally or through the 'wilful neglect' of the Railway Company's servants. [P. 341, C. 2]

Tek Chand—for Appellants.

C. H. Carden Noad—for Respondent.

Broadway, J.—(After setting out the facts his Lordship proceeded). Mr. Tek Chand on behalf of the appellants has urged that inasmuch as it has been found that the wagons in each case caught fire through the wilful neglect of the company's servants this, proviso did not afford the Company any protection. It was urged that in order to avoid liability to pay compensation for loss occasioned by fire it was necessary for the company to prove that the fire was accidental and not due to any wilful neglect on the part of the company's servants. Admittedly this question has not formed the subject of any reported decision hitherto. An examination of the Risk Notes, however, appears to me to show, without any reasonable doubt, that in drafting this proviso it was intended that a Railway Company should be protected from liability in the case of loss by fire in any circumstances. Both these Risk Notes B and H hold the Railway Company free from responsibility for any loss or destruction of or damage to the goods "from any cause whatever." When however, a complete consignment or a complete package forming part of consignment is lost the Railway Company can be held liable, if the loss is due to.—

(*a*) wilful neglect on the part of the railway administration;

(*b*) theft by the Railway Company's employees; or

(*c*) wilful neglect on the part of the company's servants. To this exception, however, has been added the proviso under consideration which lays down that 'wilful neglect' is not to be held to include fire, etc. As I read these Risk Notes the intention is clearly to protect the Railway Company from loss of any kind arising out of fire whether that fire is caused accidentally or through the 'wilful neglect' of the Railway Company s servants. Although there is no direct authority on this point I am supported in my view by *Gopal Rai Phul Chand* v. *G. I. P. Railway Co.* (1). In that case the loss had been occasioned by theft. The guard of the train knew that theft was being commited, but did not apparently, take any step to prevent it. The company was held not to be liable as the theft was committed from a running train. It was held that if a plaintiff in a suit against a Railway Company for damages for loss of goods depends for his cause of action on 'wilful neglect' on the part of either the railway administration or any of its servants he cannot succeed if it is shown that the loss of

(1) A. I. R. 1924 All. 621.

the goods was due to theft from a running train. A similar view was expressed in *B. B. & C. I. Ry.* v. *Ranchhod Lal* (2).

In each of the present cases the plaintiffs depend for their cause of action on 'wilful neglect' on the part of the Railway Company's servants. In each it has been shown that the loss of the goods is due to fire. The Railway Company is, therefore, protected from liability under the terms of the Risk Notes as held by the learned District Judge. I, therefore, dismiss all the three appeals with costs.

Fforde, J.— The only question for decision in this appeal is whether the Railway Company is liable for the destruction of the appellant's goods by a fire which was caused by the wilful neglect of the company.

This question depends upon the true construction of the special contract entered into between the plaintiffs on the one hand and the Railway Company on the other.

The contract is contained in a document described as Risk Note Form B, the material parts of which are as follows.

> We the undersigned, do in consideration of such lower charge, agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connexion therewith ..... harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to all or any of such consignments from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working in connexion therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignments, provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident.

The effect of this contract is that, in consideration of the goods being carried at a rate lower than the usual charge, the consignors agree to hold the Railway Company exempt from all liability for any loss, destruction, deterioration or damage to the consignment, except where a complete consignment, or a complete package forming part of a consignment, is lost owing to the wilful neglect of the Railway Administration, its employees, agents and so forth, or to theft by any servants, agents or carriers, employed by them. But this reservation to the effect that the Railway Administration shall be liable for loss due to wilful neglect is qualified to this extent, that the term 'wilful neglect' is not to be held to include fire, robbery, from a running train, or any other unforeseen event or accident. In other words, the Railway Administration is liable for wilful neglect; but if the loss of the goods is due to fire, even though this fire may be caused by the wilful neglect of the Railway Administration, its servants or agents, the Administration cannot be held liable for the loss in question. This meaning appears to be so clear as to hardly admit of argument. Mr. Tek Chand has contended that upon the true construction of the last clause in the agreement 'fire' must be read as 'accidental fire.' I am quite unable to agree in this view. It seems to me that the natural reading of the clause is that the railway shall not be responsible for loss due to wilful neglect, where the loss is the result of fire or robbery from a running train or to any other event or accident of an unforeseen nature. Mr. Tek Chand will have us hold that the word 'unforeseen' governs fire and robbery and that, therefore, it is only in the case of a fire which the railway authorities could not have foreseen that they will be exempt. In my opinion this is not a reasonable construction of that clause.

The Government Advocate, for the Railway Administration, has suggested that the clause imposing liability upon the railway for fire caused by wilful neglect applies only to cases of loss of a consignment or a complete part of a consignment, and does not apply to cases of destruction or deterioration. Some observations of Banks, L. J., in *H & C. Smith Limited* v. *Great Western Railway Company* (3), in reference to the form of the contract in *Curran's* case give some colour to this view. The word 'loss', however, appears to have wider meaning attached to it in this country than is the case in the English authorities. As this point, however, does not require determination in the present appeal I do not propose to deal with it.

(2) [1919] 43 Bom. 769=52 I. C. 516=21 Bom. L. R. 779.

(3) [1921] 2 K. B. 237.

I may add that I agree with the conclusion arrived at by my learned brother and with the reasons which he has given for that conclusion.

Appeals dismissed.

A. I. R. 1926 Lahore 343

ADDISON, J.

Puran Chand and *others*—Appellants.

v.

Emperor and *others*—Respondents.

First Appeal No. 1228 of 1925, Decided on 18th December 1925, from an order of the Dist. J., Rohtak, D/- 22nd January 1925.

(a) *Court Fees Act, S. 8 and Sch. 2, Art. 17 (iv) —S. 8 overrides Art. 17 (iv), Sch. 2, in the matter of appeals relating to award of compensation in land acquisition cases.*

In the matter of appeals relating to award of compensation under the Land Acquisition Act by parties claiming compensation money, S. 8 of the Court Fees Act, being a special provision, overrides the general provisions of Sch. II, Art. 17 (iv). [P. 343, C. 2, P. 343, C. 1]

(b) *Limitation Act, S. 5—Negligence of party and counsel in not paying deficit Court-fee ordered to be paid—Time cannot be extended.*

A bona fide act is one done with due care and attention.

Where clear provisions of the Court Fees Act were brought to the notice of the party's counsel and he was asked to make up the deficit Court-fees, but counsel and the party were both negligent in not paying the deficit Court-fee :

Held : there was no ground to extend the time. [P. 344, C. 1]

Sagar Chand for *F. Byrne* and *Nanwan Mal*—for Appellants.

Shamair Chand—for Respondents.

Judgment.—1482 square yards of land in village Dhigal were acquired under the Land Acquisition Act for a school and the Collector assessed the value at Rs. 2,130-6-0. There are four panas or sub-divisions in the village. Two of them did not claim any part of the land to be theirs. The proprietors of Chauth sub-division claimed the whole area to be theirs, while those of Malian sub-division claimed that 792 square yards of the whole area of 1482 square yards were theirs. The Collector under S. 30 of the Land Acquisition Act referred the dispute for the decision of the District Court as it was a dispute "as to the persons to whom any part of the compensation money was payable." The Collector could have himself decided the question, leaving the aggrieved party to apply to him for a reference to the Court under S. 18 of the Act. This, however, makes no difference. The District Court held that Thula Lakhmian of Pana Chaudh was entitled to the entire compensation as the land belonged exclusively to it. It accordingly awarded the full sum of Rupees 2,130-6-0 to be paid to it, and it was stated at the bar that it has in fact been paid. Nothing was awarded to the applicants. On the 22nd April the appellants through counsel filed this appeal against the above decision on a four-rupee stamp. He was asked by the office the same day as to how a Court-fee of Rs. 4 only had been paid. On the 4th May he re-filed the appeal, stating that the Court-fee was correct as it was a miscellaneous appeal. That very day, his attention was drawn by the office to S. 8 of the Court-fees Act and he was directed to pay ad valorem Court-fee by 4 p. m. the next day, apparently as the period of limitation expired then. On the 5th May he asked that the time should be extended to him as he had to get the Additional Court-fees from his clients. He was told on the 6th May that time could not be extended to him beyond the period of limitation. Then on the 12th May, he affixed a Court-fee stamp of Rs. 10 on the ground that the appeal fell under Art. 17 (iv) of the Second Schedule of the Court-fees Act. and not under Cl. (8) of the Court Fees Act. The appeal was admitted to a hearing on the 11th June subject to any question which might be raised relating to the Court-fee payble and to limitation.

Counsel for the respondents raised a a preliminary objection that the appeal is barred by limitation. It is quite clear that the appellants are claiming in appeal 792/1482 of Rs. 2130-6-0, on the ground that they owned 792 square yards out of 1,482 square yards acquired and are entitled to the compensation for that area. This sum can be accurately calculated and comes to be a little more than half of Rs. 2,130-6-0. It cannot therefore, be said that the appeal is incapable of valuation (Sch. II, Art. 17 (iv) of the Court Fees Act). It also does not fall under Art. 17 (iv) as an appeal to set aside an award because S. 8 of the Court fees Act being a special provision relating to the awards of compensation under the Land Acquisition Act, overrides the

general provisions of Sch. II, Art. 17 (iv) [see *Kasturi Chetti* v. *Deputy Collector, Bellary* (1). Besides, the words of S. 8 of the Court Fees Act are very wide. They are as follows :

The amount of fee payable under this Act on memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.

The present appeal is against an order awarding all the compensation to the respondents whereas the appellants claim a definite sum out of the compensation. That is, nothing was awarded to them while they claim more than half. Court-fees were, therefore, payable on the sum they claim should have been awarded to them. The matter is beyond dispute and though the appellants' counsel was at once put upon his guard by the office still the necessary Court-fees were not put in within the period of limitation and when extra Court-fees were put in after the period of limitation, the provisions of S. 8 were still not followed though the section had been quoted by the office. It is further clear from the order of the Judges admitting the appeal in June that this was a matter that was bound to arise and still Court-fees have up till the present not been filed. Even if, therefore, Ramji Lal, one of the appellants, thought a Court-fee of Rs. 4 only was necessary, there has obviously been gross negligence both on the part of the appellants and of counsel in not filing the Court-fees either at once on the office objection or when the appeal was admitted to a hearing. In my judgment they are not entitled to any extension of time after these dates. The law is so clear that no mistake should have been made in the first instance and for this reason also time cannot be extended. A bona fide act is one done with due care and attention [*Resal Singh* v. *Shadi* (2)].

I, therefore, hold that the appeal is barred by limitation as up to date the proper Court-fees have not been put in and no sufficient cause has been shown as to why this has not been done. I accordingly dismiss it with costs.

Appeal dismissed.

(1) [1898] 21 Mad. 269.
(2) [1917] 95 P. R. 1917=13 P. L. R. 1918=43 I. C. 317=174 P. W. R. 1917.

* A. I. R. 1926 Lahore 344

CAMPBELL, J.

Wiru Ram—Plaintiff—Petitioner.

v.

Amar Chand and *another*—Defendants—Respondents.

Civil Revision No. 516 of 1925, Decided on 23rd February 1926, against the order of the Sub-J., 3rd Cl., Fazilka, D/- 7th July 1925.

* (a) *Civil P. C., S.* 115—*Setting aside ex-parte decree, application for—Proceeding on the application is a case within S.* 115—*Civil P. C., O.* 9, *R.* 13.

When an ex-parte decree is passed, the suit is terminated, and it remains terminated until the proceedings on the application to set aside the decree come to an end. There is no suit pending, either when the application is presented, or when the order disposing of it is passed, and the proceedings, since they involve the reversal of a final order and decree, are themselves a case : *C. R. No.* 429 *of* 1925, decided on 8th December 1925, *Foll.* [P. 344, C. 1]

(b) *Civil P. C., S.* 115—*Court finding an application to be time-barred, but deciding it in favour of the applicant, illegally assumes jurisdiction which it does not possess.*

When a Court in effect decides that an application is time-barred, and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time, as within time, and proceeds to decide it in favour of the applicant the Court is guilty of much more than an erroneous decision of law. It illegally assumes jurisdiction which it does not possess. [P. 345, C. 1.]

Mukand Lal Puri—for Petitioner.

Parkash Chandra for *H. D. Bhalla*—for Respondents.

Judgment.—This is an application for revision of an order setting aside an ex-parte decree. The ex-parte decree was passed on the 4th April 1924 and the application to set it aside was made on the 15th January 1925. On receiving the application the Court struck an issue :

Is the judgment debtor's application, dated the 15th January 1925 for setting aside the ex-parte decree, within time ?

The suit was instituted on the 20th February 1924 and the Court distinctly holds that on the 26th February the petitioner defendant refused to take summons in Fazilka hospital. The Court decided that there was no regular service of summons but that the defendant had knowledge of the suit. It proceeded in its order to observe that in such a case the judgment-debtor had thirty days time from the date on which he had

knowledge of the decree to apply for an order setting it aside. The learned Subordinate Judge went on to discuss certain evidence and then recorded as follows:

In view of the above facts and the parties' evidence it is difficult to say when the judgment-debtor had knowledge of the decree. Hence the appiication of the judgment-debtor is within time and there are sufficient grounds for setting aside the decree.

Preliminary objections are taken before me: firstly that the order is not one deciding a case within the meaning of S. 115 of the Civil P. C. in view of the decision by the Full Bench of this Court in *Lal Chand Mangal Sen* v. *Behari Lal Mehr Chand* (1). (*I. L. R. 5 Lah.* 288); and secondly that an erroneous decision on a point of law, that is to say a point of limitation, is not one which comes within the scope of S. 115. Both these points are covered by my decision in *Piroj Shah and Co.* v. *Mian Qarib Shah* (2) and I adhere to what I said there. When an ex-parte decree is passed, the suit is terminated, and it remains terminated until the proceedings on the application to set aside the decree come to an end. There is no suit pending, either when the application is presented, or when the order disposing of it is passed, and the proceedings since they involve the reversal of a final order and decree are themselves a case.

As regards the second preliminary objection, when a Court in effect decides that an application is time-barred, and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time, as within time, and proceeds to decide it in favour of the applicant, the Court is guilty of much more than an erroneous decision of law. It illegally assumes jurisdiction which it does not possess. To view the case otherwise would be to admit that the express provisions of the law of limitation may be qualified or relaxed at the pleasure of a Court. In the present case the issue framed by the Court shows that it appreciated properly that the onus lay on the petitioner of proving that his application was presented within 30 days of his having knowledge of the decree. That onus lay the more heavily upon him when it was found that he had knowledge of the suit. The Court nowhere says erroneously that the onus of proof in regard to knowledge of the decree was on the decree-holder, and indeed, if it had said this, there is authority in the case printed *Sugru Mal Harcharan Das* v. *Sham Lal Gokal Chand* (3), for this Court to interfere on revison. The situation is that there has been no decision that the petition is within time, and any decision that there has been amounts to one that it is time-barred. Hence the learned Subordinate Judge had no jurisdiction to accept it and to set aside the decree.

I accept the revision with costs and set aside the order of the lower Court.

Revision accepted.

(1) A. I. R. 1924 Lah. 425 (F. B.).
(2) Civil Revision No. 429 of 1925, Decided on 8th December 1925.
(3) [1918] 146 P. W. R. 1918=46 I. C. 777.

A. I. R. 1926 Lahore 345

ZAFAR ALI, J.

Narain Devi—Plaintiff—Petitioner.

v.

Shankar Dass and *others*—Defendants—Respondents.

Civil Miscellaneous Petition No. 96 of 1926, Decided on 29th March 1926, for transfer of the case.

Civil P. C., S. 24—Expression of opinion on certain points in a previous case is not a ground for transfer.

Expressing an opinion in a previous case by Court on certain points involved in the case before it, is not a ground for the transfer of the case to another Court. [P. 345, C. 2]

Chandar Gupta and *Fakir Chand*—for Petitioner.

Badri Dass—for Respondents.

Order.—The petitioner is a widow who has filed an appeal in the Court of the District Judge of Jullundhur against the order of the trial Court dismissing her suit but she applies for a transfer of the appeal to some other Court on the ground that the District Judge has already expressed his opinion against her on certain points involved in the present appeal which were in issue in a succession certificate case decided on appeal by the learned District Judge.

I am of opinion that this is no ground for transfer. The District Judge will evidently decide the present appeal on the material that has been brought on the record of this case. I, therefore, dismiss the application.

Application dismissed.

* A. I. R. 1926 Lahore 346

CAMPBELL AND ZAFAR ALI, JJ.

Arshad Ali—Plaintiff—Appellant.

v.

Zorawar Singh and *others*—Defendants—Respondents.

Appeal No. 1014 of 1924, Decided on 14th January 1926, from an order of the Senior Sub-J., Rohtak, D/- 31st January 1921.

(a) *Pre-emption—Punjab—Suit for pre-emption—Part of the estate sold recorded in Collector's revenue register—Value for jurisdiction is 30 times revenue.*

The value of land for purposes of jurisdiction is 30 times the proportionate amount of the revenue recorded as payable for the holding in which the land sold is comprised where land sold is a portion of part of an estate for which part of the land, revenue payable is recorded in the Collector's register. [P. 347. C. 1]

* (b) *Civil P.C., S. 149—Suit dismissed and deficient Court-fees ordered to be paid—If deficiency is made up the plaint shall be deemed to be in order from the day of presentation.*

Where a Court dismisses a suit and at the same time orders plaintiff to make up the deficiency in Court-fees, the Court must be presumed to have acted under S. 149, and if the plaintiff makes up the deficiency, the plaint becomes of the same force and effect as if the Court-fee demanded had been paid in the first instance. [P. 347, C. 1]

(c) *Pre-emption—Improvements by vendee before notice of suit for pre-emption but after expiry of limitation for the suit—Vendee must be compensated.*

Where it is not shown that the vendee knew anything about the pre-emption suit before he made improvements, and the improvements are made after the limitation for a suit for pre-emption, he is in equity entitled to compensation. [P. 347, C. 1]

Tek Chand—for Appellant.

Shamair Chand, Sagar Chand and *Harish Chandra*—for Respondents.

Judgment.—This appeal arises out of a pre-emption suit. The vendor was Anwar Ali and the vendee was Zorawar Singh. The sale was on the 20th of August 1917 ostensibly for Rs. 3,300 of a small plot of one bigha and 15 biswas at Rohtak. The suit was instituted on the 19th of August 1918 in the Court of the Munsif and the plaint stated the value of the suit for purposes of jurisdiction to be 30 times the jama, namely. Rs. 39-1-0 and for purposes of Court-fee Rs. 13-0-4, the Court-fee being Re. 1-2-0. The plaint alleged that the price mentioned in the sale-deed of Rs. 3,300 was fictitious and that the market value was Rs. 175. The prayer was to pre-empt at that price.

A preliminary issue was framed: "Whether the suit was beyond the jurisdiction of the Court? and on an admission by the plaintiff's counsel that it was probably so, the plaint was sent to the District Judge with a request that it should be made over to a Court competent to hear it. This was on the 19th of June of 1919. Previous to this on the 20th of August 1918, the day after the suit was filed the plaintiff had applied to the Court that the suit should be postponed without issue of summons because the plaintiff, who is the son of the vendor, had then pending another suit for possession of the same land or for a declaration that the sale should not affect his reversionary rights. When this was decided and the present suit was taken up on the 30th of May the defendant vendee was summoned and he then objected that the suit was beyond the jurisdiction of the Munsif.

The District Judge sent the suit to the Junior Sub-Judge who found, firstly, in favour of the plaintiff that the land was not sakni land as alleged by the defendant; secondly, that out of the ostensible sale price, Rs. 1,985, alone were paid; thirdly, that this was the market value of the land, fourthly, that the value of the suit for purposes of Court-fee and jurisdiction was Rs. 6,038 being the market value of the land plus the ascertained value of improvement effected by the vendee in the shape of buildings. Two other law points which need not be detailed were decided in favour of the plaintiff and then the Court held that the value of improvements as above stated was Rs. 4,053 and that the suit was barred by limitation because it was instituted in a Court which had not jurisdiction to hear it and the date of institution must be taken to be that on which it was transferred by the District Judge to the Junior Subordinate Judge a year and 10 months after the sale. The suit was dismissed with costs. The plaintiff was directed within one month to make up the requisite Court-fee on a valuation of Rs. 6,038 and did so.

The plaintiff has appealed. The land sold is described in the sale-deed as 1 bigha and 15 biswas out of fields Nos. 2641 and 2642 as depicted in the plan attached to the deed andthe finding of the lower Court was that when a specific plot by metes and bounds is the subject

of a pre-emption suit the case falls under S. 7 (v) (d) of the Court Fees Act and Court-fees according to the market value of the land and that the market value also determines the jurisdictional value.

Whatever may be correct Court-fee the learned Sub-Judge was wrong as regards jurisdiction. The rules of the Local Government, Punjab, are given on page 93, Rules and Orders of the Chief Court, Vol. III ; and according to the Explanation of R. 1 (b) the value for purposes of jurisdiction of the plot in suit was 30 times the proportionate amount of the revenue recorded as payable for the holding in which the land is comprised; for the land sold was manifestly a portion of part of an estate for which part the land revenue payable is recorded in the Collector's register. This conclusion is not seriously disputed by the learned counsel for the vendee respondent, but he argues that the Court-fee, at any rate was due on the market value under S. 7 (v) (d) since that applies where S. 7 (b) does not apply and that S. 7 (v) (b) does not apply because it does not contain any explanation corresponing with that quoted above which is appended to a similar provision enacted by the Local Government under powers conferred by S. 3 of the Suits Valuation Act, 1887. It is not necessary for us to decide this question, because what the learned counsel alleges to have been the proper fee was in fact paid in the lower Court by the plaintiff in obedience to the order of the Court, and we hold that in giving that order the Court acted under S. 149 of the Civil P. C., as it was entitled to do at any stage of the case. The effect was that the plaint became of the same force and effect as if the Court-fee demanded had been paid in the first instance and it cannot be held now that there was no proper presentation of the plaint within limitation.

So far the plaintiff-appellant succeeds; but in his further contention that no compensation for improvements should be allowed and that the amount of such compensation estimated by the lower Court is excessive we are not disposed to dissent from the findings of the learned Sub-Judge. The buildings we find were commenced in March 1919; that is to say after the institution of the suit ; but no notice of the suit was given to the defendant vendee and the suit itself was instituted on the last day of limitation. It is clear what the plaintiff's position was. He had attacked the alienation in another way with a view to its being nullified without cost to himself, but as a second string to his bow he deemed it advisable to institute a suit for pre-emption. He, however, was guilty of the blunder of asking for the pre-emption suit to be stayed without issue of process to the defendant. What he should have done was to have the defendants served with summons and then to ask for the suit to be stayed. In that case the defendant would have had no justification in claiming compensation for improvements begun after the institution of the suit. But, since, it is not shown that the defendant knew anything about this pre-emption suit before he erected his buildings, he is in equity entitled to compensation and the fact that the other suit was in progress does not appear to us to be material at all. The other suit in the event was dismissed and the dismissal was upheld in appeal. The defendant was entitled to run the risk of commencing his buildings during the pendency of the other suit, which he considered with justice to be a weak one, and to assume that since the statutory period of limitation of one year from the sale had elapsed, he was safe from a pre-emption suit.

We accept the appeal and give the plaintiff a decree for pre-emption on payment of Rs. 1,985 plus Rs. 4,053 total Rs. 6,038 ; on or before a date three months from the date of decree. The decree shall be drawn up in accordance with O. 20, R. 14 (1), Civil P. C. As regards costs, each party has had its success both in this Court and in the lower Court and we order the parties to bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 347

FFORDE, J.

Narain Singh—Accused—Petitioner.

v.

Emperor—Respondent.

Criminal Misc. Petition No. 30 of 1926, Decided on 12th March 1926, for transfer of the case.

Criminal P. C., S. 526—Magistrate receiving hospitality of complainant's son—Transfer should be ordered.

Although Magistrate receives hospitality in ignorance of the fact that his host is the son of the complainant, it would naturally raise a reasonable apprehension in the mind of the accused that they would not have a fair trial in the Magistrate's Court, and a transfer should be ordered.

Nand Lal—for Petitioner.

Order.—The Tahsildar admits that he accepted the hospitality of Kartar Singh, the complainant's son. Although I would accept the Tahsildar's statement that it was not done with any ulterior motive, and that he merely did so in ignorance of the fact that his host was the son of the complainant Mula Singh, at the same time this would naturally raise a reasonable apprehension in the mind of the accused that they would not have a fair trial in the Tahsildar's Court. I accordingly direct that the case may be transferred to such other competent Court as the District Magistrate deems fit.

Transfer directed.

A. I. R. 1926 Lahore 348

CAMPBELL AND ZAFAR ALI, JJ.

Mulkh Raj and *another*—Defendants—Appellants.

v.

Firm Ralla Ram-Rao Mal and *others*—(Plaintiffs)—(Defendants)—Respondents.

Second Appeal No. 2398 of 1922, Decided on 12th February 1926, from a decree of the Dist. J., Gurdaspur, D/- 5th July 1922.

Civil P. C., O. 21, R. 63—Suit for declaration lies only when attachment has been objected to and the claim accepted or disallowed—Decree-holder himself withdrawing attachment cannot bring a suit under R. 63.

It is not open to a decree-holder to withdraw the attachment himself and then to bring a suit under R. 63, but a suit under R. 63 for declaration lies only when an attachment has been objected to and the objector's claim has been either aceepted or disallowed by the execution Court, as R. 63 precludes all suits but the one under the rule itself. [P. 348, C. 2]

Mehr Chand Mahajan—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Judgment.—This second appeal arises out of a suit by two sets of judgment-creditors for a declaration that the property in dispute belongs to their judgment-debtor Buta and is liable to attachment and sale in execution of their decree against him. The property had originally been attached by the executing Court and the attachment was objected to by Buta's brothers who claimed to be the owners thereof by purchase from him. But before the executing Court could give its decision on the objection one of the decree-holders himself applied for release of the property from attachment stating that he would bring a regular suit to have it declared liable to attachment and sale. The defendants, therefore, pleaded that as the property was released at the instance of one of the plaintiffs (decree-holders) the present suit was not competent.

Buta had applied to be adjudged insolvent, and the sale of the property by him to his brothers was not questionable in the Insolvency Court on account of bar of time. The plaintiffs' explanation of the course adopted by them, as stated by the District Judge, was that

> they resorted to the expedient of getting the execution proceeding filed

and getting an order of release against their interest in

> order to be able to launch a declaratory suit as allowed by O. 21, R. 63, Civil P. C.

The question, therefore, is whether it is open to a decree-holder to withdraw the attachment and then to bring a suit under R. 63. We are of opinion that it is not. R. 63 contemplates that the attachment was objected to and that the objector's claim was accepted or disallowed by the execution Court. If the claim is once accepted, he cannot challenge the order by bringing a suit to contest it because the suit should be brought by the party against whom the order is made and not by the party who himself sought that order and obtained it. Next it is contended that the suit is not under R. 63 as that rule is nowhere referred to in the plaint, but is a suit covered by S. 53 of the Transfer of Property Act or S. 42 of the Specific Relief Act. But R. 63 precludes all suits but the one under the rule itself, and, therefore, no suit under any other provisions of law is competent.

We may note here a preliminary objection taken by the respondents' counsel that the Receiver appointed by the Insolvency Court was a necessary party

and that the appeal must fail because he was not added as a respondent within the time prescribed for the appeal. But the Receiver was appointed after the institution of the suit and was no party to it. He was, therefore, not a necessary party in the appeal.

We accept the appeal, and, reversing the order of the District Judge, dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

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* A. I. R. 1926 Lahore 349

CAMPBELL, J.

Municipal Committee of Amritsar—Defendant—Appellant.

v.

Shankar Das—Plaintiff—Respondent.

Second Appeal No. 2210 of 1925, Decided on 13th February 1926, against the decree of the Dist. J., Amritsar, D/- 6th May 1925.

* *Civil P. C., S. 9—Suit for damages against licensee under Electricity Act for failure to supply energy on a proper requisition is not barred—Electricity Act, S. 22.*

There is nothing in the Indian Electricity Act which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. [P. 350, C. 1]

Sham Dass—for Appellant.

Ralli for *Jagan Nath Aggarwal*—for Respondent.

Judgment.—This is a second appeal against the decision of the District Judge, Amritsar, upholding a decree for damages granted against the Municipal Committee, Amritsar, the cause of action being the failure of the Committee to supply the plaintiff with electric energy in compliance with a requisition made under the provisions of the Indian Electricity Act.

Three points are urged: firstly that the requisition is not in accordance with law; secondly, that the plaintiff was himself in fault in not paying a demand by the Committee for preliminary costs; and thirdly, that no civil suit for damages lies in view of the fact that a criminal offence is created by S. 42 of the Act and a penalty is imposed against the licensee who fails to supply the energy in accordance with the conditions of his license.

On the first point the learned District Judge held that the defendant Committee, having acted upon the requisition and accepted payment of their bill for charges, were estopped from questioning the correctness of the requisition. It is possible, as urged before me, that there was not in law any actual estoppel, but the requisition was perfectly regular under the rules. The premises were adequately described, and, although the requisition was signed by the plaintiff's son, it was signed by him for his father. The fact that the requisition was acted upon is very good evidence that it was in order.

The second point has still less force. The requisition was made on the 5th July 1922, and on the 7th July the Committee sent the plaintiff a bill for the cost of the service line. This was paid and under Clause VI of the Schedule to the Act the Committee was then obliged by their terms of license to supply energy within one month of the making of the requisition. The Committee did not do so and, on the 8th of November sent the plaintiff another and revised bill of charges which he refused to pay. It is argued that under Clause VI(1)(b) the defendant was entitled to refuse to supply energy because the second bill was not paid. This is not so, since the first part of the clause required the Committee to supply energy within one month of the requisition, and everything demanded within that one month had been paid.

On the third point I am asked to hold that, when a statutory duty is created, a person, alleging injury from non-performance of that duty cannot bring an action for damages against the person on whom the duty is imposed if the statute lays down a penalty to be exacted on conviction for non-performance of that duty. In support of this contention reliance is placed upon 39 *P. R.* 1911, and an English case, *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (1). The former ruling does not apply because S. 42 of the Indian Electricity Act does not provide that the present plaintiff has any remedy, but merely imposes a penalty upon the defendant. Hence the ruling in that case that, when a special remedy is provided by statute the plaintiff is bound to exhaust it before filing a suit has

(1) 2 Ex. D. 441=46 L. J. Ex. 775=25 W. R. 794=36 L. T. 761.

nothing to do with the present case. The English case is scarcely of more assistance to the appellant and certainly does not lay down the rule put forward by him. It was an action for damages on account of the defendants not having kept their pipes charged as required by S. 42 of the Waterworks Clauses Act 1847, and it was held by the Court of appeal [questioning as a proposition of general applicability the rule ennunciated in *Couch* v. *Steel* (2)] (a) that the mere fact that the breach of a public statutory duty has caused damage does not vest in the person suffering the damages a right of action against the person guilty of the breach ; (b) that whether the breach does or does not give such right of action must depend upon the object and language of the particular statute ; and (c) that the particular statute under examination did not give that right.

Here in India we have S. 9 of the Code of Civil Procedure which declares that the Courts have "jurisdiction to try all suits of a civil nature excepting those of which their cognizance is either expressly or impliedly barred." There is nothing in the Indian Electricity Act which bars either expressly or impliedly the present suit, and there are reported cases in which, apparently, it never occured to anyone to question the jurisdiction of a civil Court to try a suit against a licensee for damages for a breach of duty under the Indian Electricity Act.

There are no grounds for interference with the decision of the lower appellate Court. I dismiss the appeal with costs.

Appeal dismissed.

(2) 23 L. J. Q. B. 121=3 El. & Bl. 402=2 C. L. R. 940=18 Jur. 515=2 W. R. 170.

A. I. R. 1926 Lahore 350

CAMPBELL, J.

Emperor

v.

Sohan Singh—Accused.

Criminal Reference No. 1470 of 1925, Decided on 29th January 1926, made by the S. J., Amritsar, D/-31st August 1925.

(a) *Criminal P. C., S. 562—Accused, a lambardar convicted for pocketing money received as Government agent—S. 562 does not apply.*

The case of an accused, a lambardar, convicted for pocketing water-rate money received by him as an agent of the Government from a landowner is not one suited for the application of S. 562. [P 351 C 1]

(b) *Penal Code, Ss. 409 and 420 — Sentence of imprisonment is obligatory — Penal Code, S. 420.*

A sentence of imprisonment is obligatory under the law for an offence either under S. 409 or under S. 420. [P 351 C 1]

Amar Nath Chona—for Petitioner.

Ghulam Rasul—for Respondent.

Facts.—Sohan Singh accused was the lambardar of the village Lopoki and Vir Singh complainant was a landowner of that village. Rupees 46-6-0 was due on a water-rate from Vir Singh who paid the said amount to the lambardar obtaining from him receipt Ex. PA. The complainant is illiterate and was satisfied with the receipt as it was given to him. The lambardar, however, pocketted that money and did not credit it into the Government Treasury. On the other hand some time later he applied for a warrant to realize the amount from Vir Singh through Tahsil. On warrant being issued Vir Singh had to pay the abiana a second time. He then lodged a complaint against the accused under S. 420, Indian Penal Code. The accused denied the receipt PA as well as the receipt of the money alleged to have been paid by the complainant on the said receipt (Ex. PA). The complainant, however, proved by the evidence of several witnesses that he had really paid the amount to the accused on the first occasion and that the accused cleverly did not sign the receipt, Ex. PA, given by him. Other receipts admittedly given by the accused to other persons were produced and the opinion of the Government Examincr of Questioned Documents Mr. Brewster was obtained. The expert also supported the prosecution. The Magistrate finding that the accused had really received the abiana on the first occasion and given the receipt Ex. PA, convicted the accused under S. 420, Indian Penal Cade, but sentenced him under S. 562, Criminal P. C., to furnish two securities for Rs. 3,000 for two years.

The complainant filed a petition of revision, and urged that the offence really fell under S. 409, Indian Penal Code, and that the complainant had suffered a lot and paid Rs. 200 as fee to the hand writing expert, that the sen-

tence awarded is too mild, and that the accused should be given substantial punishment, and out of the fine, complainant should be awarded reasonable compensation.

Grounds.—The accused has filed no appeal against his conviction and having gone through the file, I find the facts as stated above to be fully proved by the evidence on the record. The conviction of the accused is amply justified. I also think the proper section applicable is 409, Indian Penal Code, and not 420, Indian Penal Code. The accused is an agent of the Government and was given abiana in that capacity and he misappropriated the amount. In any case, the sentence under S. 562 is certainly ridiculous in a case like this. The accused is said to be an old man of 62 years with a good previous record and that may be a good ground for not sending him to jail, but that is no reason why he should not be fined substantially for having committed such a serious offence and so boldly, especially as the Magistrate himself remarks that his attitude in this case from the beginning to the end had been very unsatisfactory. It is recommended, therefore, that the conviction may be altered to one under S. 409, Indian Penal Code, and the sentence enhanced to a fine of Rs. 300 or in default the accused to undergo simple imprisonment for 6 months. It may be further ordered that out of the fine, if realized Rs. 200 may be paid to the complainant as a compensation under S. 545, Criminal P. C.

Order.—The facts are given in the report by the learned Sessions Judge. The case was obviously one not suited for the application of S. 562, Criminal P. C. The Crown is represented and the learned counsel appearing does not press for any greater sentence than that recommended by the learned Sessions Judge. A sentence of imprisonment, however, is obligatory under the law for an offence either under S. 409 or under S. 420, Indian Penal Code. Since the accused was not charged under S. 409, Indian Penal Code, I maintain the conviction under S. 420, Indian Penal Code, and sentence the accused to pay a fine of Rs. 300 and undergo one day's simple imprisonment. In default of payment of the fine the accused shall undergo 6 months' rigorous imprisonment. Rupees 200 of the fine to be paid to the complainant as compensation as recommended by the learned Sessions Judge.

Conviction altered.

A. I. R. 1926 Lahore 351

BROADWAY, J.

Lachhman Dass — Plaintiff — Appellant.

v.

Sadhu and *another*—Defendants—Respondents.

Second Appeal No. 2568 of 1925, Decided on 12th February 1926, from a decree of the Addl. Dist. J., Hoshiarpur, D/- 16th June 1925.

Civil P. C., O. 41, R. 31—Lower appellate judgment dealing with part only of subject-matter—Remand should be ordered.

Where the judgment of the lower appellate Court does not deal with the whole subject-matter, but deals with only a part, the appeal can not be said to be legally disposed of.

[P. 351, C. 1]

Fakir Chand—for Appellant.

Shamair Chand—for Respondent.

Judgment.—Lachhman Dass, plaintiff in this suit, claimed possession of 10 marlas of land, Khasra Nos. 543 and 555 on the allegation that the defendants had unlawfully dispossessed him about ten years ago. The contesting defendant pleaded that the land had been in possession of himself and his ancestors for a very long period and that he was, therefore, the owner. The trial Court settled the following issues :

(1) Whether Defendant No. 1 has made an encroachment on the land in question within 12 years.

O. P. on plaintiff.

(2) Whether defendant has been in adverse possession for more than 12 years.

O. P. on defendant.

It decided both these issues in the plaintiff's favour and granted him a decree. The defendant Sadhu appealed and the Additional District Judge, holding that the defendant's possession had extended over a period of 12 years, dismissed the plaintiff's suit. Plaintiff has come up to this Court in second appeal through Mr. Fakir Chand.

Firstly, it has been urged that the civil Courts had no jurisdiction to deal with this matter because the defence set up was that the defendant Sadhu had been an occupany tenant of the land and that, therefore, the suit was cognizable only by a revenue Court. A reference to the

written statement, however, shows that the defence set up was that the land in dispute had been held by the defendants and their ancestors as maurisiat for eight generations. A reference to the dictionary shows that the word "maurusi" means ancestral or hereditary. It is perfectly clear that the Courts below never regarded the plea raised by the defendant as being that he was the occupancy tenant of the land and in these circumstances I must hold that this contention has no force.

It was next urged that the judgment of the lower appellate Court had not discussed the entire piece of land in suit. As has been stated above the land comprised an area of 10 marlas bearing two khasra Numbers, 543 and 555. The lower appellate Court has dealt with Khasra No. 543, but appears to have entirely ignored Khasra No. 555. It follows, therefore, that the lower appellate Court has not disposed of the appeal that was before him.

I, therefore, accept this appeal, set aside the decision of the lower appellate Court and remand it to him for a re-hearing of the appeal in its entirety and a re-decision in accordance with the law. Costs in this Court will follow the event.

Appeal accepted.

A. I. R. 1926 Lahore 352

SHADI LAL, C. J., AND
LEROSSIGNOL, J.

Prem Sukh—Appellant.

v.

Mt. Parbati—Respondent.

Letters Patent Appeal No. 46 of 1925, Decided on 19th March 1926, from the judgment of Martineau, J., D-/ 20-1-25.

Probate and Administration Act, S. 50—S. 50 is exhaustive but irrespective of S. 50 Court has inherent powers to withdraw grant.

Section 50 is exhaustive and not merely illustrative, but irrespective of S. 50 when the condition, on the fulfilment of which alone the grant can be made, is not satisfied, the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process. 47 *Cal.* 115 *Appr.* [P 352 C 2]

Shamair Chand—for Appellant.

Parkash Chandra—for Respondent.

Judgment.—On the 29th of March 1923, the District Judge of Ambala made an order for the grant of Letters of Administration *cum testamento annexo* to Mt. Parbati in respect of the estate of her deceased husband and at the same time directed her to give a bond with one surety engaging for the collection, getting in and administering of the estate. It appears that no time was fixed within which the security was to be furnished, and though Mt. Parbati produced in March 1924, a security bond, it was not accepted because she failed to appear on the date fixed for enquiry in regard to the surety. Consequently, the District Judge passed an order revoking the grant of Letters of Administration.

On appeal, the order of the District Judge has been set aside by Mr. Justice Martineau, who holds that the grant can be revoked only under S. 50 of the Probate and Administration Act, and that failure to furnish security does not constitute a "just cause" within the meaning of the section. Now, while we agree with the learned Judge that S. 50 of the Act is exhaustive, and is not merely illustrative, we are of opinion that the Court has inherent power to enforce obedience to its direction It is quite clear that the Letters of Administration cannot be granted unless the administrator furnishes a security bond in compliance with the direction of the Court ; and indeed, in this case the Letters of Administration were never committed to Mt. Parbati and could not be committed without her furnishing security as directed by the Court. There can, therefore, be no question of the revocation of the Letters of Administration and we consider that when the condition, on the fulfilment of which alone the grant can be made, is not satisfied, the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process: vide *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (1).

While we hold that the District Judge was competent to withdraw the order for the grant of Letters, we consider that as Mt. Parbati is the sole legatee under the Will of her husband, she should be given another opportunity to furnish security. We accordingly direct her to furnish, within six months, a security bond with one surety for the due administration of the estate. In the event of her failure to comply with this order, the District Judge is authorized to

(1) [1920] 47 Cal. 115 = 23 C. W. N. 763 = 51 I. C. 936 = 29 C. L. J. 496.

withdraw the order for the grant of Letters of Administration to her. The appeal is accepted pro tanto, and the parties are directed to bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 353

BROADWAY, J.

Pritam Singh—Accused—Petitioner.

v.

Mt. Basant Kaur—Respondent.

Criminal Revision Petition No. 102 of 1926, Decided on 12th March 1926, reported by Addl. S. J., Amritsar, on 11th January 1926.

Criminal P. C., S. 488—Ill-treatment by husband—Wife's refusal to live with him does not disentitle her to maintenance—Husband marrying second wife is no ground to refuse to live with husband.

The marrying of a second wife by the husband does not justify a first wife to refuse to live with her husband. But when the first wife has been turned out after continued ill-treatment a half-hearted attempt to induce her to come back must be regarded as merely an excuse for the contracting of a second marriage, and therefore she is not bound to come back to her husband and the fact that she refused to do so would not disentitle her to maintenance. [P. 353, C. 2, P. 354, C. 1]

Amar Nath Chona—for Petitioner.

Niaz Muhammad—for Respondent.

Order.—One Pritam Singh is a student in the Khalsa College at Amritsar. He is apparently about 19 years of age. Mt. Basant Kaur was married to him between four and five years ago. She lived with him for a certain time and then went back to her parents' house.

A short time ago Pritam Singh instituted a suit against her for restitution of conjugal rights. This suit, however, was allowed to go by default. Mt. Basant Kaur, after this, filed an application under S. 488 of the Criminal P. C. asking for maintenance. This application was dealt with by a S. 30 Magistrate who accepted the allegations made by Mt. Basant Kaur to the effect that from the time of her marriage she was badly treated by her husband and that after about 18 months she had been beaten and turned out of his house by him. Further it appears that after the suit referred to above, had been dismissed in default Pritam Singh has married another wife. Taking all these circumstances into consideration the learned Magistrate came to the conclusion that Mt. Basant Kaur was entitled to maintenance allowance of Rs. 10 per mensem.

Against that order Pritam Singh filed a petition for revision before the learned Additional Sessions Judge. The learned Additional Sessions Judge has sent up the case to this Court under S. 438 of the Cr. P. C. apparently with a view to having the order for maintenance set aside. In the order of reference he has pointed out that Pritam Singh is a student and is a man of no means dependent entirely on his father. Further that on the evidence led by Pritam Singh it was evident that he was desirous of getting his wife to come back to him and in order to induce her to do so had called a panchayat and sent a deputation to Mt. Basant Kaur's father asking him to send his daughter to her husband and that it was on her refusal to come back that he married a second wife.

Now the Magistrate, after seeing the witnesses, came to the conclusion that their evidence was true that Mt. Basant Kaur had been turned out of the house by her husband. This matter the learned Additional Sessions Judge has not apparently considered and this matter is one of considerable importance in this case. If, as a matter of fact, Mt. Basant Kaur had been illtreated by her husband and turned out of the house, I do not think that her refusal to live with him dissentitles her to maintenance. The learned Additional Sessions Judge appears to have been influenced very greatly by the circumstance that for Mt. Besant Kaur an additional reason has been urged, viz., that her husband had re-married. It has been held repeatedly that the marrying of a second wife would not justify a first wife to refuse to live with her husband and I need only refer to *Emperor* v. *Waryam Singh* (1) in this connexien. But when the first wife has been turned out after continued ill treatment and a half-hearted attempt to induce her to come back is made (such as is evidenced in this case by the fact that the suit for restitution of conjugal rights was allowed to go by default) this attempt to

(1) [1914] 12 P. R.Cr. (1914)=25 I.C. 329=245 P. L. R. 1914.

induce the first wife to return, must, I think, be regarded as merely an excuse for the contracting of a second marriage, and, therefore, I am of opinion that Mt. Basant Kaur is not bound to come back to her husband and the fact that she had refused to do so would not disentitle her to maintenance.

The learned Magistrate has found that Pritam Singh is a man of means and property. The learned Additional Sessions Judge has taken a different view and has held that as Pritam Singh is still a student he must be dependent on his father, and, therefore, is not in a position to maintain his wife so long as she lives apart from him. The learned Additional Sessions Judge's view appears to be based entirely on conjecture, whereas that taken by the learned Magistrate is claimed to be based on evidence. If, as a matter of fact, Pritam Singh has no means at all Mt. Basant Kaur will be unable to recover her maintenance.

In these circumstances, however, I see no reason why the order of the Magistrate should be interfered with and I, therefore, dismiss the petition.

Petition dismissed.

A. I. R. 1926 Lahore 354

BROADWAY, J.

Karim Bakhsh and *others*—Plaintiffs—Appellants.

v.

Mohamed Shafi and *another*—Defendants—Respondents.

Second Appeal No. 625 of 1924, Decided on 27th January 1926, from a decree of the Senior Sub-J., Gujranwala, D/- 1st December 1923.

Acquiescence—Stranger deliberately building on another's land—Owner is entitled to recover except under special circumstances amounting to his acquiescence—Mere delay in bringing suit is not sufficient to deprive him of his right.

If a stranger builds deliberately on the land of another, the owner is entitled to recover the land, unless there are special circumstances amounting to a standing by, so as to induce the belief that the owner intended to forgo his right or to an acquiescence in his building on the land. Mere delay in bringing a suit is not in itself sufficient to create an equity in favour of the person building so as to deprive the owner of his strict rights: 20 *Bom.* 298 and 28 *Bom.* 298, *Appl.*

[P. 355, C. 1]

Ghulam Moh y-ud-din—for Appellants.

Judgment.—This second appeal has arisen out of a suit brought by Karim Bakhsh and others for possession of a plot of land measuring 46 feet by 3-1/2 feet. It was alleged that the plaintiffs were the owners of a vacant site adjacent to another vacant site which belonged to Hafiz Abdul Ali alias Jhandu, a gentleman who had been born blind. This Jhandu had purchased this site in 1915 and had erected a house thereon. Later he died and his minor sons sold the house so built in 1919 to Nawab Changar. In 1920, the plaintiffs discovered that this house had been erected partly on a strip of land belonging to them; in other words, that Jhandu had encroached on the plaintiffs' site. The trial Court held that the encroachment had, as a matter of fact, been made, but as the suit had not been brought for five years, they were only entitled to damages which he assessed at Rs. 100. The learned Senior Subordinate Judge, on appeal by both parties to him, while agreeing with the view taken by the trial Court as to the factum of the encroachment, reduced the damages to Rs. 50.

The plaintiffs have come up to this Court in second appeal through Mr. Ghulam Mohy-ud-din and the respondents have put in cross-objections but no appearance has been made either to support them or to oppose this appeal. The case first came up for hearing on the 4th March 1925, before Mr. Justice Abdul Raoof, who remanded it to the Court below for findings on three issues which are:

(1) Was Jhandu under the mistaken belief that he was building upon his own land?

(2) Did the plaintiff stand by and allow Jhandu to proceed to build on the land in dispute?

(3) Was the plaintiff present in Gujranwala and was the building constructed in his presence?

The Court, below have now submitted their findings on the points referred to them and have agreed in holding that Jhandu was well aware that he was encroaching on the plaintiffs' land when he erected his house, that the plaintiffs did not stand by and allow Jhandu to proceed with the building, and that the plaintiffs were not present in Gujranwala when the building was constructed and did not know of its erection.

On these findings Mr. Ghulam Mohyud-din has urged that the plaintiffs-appellants are entitled to the decree asked for by them and has further urged that this is not a case which can be met in equity by the award of damages. In *Premji Jiwan Bhate* v. *Haji Cassum Juma Ahmed* (1) it was held that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land, with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forgo his right or to an acquiescence in his building on the land. This, it was found, was the law in England. Sargent, C. J., further pointed out that the law in this country was the same with the exception that the party building on the land of another was allowed to remove the building. Further it was held that delay in bringing a suit was not in itself sufficient to create an equity in favour of the person building so as to deprive the owner of his strict rights. This case was considered by a Division Bench of the same Court in *Jethalal* v. *Lalbhai* (2) where certain English authorities were discussed and it was held that the mere fact that since the encroachment a certain amount of time had elapsed before the suit was brought was not sufficient to deprive the owner of the land of his strict rights.

In the present case it has been found as a fact that Jhandu encroached upon this land knowing that he was encroaching. From this finding it is impossible for me to differ in second appeal even if I wished to do so. It appears, however, that the person employed by Jhandu to erect this house was examined as a witness and as shown in the reports of the Courts below this witness stated that Jhandu was well aware that he was encroaching, but says that the plaintiffs had agreed to let him have the land. The present case, therefore, is stronger than the Bombay cases cited above; for there the persons making the encroachment did so under the mistaken belief that they were building on their own land. Here it has been found that Jhandu built on another man's land knowing that he was doing so. It would be putting a premium on actions such as this if a party were to be allowed deliberately to build on another person's land and then force him practically to sell the land to him on receipt of compensation therefor, and, I, therefore, think that in the present case the award of damages was not correct.

I, therefore, accept this appeal with costs and grant the plaintiffs a decree for possession of the site in suit. The defendants will be allowed, to remove their materials therefrom within six months from the date of this decree, failing which the plaintiffs will be entitled to have the said building removed at the expense of the defendants-respondents. The cross-objections are dismissed.

Appeal accepted.

(1) [1896] 20 Bom. 298.
(2) [1904] 28 Bom. 298=6 Bom. L. R. 86.

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* A. I. R. 1926 Lahore 355

ADDISON, J.

Hardwari Mal — Defendant — Petitioner.

v.

Chiranji Lal and *another*—Plaintiffs —Respondents.

Civil Revision No. 461 of 1925, Decided on 20th February 1926, from a decree of the Senior Sub-J., Rohtak, D/- 23rd April 1925.

* *Civil P. C., S. 115—Revision does not lie on wrong decision on limitation by lower Court.*

A High Court cannot interfere under S. 115 merely becausa the lower Court wrongly decided that the suit was barred by limitation or on the principle of res judicata. [P. 356, C. 1]

Shamair Chand—for Petitioner.

Nanwa Mal—for Respondents.

Judgment.—The Senior Subordinate Judge, Rohtak, sitting as an appellate Court, held, that an appeal was not properly presented and was thus barred by time. He accordingly dismissed the appeal and against this order this revision has been filed. It seems to me that S. 115 of the Civil P. C. does not apply. The appellate Court held that it had jurisdiction to hear the appeal and acting within its jurisdiction held that the appeal was barred by time.

As stated at page 288 of Mulla's Code of Civil Procedure, it is settled law that where a Court has jurisdiction to determine a question, it cannot be said

to have acted illegally or with material irregularity because it has come to an erroneous decision." A High Court cannot, therefore, interfere under S. 115 merely because the lower Court wrongly decided that the suit was barred by limitation or on the principle of res-judicata, etc. I see no ground to interfere on revision and dismiss this petition with costs,

Petition dismissed.

A. I. R. 1926 Lahore 356

LE ROSSIGNOL AND MARTINEAU, JJ.

Hakim Rai—Plaintiff—Appellant.

v.

Ganga Ram—Defendant—Respondent.

First Appeal No. 1325 of 1922, Decided on 20th January 1926, from the decree of the Senior Sub-J., Gujranwala, D/- 10th February 1921.

Promissory note—Cause of action complete before execution of pro-note—Plaintiff can maintain suit upon original contract even though he is debarred from producing the pro-note.

Where the promissory note is not the original contract, but is a mere collateral security or instrument by which payment of the original debt might be facilitated, in other words, the cause of action was complete before the promissory note is given and there is an independent admission of the loan quite apart from the promissory note :

Held : that even though the plaintiff is debarred from supporting his claim by the promissory note, he is competent to maintain his suit upon the original contract. [P. 357, C.1]

M. L. Puri and *Balkishan*—for Appellant.

Jagan Nath Aggarwal and *Jagan Nath Bhandari*—for Respondent.

LeRossignol, J.—This appeal arises out of an action brought by the plaintiff-appellant for the recovery of Rs. 20,000, being the amount due to him by defendant as a result of partition of joint property, for which defendant executed a promissory note by way of memorandum of the transaction. The plaint recites the passing of certain joint property from the plaintiff to the defendant, on which the plaintiff was due, Rs. 12,988, from the defendant. It also recites that if the promissory note for any reason is not admissible in evidence the plaintiff is still entitled to sue upon the original contract.

The defendant, pleaded inter alia, that the suit was barred by time and that the form of the suit was bad. On the merits he pleaded repayment. Originally there was no plea that the promissory note was inadmissible, but at a subsequent hearing the defendant urged that the plaintiff should be made to produce the promissory note or prove his allegation that it had been lost, and an issue as to the loss of the promissory note which admittedly was written in a bahi was struck. The Court below, after recording evidence, has come to the conclusion that the promissory note has not been lost, and having read the evidence and heard counsel we have no hesitation in agreeing with the Court below in its conclusion. Thereupon the trial Court dismissed the suit, holding that secondary evidence as to the contents of the promissory note could not be led and that the plaintiff was barred from falling back upon the original contract.

Before us it is not urged that the finding of the Court below regarding tho loss of the promissory note is incorrect. The only contention raised on behalf of the plaintiff is that he is entitled to fall back upon the original contract to pay, inasmuch as the promissory note was a mere collateral security for payment, and that the real contract is to be found in the deed of partition subscribed by the parties which is printed on page 56 and following of the supplementary paper-book. We consider that this contention is correct.

The plaintiff and defendant are two brothers who jointly owned a saltpetre factory. In August 1914 they made a partition of their property retaining some as joint and partitioning some other. The value of the property partitioned amounted to Rs. 25,920 and this was allotted to the defendant who, inasmuch as he was entitled to only one-half of that property, undertook to pay one-half of that sum to the plaintiff. This fact is duly set forth in the deed of partition which is signed by both parties, and is to be found recorded on page 58 of the aforementioned paper-book. In the same document also there is a reference to the promissory note as follows :

An entry with regard to the said sum has this day been secured from Ganga Ram. The said amount shall be paid by him together with

interest at the rate of Re. 0-12-0 per cent per mensem within 1½ years.

This was the original contract reduced to writing between the parties and it is admitted by the defendant. The promissory note, written in the bahi was not the original contract and was a mere collateral security or instrument, by which payment of the original debt might be facilitated. In other words, the cause of action was complete before the promissory note was given and there is an independent admission of the loan quite apart from the promissory note. For these reasons we hold that even though the plaintiff is debarred from supporting his claim by the production of the promissory note, he is competent to maintain his suit upon the original contract.

We accordingly accept the appeal and remand the case under O. 41, R. 23, Civil Procedure Code, for decision whether the suit on the original contract is within time, and if so, whether there has been payment of the debt as contended by the respondent-defendant. Court-fee on this appeal shall be refunded and costs up to date shall be costs in the case.

Case remanded.

A. I. R. 1926 Lahore 357

BROADWAY AND FFORDE, JJ.

Hari Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 665 of 1925, Decided on 23rd March 1926, from the order of the S. J. Rawalpindi, D/- 29th January 1925.

(a) *Interpretation of Statutes—Clear words carrying definite meaning cannot be cut down or added to.*

Clear words of an Act of Parliament, conveying a definite meaning in the ordinary sense of the words used, cannot be cut down or added to so as to alter that meaning. [P 359 C 2]

(b) *Criminal Law Amendment Act* (1908), S. 17 (2)—*For conviction under Cl.* (2) *person taking part in meetings or helping an association need not be authorized by the association.*

A person who is in charge of an office is not necessarily the person who manages or assists in managing the association which owns that office. [P 358 C 2]

Clause (1) of S. 17 makes it an offence not only to be a member of an unlawful association or to take part in its meetings, but also to help it in any way and it is immaterial whether the person who renders such help has been authorized to do so or whether he acts purely on his own initiative: *A. I. R.* 1925 *Lah.* 522, *Expl.* [P 359 C 2]

Cl. (1) of S. 17 is obviously intended to deal with members and all other persons identifying themselves with any unlawful body of persons as defined by S. 15; and Cl. (2) of S. 17 is directed against the ringleaders of such a body; that is, the persons who actually control or direct the activities of the association, or who organize or help to organize any of its meetings: *Cr. App. No.* 912 *of* 1924 and *Cr. Rev. No.* 1045 *of* 1925, *Rel. on.* [P 359 C 2]

Man Singh—for Petitioner.

Ram Lal—for the Crown

Fforde, J.—These are three criminal revisions submitted to a Division Bench by LeRossignol, J. on the ground that there have been conflicting judgments by different Judges of this Court in respect of the matters raised in these applications.

As each case depends upon somewhat different facts, it is necessary to deal with them in separate judgments.

Criminal Revision No. 665 of 1925, *re. Hari Singh.*

This is an application for revision of an order of the Sessions Judge, Rawalpindi, dated the 29th January 1925, dismissing an appeal from a conviction of Hari Singh petitioner for an offence under S. 17 (2) of the Criminal Law Amendment Act (XIV of 1908).

The charge against this petitioner reads as follows:

That you on or about the 22nd August 1924 at Gujar Khan addessed the Sikhas at Singh Sabha, Gujar Khan and appealed them to organize themselves into jathas and proceed to Jaito in the name of the Shiromani Gurdwara Parbandhak Committee. The Shiromani Gurdwara Parbandhak Committee and Akali Dal and all jathas organized by or affiliated to them are declared unlawful associations by the Local Government: vide Government Notification No. 23772 and No. 23773, dated 12th October 1923. You were in the charge of the office of Singh Sabha and Akali Jatha when it was searched and thereby committed an offence punishable under S. 17 (2) of the Criminal law Amendment Act and within my cognizance.

To this charge the petitioner pleaded not guilty, and produced evidence to prove that he did not make the alleged speech. The finding of the lower appellate Court is that the petitioner was the Secretary of the Akali Dal at Gujar Khan, and that at the political meeting held in the Singh Sabha at Gujar Khan on the 22nd August, he exhorted the

Sikhs present at the meeting to organize themselves into jathas and proceed to Jaito and Bhai Pheru in the name of the Shiromani Gurdwara Committee. So far as his presence in the meeting and the making of the statement in question is concerned, there can be no doubt ; but Mr. Man Singh, who appears for the petitioner urges that there is no evidence in support of the finding that the petitioner was the Secretary of the Akali Dal at Gujar Khan, and that, therefore, he cannot be held to be guilty of an offence under S. 17 (2) of the Criminal Law Amendment Act as having managed or assisted in managing that association.

The evidence for the prosecution on this point is to the effect that upon a search of the office of the Singh Sabha at Gujar Khan the petitioner was found to be in charge of that office, and a mass of correspondence is produced which is proved to have been found on the occasion of that search. These documents are either in Gurmukhi or in Urdu, and the difficulty of this Court has been considerably and unnecessarily added to by reason of the fact that none of these documents have been translated into English, although I understand that English is the language of this Court. Some of the documents purport to be letters from the Secretary of the Shiromani Akali Dal, Amritsar, to the Secretary, Akali Jatha, Gujar Khan. Others purport to be letters from the Secretary, Singh Sabha, Rawalpindi, to the Secretary, Singh Sabha, Gujar Khan. The fact that these documents were found in the office of which the petitioner was in charge is clearly established. To avoid any doubt on this point he was asked to affix his signatures upon them, which he did.

But it does not appear that any of these documents were addressed to the petitioner by name, and the lower Courts appear to have assumed that because these documents were addressed to the Secretary of the Singh Sabha and of the Akali Jatha at Gujar Khan, the person in charge of the Singh Sabha office must necessarily be that secretary. The petitioner himself says that he was merely a clerk in charge of the office, and emphatically denies that he was either the Secretary of Singh Sabha or of the Akali Dal at Gujar Khan. It has not been proved who wrote the letters in question, and there is no evidence that the addressee of the letters is the petitioner. Upon these facts I do not see how it is possible to hold that the petitioner has been proved to be the Secretary of the Akali Dal at Gujar Khan. He has merely been proved to have been in charge of that office on the date on which the search was made, and it can hardly be seriously contended that a person who is in charge of an office is necessarily the person who manages or assists in managing the association which owns that office. Had it in fact been proved that the petitioner was the Secretary of the Akali Dal at Gujar Khan I have no doubt one would be justified in presuming that he was assisting in the management of that association. In the present case it is a presumption which has not been derived from any legal evidence.

The fact that the petitioner addressed the meeting of the 22nd August, appealing to the audience to organize themselves into Jathas and proceed to Jaito in the name of the Shiromani Gurdwara Parbandhak Committee is, however, clearly established and even if it be not proved that the petitioner was a member of that association, which by notification has been declared to be unlawful, nevertheless his action in calling upon people to form jathas in connexion with such an unlawful association in my opinion clearly amounts to assisting the operations of that association within the meaning of section 17 (1) Criminal Law (Amendment) Act 1908. The Government Notification No. 23772, dated 12th October 1923, declares that the Shiromani Gurdwara Parbandhak Committee and all jathas organized by or affiliated to this body are unlawful associations. The petitioner in his speech called upon his audience to form jathas in aid of the Shiromani Gurdwara Parbandhak Committee, and he thereby unquestionably assisted the operations of the association. Mr. Man Singh has referred to the case of *Attar Singh* v. *Crown* (1) in which it was held that a person could not be said to have assisted the operations of the Shiromani Gurdwara Parbandhak Committee by urging people to form jathas, in the absence of proof that he was acting on behalf or under the authority of the Committee, and that such an

(1) A. I. R. 1925 Lah. 522.

authorization is not proved by the mere fact of the petitioner alleging that he was so acting. This question was not fully discussed before the learned Judge who decided the case, and a decision on this point was not necessary for the determination of the matters which were there involved. As Mr. Man Singh has, however, raised this point in all the cases before us I feel bound to deal with it.

Section 17 (1) of the Criminal Law (Amendment) Act reads as follows :

> Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished, etc.

An " unlawful association " is defined by S. 15 as an association (a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habituallly commit such acts, and (b) which has been declared to be unlawful by the Local Government under the powers hereby conferred. S. 17 (1) renders a person liable to punishment if he is proved to be a member of such an association, without any proof being required of any active participation in its operations. It further renders a person liable to punishment who is proved to have attended a meeting of any such association, or who is proved to have contributed or received or solicited any contribution for the purpose of any such association or, finally, who is proved to have assisted in any way its operations.

Mr. Man Singh would have us hold that a person who has been proved to have received a contribution for the purpose of an unlawful association, or to have assisted its operation in any way, has not committed an offence within the provisions of this section unless it be further proved that he has been authorized by the association itself to receive the contribution or to render the assistance in question. I fail to understand why such a proviso should be rend into the section. If it were intended to restrict its meaning in this way one would naturally expect words to that effect. We are asked to read the section as though it ran :

> Whoever is a member of an unlawful association or acting on behalf and with the authority of any such association contributes....

Such a view is obviously unsustainable. Clear words of an Act of Parliament, conveying a definite meaning in the ordinary sense of the words used, cannot be cut down or added to so as to alter that meaning. In my opinion it is perfectly clear from the words used that Cl. (1) of S. 17 makes it an offence not only to be a member of an unlawful association, or to take part in its meeting, but also to help it in any way and it is immaterial whether the person who renders such help has been authorized to do so or whether he acts purely on his own initiative. It seems to me absurd to suggest that a stranger who, attracted by the objects of an unlawful association, sent it a voluntary contribution of a sum of money, would not be guilty of the offence of contributing unless it were first proved that he had authority from the association to send the money. Or again, that a person who attended a meeting of such an association would not be guilty of an offence unless he had permission from the association to attend. I can see no reason for differentiating between different portions of this section and to hold that though a stranger may commit an offence by voluntarily contributing a sum of money, yet he does not commit an offence if he assists it in any way unless such assistance has first been approved of. Contributing to an association is after all only one way of assisting it.

Clause (1) of S. 17 is obviously intended to deal with members and all other persons identifying themselves with any unlawful body of persons as defined by S. 15, and Cl. (2) of S. 17 is directed against the ringleaders of such a body, that is, the persons who actually control or direct the activities of the association, or who organize or help to organize any of its meetings. That this distinction is deliberate is shown by the different degrees of punishment awarded in the two cases. In this regard I would refer to the following observations of a Division Bench of this Court in its judgment in *Crown* v. *Saudagar Singh* (2).

> The word " management " is not defined in the Act nor in any other legal enactment and is, therefore, to be interpreted according to its dictionary meaning. The person entrusted with the management of the affairs of an institution has the conduct and direction of an institution, and a person cannot assist in the management of an association who has no hand in the conduct or direction of its affairs, though as an employee of that association he may carry out the orders of its managing body.

(2) Cr. App. No. 912 of 1924.

If I may say so I entirely agree with the view thus expresssed which fortifies me in my conclusion that upon the facts of the present case the petitioner cannot be held guilty of an offence under S. 17 (2) of the Act of 1908. I am, however, satisfied that upon the facts proved he is clearly guilty of an offence under S. 17 (1), in having assisted the Shiromani Gurdwara Parbandhak Committee by calling npon peeple to organize jathas in its name; and in my cpinion it is entirely immaterial that in doing so he has not been proved to have acted under the authority of the organization which he has assisted. I may add that the view which I have expressed in regard to the two sub-sections of S. 17 is supported by the decision of LeRossignol, J., in *Dewa Singh* v. *The Crown* (3).

For the reasons given I would accept the petition to the extent of altering the conviction under S. 17 (2) to one under S. 17 (1) and as the petitioner has already served almost the maximum sentence of imprisonment which may be imposed by this latter section, I would direct that his bail bond be discharged and that he be set at liberty.

Broadway, J.—I agree.

Petition accepted.

(3) Cr. Rev. No. 1045 of 1925.

A. I. R. 1926 Lahore 360

DALIP SINGH, J.

S. R. Darrah— Debtor—Defendant — Appellant.

v.

Fazal Ahmad and *another*—Creditors —Plaintiffs—Respondents.

Miscellaneous Second Appeal No. 2010 of 1925, Decided on 22nd February 1926, from an order of the Addl. Dist. J., Lahore, D/- 23rd July 1925.

Provincial Insolvency Act (5 *of* 1920), *S.* 19 (2)—*Applicability.*

There is no authority for holding that sub-S. (2), S. 19, only applies to the case of a petition by the debtor. [P 360, C 2]

(*b*) *Provincial Insolvency Act* (5 *of* 1920), *Ss.* 21 *and* 22—*Powers are discretionary.*

The powers under Ss. 21 and 22 are entirely in the discretion of the Court and the High Court should not in second appeal interfere with that discretion. [P 360, C 2]

(*c*) *Provincial Insolvency Act* (5 *of* 1920)—*Rules framed under Act of* 1907 *hold good where not inconsistent.*

As no rules have been framed under the new Act V of 1920, the old rules under the Act, 1907, hold good where they are not inconsistent with the new Act. [P 361, C 2]

(*d*) *Provincial Insolvency Act* (1907), *S.* 12 (1)—*Notification in Gazette is not illegal.*

The notification of a petition for insolvency in the local official Gazette is not illegal. [P 361, C 1]

Moti Sagar and *Balwant Rai*— for Appellant.

Ghulam Mohy-ud-Din — for Respondents.

Judgment.—In this appeal the parties took time to arrange a compromise on certain terms which were recorded when the case came before me on the 12th January 1926. The terms of the arrangement have not been complied with and the compromise, therefore, drops.

Rai Bahadur Moti Sagar for the appellant has argued that the trial Court was wrong in ordering notification of the petition for insolvency in the Gazette, was wrong in demanding security under S. 21 and wrong in demanding a list of property and debts under S. 22 of the Provincial Insolvency Act before deciding the question which was disputed by the debtor, namely as to whether the debtor had committed any acts of insolvency or not. He further urged that sub-S. (2) of S. 19 only applied to the case of a petition by the debtor. This last contention is not supported by any authority and *Muthukaruppan Chettiar* v. *Muthuraman Chettiar* (1) seems to be against the contention. I, therefore, repel it. Under S. 21 the Court is given discretion to make an order for security at any time at or after admitting the petition. Similarly under S. 22 the Court may at any time after admitting the petition demand an inventory of the debtor's property and lists of his creditors and debtors and of the debts due to and from them. It is clear, therefore, that the matter is entirely in the discretion of the Court and I see no reason in second appeal to interfere with that discretion in the circumstances of this case.

As regards the question of notification in the Gazette it appears that no rules have been framed under the new Act

(1) [1914] 1 L. W. 1012=26 I. C. 282=(1914) M. W. N. 899.

V of 1920. It follows, therefore, that the old rules under the Provincial Insolvency Act, 1907, still hold good where they are not inconsistent with the present Act. Under the Act of 1907 a notice in the local Gazette was made obligatory by S. 12 (1). R. 5 of the rules is as follows:

Notice of an order fixing the date of the hearing of a petition under S. 12 (1) may in addition to the publication thereof in the local official Gazette as required by the Act be also advertised in such local newspaper or newspapers as the Court may direct.

I consider that the rule does not in terms incorporate the publication required by the Act in the local official Gazette in itself, but even omitting this clause in the rule the rule would empower the Court at its discretion to advertise the petition in any local newspaper or newspapers. The local official Gazette may in a sense be said to be a newspaper. In any event I asked counsel for the respondent whether he would prefer a publication of the petition in other newspapers and he said not. In the circumstances of the case I am therefore not prepared to interfere in second appeal on this ground.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 361

BROADWAY AND FFORDE, JJ.

Kanshi and *others*—Appellants.

v.

Emperor—Opposite party.

Criminal Appeal No. 962 of 1925, Decided on 10th March 1926, from the order of the S.J., Karnal, D/- 27th August 1925.

(a) *Penal Code, S.* 300, *Exception* 4—*Culpable homicide without premeditation in sudden fight—But blow with hatchet splitting skull, without apprehension of injury to assailant—Assailant is not protected by Exception* 4.

Although culpable homicide is committed without premeditation and in a sudden fight, and also in the heat of passion upon a sudden quarrel, when a man uses a hatchet on another unarmed man and strikes him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, he cannot claim the protection of Exception 4. [P 362, C. 2]

* (b) *Criminal P. C., S.* 439 (4)—*High Court can convict on a charge on which trial Court has acquitted.*

Sub-clause (4) does not prohibit a Court from convicting in revision on a charge upon which the trial Court has in effect acquitted an accused: *A. I. R.* 1924 *Bom.* 456, *not Foll.*; 12 *P. R.* 1904 *Cr. and* 37 *Mad.* 119, *Foll.* [P. 363, C. 2]

Mian Muhammad Shafi and *Muhammad Rafi*—for Appellants.

J. M. Mackay—for the Crown.

Broadway, J.—Kanshi, son of Phule, Ram Gopal, son of Data Ram, and Mai Dhan, son of Laje, Banias of Mauza Pinana, in the Sonepat Tahsil of Rohtak District, have been convicted of having caused the death of one Ram Gopal, son of Ghasi Ram, grievous hurt to one Santu and simple hurt to one Asa Ram, and have been awarded various terms of imprisonment and Mai Dhan and Ram Gopal have also been directed to pay fines; against their convictions and sentences they have preferred this appeal to this Court. The relatives of the deceased Ram Gopal, son of Ghasi Ram, have also moved this Court under S. 439, Criminal Procedure Code, praying that the convictions of the three persons named should be under S. 302, Indian Penal Code, and appropriate sentences awarded.

The facts are simple. It appears that on the 24th April 1925, at about 9 a. m., a boy named Ram Gobind, aged 12 years, had a quarrel with a lad named Moti of about 15 or 16 years of age outside a shivala. Ram Gobind abused Moti who struck Ram Gobind and twisted his finger. This was witnessed by Santu (P. W. 12), a young man aged about 22, who was related to Ram Gobind. Santu slapped Moti. This incident was witnessed by the three appellants who were at Ram Gopal appellant's shop a few paces from the shivala. These three proceeded to assault Santu in revenge for his having slapped Moti. Ram Gopal was armed with a gandasa; Kanshi with a hatchet and Mai Dhan with a khunta or pole forming part of bullock cart—all three formidable weapons. According to the evidence, Mai Dhan was the first to hit Santu inflicting an injury on his head; Kanshi struck him a violent blow on his chest with a hatchet cutting his sternum and actually damaging the lung. Santu fell and was struck by Ram Gopal on the calf of his leg with the gandasa inflicting an injury 8 inches long 2-1/2 inches wide and deep to the bone.

In the meantime Asa Ram, father of Ram Gobind, appeared on the scene and

was assaulted in his turn by Kanshi with a hatchet and Mai Dhan with a khunta. Asa Ram was not armed. Immediately behind him came Ram Gopal, son of Ghasi Ram, who recieved a violent blow on the head delivered by Kanshi with a hatchet. Ram Gopal was felled to the ground and died. Immediately behind him came Ratan at whom Ram Gopal appellant aimed a blow with a gandasa. Ratan managed to catch hold of the gandasa and kept hold of it in spite of being hit by Kanshi with a hatchet. Barbaria (P. W. 8), a Jat, arrived on the scene and took hold of this gandasa. Other people then arrived and the incident came to an end, the parties being separated. The matter was reported at 5-30 p. m. on the same day, the police station being 13 miles distant.

It has been urged that there was delay in making the report ; but having regard to the circumstances I do not think that there is anything sinister in the time that elapsed. It has to be borne in mind that an attempt to make a report on the part of the other side was made even at a later time on the same day.

It has been urged that there was no previous enmity between the parties who are Banias by caste and that the whole affair was sudden and unpremeditated. Although one of the appellants has attempted to show in his statement that there was some previous ill-feeling, I think it may be accepted that the relations between the parties were not such as to supply any adequate motive for violence of this nature. It may be accepted that the occurrence took place suddenly and was due to the quarrel between Ram Gobind and Moti.

An attempt was made by the defence to prove that there was a general fight between two factions, but the evidence led, which was read to us by Sir Mohammad Shafi, has only to be referred to show how utterly absurd this theory is. While attempting to establish the innocence of the appellants, none of the witnesses makes any attempt to account for the injuries inflicted upon Santu, Ram Gopal, son of Ghasi Ram, or Asa Ram. I would, therefore, hold inagreement with the learned Sessions Judge that the story told by the prosecution as detailed above is substantially accurate.

It remains to consider what offence or offences the appellants have committed. With regard to Kanshi, there can be no doubt that he is responsible for the grievous hurt caused to Santu, and the death of Ram Gopal, son of Ghasi Ram. The learned Sessions Judge, in disagreement with the assessors, has found that the act of Kanshi in connexion with the death of Ram Gopal, son of Ghasi Ram constituted an offence under the second part of S. 304, Indian Penal Code, and for that offence Kanshi has been awarded ten years' rigorous imprisonment. He has also been convicted of having caused grievous hurt to Santu and Asa Ram, and for the first offence has been sentenced to seven years' rigorous imprisonment and for the second to one year's rigorous imprisonment, the sentences to run consecutively.

I would note here that the assessors, who were four in number, were unanimously of opinion that all the appellants were guilty of murder and causing grievous hurt with an instrument used for cutting—S. 326, Indian Penal Code. Now, as far as Kanshi's act in connexion with the killing of Ram Gopal, son of Ghasi Ram, is concerned, the onus is on Kanshi to show that his act fell within one of the exceptions to S. 300. It has been urged that inasmuch as the offence committed was entirely unpremeditated and was the result of a sudden quarrel, it fell within the fourth exception to S. 300. That exception runs as follows :

> Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

It may be granted that in the present case culpable homicide was committed without premeditation and in a sudden fight and also in the heat of passion upon a sudden quarrel ; but it seems to me that when a man uses a hatchet on another unarmed man and strikes him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, he cannot claim the protection that this exception affords. In my judgment the offence committed by Kanshi in killing Ram Gopal falls within the purview of S. 302, Indian Penal Code, and I would, therefore, alter his conviction to one under that section and sentence him to transportation for life. I would also maintain his conviction under S. 326 in respect of the injuries caused to Santu and Asa Ram,

but do not think it necessary to pass any separate sentence for those offences.

Ram Gopal, appellant, has been found guilty of having caused simple hurt to Santu with a sharp edged weapon, an offence under S. 324. In my judgment his attack on Santu falls within the purview of S. 326, Indian Penal Code. As stated above, all the three appellants came together from Ram Gopal appellant's house or shop with a view to assaulting Santu in revenge for his having slapped Moti. Of these three persons, two, of whom one was Ram Gopal, were armed with formidable sharp-edged weapons while the third was armed with a heavy pole. All three used the weapons that they were armed with on Santu and having regard to the provisions of S. 34, Indian Penal Code, I consider that they all had the intention of causing, at least, grievous hurt to Santu. Grievous hurt was actually caused. I would, therefore, alter the conviction of Ram Gopal to one under S. 326 and sentence him to seven years' rigorous imprisonment. The fine, however, is set aside and, if paid, will be refunded.

In the case of Mai Dhan he has been found guilty of having caused simple hurt to Santu and Asa Ram. In my opinion his case is on the same footing as that of Ram Gopal so far as the attack on Santu is concerned, and I would, therefore, alter his conviction to one under S. 326, Indian Penal Code, and sentence him for that offence to seven years rigorous imprisonment. I do not think it necessary to inflict any separate sentence on him for the offence committed in regard to Asa Ram, and I would, therefore, direct that the fine, if paid, be refunded.

Before concluding I would note that it has been urged at the Bar that this Court has not power under S 439 (4) to enhance the sentence as the decision of the learned Sessions Judge amounted to an acquittal on the more serious charges. In this connexion attention was drawn to *Emperor* v. *Shiwaputraya* (1). That authority no doubt supports the contention, but the contrary view was taken by the Madras High Court in *Bali Reddi* v. *Emperor* (2) and by this Court in *Bhola* v. *King-Emperor* (3) which I think is the correct view for me to follow.

(1) A. I. R. 1924 Bom. 456.
(2) [1914] 37 Mad. 119=22 I. C. 753.
(3) [1904] 12 P.R. 1904 Cr.=110 P.L.R. 1904.

Fforde, J.—I agree. I must confess I have some doubts whether sub-Cl. (4) of S. 439 of the Criminal Procedure Code does not prohibit a Court from convicting in revision on a charge upon which the trial Court has in effect acquitted an accused. Being bound, however, by the unanimous current of decisions of this Court it would serve no useful purpose to express my views upon this question.

Sentences altered.

A.I.R. 1926 Lahore 363

SHADI LAL, C. J.

Fazal and *another*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 2044 of 1925, Decided on 19th March 1926, from an order of the 1st Cl. Mag., Lyallpur, D/- 7th December, 1925.

Criminal P. C., S. 162—Improper use of police diaries.

To believe the evidence of a witness because a perusal of the police diaries satisfied the Court that he was examined at the earliest opportunity and had made the same statement before the police is an improper use of the police diaries.

[P. 363, C. 2 P. 364, C. 1]

Nawal Kishore for *Ramchand Manchanda*—for Petitioners.

J. N. Bhandari—for the Crown.

Judgment.—The stolen bullocks were undoubtedly found in the hut of one Taju, but there was no evidence to connect Taju with the commission of the crime and the investigating officer was consequently justified in not proceeding with the case against him. Two persons, namely, Fazal and Nura, were subsequently prosecuted for the theft of the bullocks, and they have been convicted and sentenced under S. 379, Indian Penal Code.

The judgment of the appellate Court shows that the conviction rests upon the uncorroborated testimony of only one witness, namely, Turezi. Now, Turezi is related to Taju, described as an independent witness. The appellate Court has believed his evidence because a perusal of the police diaries satisfied the Court that

this witness was examined at the earliest opportunity and at the very time he had stated

that he had seen two persons with Taja along with the cattle.

This is an improper use of the police diaries, and there can be no doubt that inadmissible evidence should not have been invoked in order to sustain the conviction.

After considering the matter carefully I have reached the conclusion that the guilt of the petitioners has not been established. Accordingly I accept the application for revision, and, setting aside the convictions and sentences, I direct that both the prisoners be released forthwith.

Convictions set aside.

A. I. R. 1926 Lahore 364

DALIP SINGH, J.

Dhanpat Rai—Decree-holder—Appellant.

v.

Nathe Khan and *others*—Judgment-debtors—Respondents.

Miscellaneous First Appeal No. 1537 of 1925, Decided on 21st January 1926, from an order of the Senior Sub-J., Amritsar, D/- 9th May 1925.

Civil P. C., O. 34, Rr. 4 and 5—Preliminary decree is made final by endorsement on preliminary decree—Absence of separate final decree-sheet is mere irregularity.

Where a final decree in a mortgage suit is made by an endorsement on the preliminary decree itself and no separate formal final decree sheet is drawn up, absence of a formal decree is a mere irregularity and the decree should be considered to be made final by the endorsement.

[P 364 C 2, P 365 C 1]

Shaukat Rai—for Appellant.

Asghar Beg—for Respondents.

Judgment.—The sole question in this appeal is whether under the terms of the decree passed on the 16th day of March 1921 by the learned Senior Subordinate Judge, which was made final on the 15th of October 1921, the decree-holder is entitled to execute separately for costs against the judgment-debtors mentioned in the decree-sheet.

The preliminary decree declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the 16th day of April 1921 was Rs. 27,921 and that the amount of Rs. 24,923-4-6 should carry interest at the rate of 9 per cent. per annum until realization. It was further declared that if such payment was not made on or before the 16th of April 1921 the mortgaged property should be sold and the proceeds applied in payment of what was declared due to the plaintiff together with subsequent interest and subsequent costs. The decree further went on to say that Nathe Khan, Sain Das, Shahab Din and Jalal Din should pay the plaintiff costs of the suit amounting to Rs. 1,526-10. No separate final decree was drawn up, but on the decree-sheet the learned Senior Subordinate Judge endorsed the words: "This decree is made final," and signed and dated the same. It seems that the decree-holder took out execution for the total sum found due under the decree, namely, Rs. 27,921 which included the Rs. 1,526-10, found due as costs. The mortgaged property was sold and Rs. 15,695 was recovered by the decree-holder. The decree-holder has now taken out execution against the judgment-debtors named in the decree for the costs alone.

The learned Senior Subordinate Judge has dismissed this application on two grounds:

(1) That as the decree-holder has already taken out execution for costs and recovered more than the total sum due for costs, there was nothing left to execute so far as costs were concerned. I cannot see how it can be said that the decree-holder's realization of Rs. 15,695 out of Rs. 27,921 due can be said to be in complete satisfaction of the Rs. 1,526-10-0 costs which were included in Rs. 27,921. (2) The learned Senior Subordinate Judge has held that the decree-holder cannot proceed against the present judgment-debtors without a separate personal decree under O. 34, R. 6, Civil P. C. So far as this point is concerned, it seems to me that, rightly or wrongly, the decree already gave a personal decree against the aforenamed judgment-debtors for the amount of the costs and that, therefore, it was not necessary for the decree-holder to get a further decree under O. 34, R. 6, Civil P. C., for the amount of the costs.

The learned counsel for the respondents has further contended that as no final decree was drawn up, therefore, there is no execution open to the decree-holder at all. In the first place I am not satisfied that where a preliminary decree is given for costs alone, that decree cannot be executed after it has been made final. Further, I do not think that the absence of a formal decree-sheet can in the circumstances of this case be taken to mean that no final decree was passed. By the endorsement on the decree sheet the

learned Senior Subordinate Judge intended to make the preliminary decree the final decree, and the absence of a separate decree-sheet should, in my opinion, only be taken to be an irregularity. I, therefore, accept the appeal and remand the case for disposal. The appellant will have his costs of this appeal.

Case remanded.

A. I. R. 1926 Lahore 365

HARRISON, J.

The Municipal Committee, Simla—Complainant—Petitioner.

v.

Mukand Singh—Accused—Respondent.

Criminal Revision Petition No. 1308 of 1925, Decided on 17th March 1926, from an order of the S.-J., Ambala, D/- 16th February 1925.

(a) *Criminal P. C., S. 250—Accusation is not vexatious unless main intention of complainant is annoyance to accused.*

An accusation cannot be said to be vexatious unless the main intention of the complainant was to cause annoyance to the person accused, and not merely to further the ends of justice; 11 *S. L. R.* 55, *Appr.* [P. 365, C. 2]

(b) *Criminal P. C., S. 162—Police diaries should not be referred unless witnesses are confronted by statements in them.*

A Magistrate is not justified in referring to the statements made in the police diaries unless and until the witnesses have been confronted by those statements. [P. 366, C. 1]

Cardon Noad, Ram Lal and *Muhammad Umar*—for Petitioners.

M. S. Bhagat—for Respondent.

Judgment.—B. Mukand Singh, Work Supervisor lately in the employment of the Municipal Committee, Simla, was sent up for trial by the police under S. 477-A of the Indian Penal Code. He was acquitted by the trial Magistrate and a sum of Rs. 100 was awarded to him by way of compensation under S. 250 of the Criminal P. C. An appeal was lodged by the Municipal Committee, who had been ordered to pay the compensation and this was dismissed by the Sessions Judge. A revision has been admitted from that order.

Without going into the facts or questioning the correctness of the findings counsel has urged that, although the accusation had been held to be unproved and unsubstantiated, there is no reason for holding that the case was false in the sense in which this word is used in S. 250 of the Criminal P. C., or even vexatioue in the sense in which the word is used in that section.

On the latter point counsel relies on *Emperor* v. *Kouro* (1), where it is explained that an accusation cannot be said to be vexatious unless the main intention of the complainant was to cause annoyance to the person accused, and not merely to further the ends of justice. A report was made regarding the conduct of this Supervisor by the Municipal Engineer on which the President, the Deputy Commissioner, set a more or less informal inquiry on foot through the police, and the Superintendent of Police reported four days later that his inquiry showed that the Supervisor had been guilty of falsification of accounts. The matter went before the Committee and at a meeting of the 17th February 1921 it was resolved that instead of proceeding further with the case the Committee decided to give one month's notice to B. Mukand Singh and to dispense with his services. On receiving a notice to this effect B. Mukand Singh protested against being treated in this way without any explanation being demanded from him.

To this the Secretary of the Committee replied that if he wished to furnish any explanation the Committee was prepared to consider it. He replied that it would be of no avail to do so as his services, had deen dispensed with and asked for the payment of his Provident Fund or rather the Municipal contribution towards it. This was refused on the ground that the order of discharge combined with the failure of Mukand Singh to furnish any explanation made that order tantamount to an order of dismissal. The Commissoner set aside this order so far as it related to the payment of the contribution and the Commissioner's order was enforced by the Local Government. Subsequently Mukand Singh made a further claim for two years' pay and on this the Committee ordered the matter of the falsification of the accounts to be proceeded with and a report was duly made to the police. Mukand Singh was challaned and acquitted.

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(1) [1917] 11 S. L. R. 55=42 I. C. 733.

What has been shown, therefore, is that the Committee withheld a sum of money which they were not entitled to withhold and that on a claim being made which they considered unjustifiable, they ordered the question of the falsification of accounts which had once been dropped to be re-opened. I do not agree with many of the findings of the Magistrate which counsel has been unable to substantiate, such as that the police was unduly influenced by the representatives of the Municipal Committee, Simla, or that the investigating officer was dissuaded by the Municipal Council or Municipal Engineer from examining witnesses whom he should have examined, or that the Committee was responsible for any shortcoming, if there be any shortcoming, in the investigation. I find that the Magistrate was not justified in referring to the statements made in the police diaries unless and until the witnesses had been confronted by these statements. I cannot discover, nor has counsel been able to show me, how it is clear that up to the date of the institution of the present proceedings Mukand Singh was ready at any time to submit a complete explanation of his case to the Muncipality. On the contrary the position seems to have been precisely reverse. I do not find that it is shown in any way that the Committee persevered with this case knowing or suspecting it to be untrue and I do not find it established that the object in instituting the proceedings was primarily to annoy the accused.

I, therefore, set aside the order of compensation. The sum, if paid, will be refunded.

Order set aside.

A. I. R. 1926 Lahore 366

MARTINEAU, J

Daya Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 1793 of 1925 Decided on 29th January 1926, made by the S. J., Karnal, on 2nd November 1925.

Criminal P. C., Ss. 110, 112 and 115—Allegation under S. 110 informed sufficiently to accused—Provisions of Ss. 112 and 115 not complied with—Order cannot be set aside.

An order passed against an accused in the proceedings under S. 110 cannot be set aside by High Court on the ground that the provisions of Ss. 112 and 115 were not strictly complied with, where it appears that the accused is sufficiently informed as to the allegation against him. [P 367 C 1]

Parkash Chand—for Petitioner.

Gobind Ram Khanna—for the Crown.

Facts.—The applicant, Daya Ram, lambardar of village Sagri, has been restricted for one year to his village under the Habitual Offenders Act by order of the Revenue Assistant (Magistrate, First Class), Karnal. He appealed to the District Magistrate but the appeal was rejected by order dated 10th August 1925. He has now applied to this Court for revision.

Grounds.—The only ground for revision in which I see any force is that the notice forming the basis of the proceedings under S. 110, Criminal P. C., is defective and not valid. The substance of the charge against the applicant in the notice is given below :

Adi sarga maweshius ki shchrat kharab hai marduman us ki adat se khaif hain aur sangin jaraim karne ka adi hai-wala mal sarqa wa naqab zan wagharia hai.

The words *wala mal sarqa* are unintelligibele and convey no meaning at this place. This notice should have been accompanied with a copy of the order passed by the Magistrate when starting the proceedings, as required by S. 115 of the Criminal P. C., but no such copy seems to have accompanied this notice when it was served upon the applicant. In the order dated 21st of July 1924, on which this notice was issued, there is no mention of cattle shifting ; while in the notice the words *sarqa naweshi* indicate that he is charged also with theft of cattle. The order is very vague and indefinite and does not comply with the provisions of S. 112 of the Criminal P. C. What the contents of the order should be is described in detail in *In re Kutti Goundan* (1) which is cited by the applicant's counsel. The Magistrate's non-compliance with the law contained in Ss. 112 and 115 of the Criminal P. C. vitiates the trial.

The proceedings are, therefore, submitted to the High Court for revision with a recommendation that the order restricting the applicant be set aside and a new

(1) A. I. R. 1925 Mad, 189.

trial ordered after issue of a proper notice.

Order.—It seems to me clear that Daya Ram was sufficiently informed as to what the allegation against him was, and I decline to interfere. Let the records be returned.

Records returned.

A. I. R. 1926 Lahore 367

CAMPBELL AND ADDISON, JJ.

Bahadur Singh and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 34 of 1926, Decided on 16th March 1926, from the order of the S. J., Gurdaspur, D/- 5-7th December 1925.

(a) *Criminal P. C., (as amended in 1923), S. 162—No statement of witness to police during investigation is to be used to corroborate or contradict if S. 162 is not complied with.*

Under S. 162 no statement made by a witness to a police officer in the course of an investigation under Chap. 14 of the Code, if not reduced into writing can be used at the trial for any purpose whatsoever. It cannot be used either to corroborate or to contradict a witness, either for the benefit of the accused or against him. If such a statement has been reduced to writing, its use for any purpose whatsoever is also prohibited unless (*a*) it is the statement of a witness called for the prosecution; (*b*) the Court has ordered the accused to be furnished with a copy, and (*c*) the written record of the statement has been duly proved. It may then be used within the limits set forth in the proviso to S. 162.

[P. 368, C. 1]

(b) *Criminal P. C., S. 162—It is illegal to allow investigating officer to state what was stated to him during investigation.*

It is illegal to allow the investigating officer to give evidence that such and such persons during the investigation gave him the names of the accused.

[P. 368, C. 1]

Mohammad Shafi and *Mohamad Rafi*—for Appellants.

M. Sleem—for the Crown.

Campbell, J.—Bahadur Singh and Ujagar Singh, together and Dina and Budha, separately, have appealed against convictions under S. 302 of the Indian Penal Code. Ujagar Singh, Dina and Budha have been sentenced to death and their sentences are before us for confirmation. Bahadur Singh has been sentenced to transportation for life.

The four appellants were tried on three charges: firstly, of having murdered Fatteh Din on the 23rd June 1925; secondly, of having murdered Kesar Singh, brother of Fatteh Din, on the same day; and thirdly with having assaulted Saudagar Singh and Bahadur Singh, sons of Kesar Singh, on the same day and having caused to them respectively simple and grievous hurt. The appellants were found guilty on all three charges, but each was given a single sentence by the learned Sessions Judge.

All the persons concerned belong to Gangran, a village in the Gurdaspur District, and the findings of the learned Sessions Judge are as follows:

There was a fair at a neighbouring Khankah called Shah Budhu Wali at which the appellants and a fifth man, Ram Singh, said to be an absconder, were observed going about in a body armed with dangs. Fatteh Din was at the fair, and on his way home was attacked by these men and beaten to death. The murderers then set out for Gangran and on their way were heard to declare their intention of killing Kesar Singh. They encountered Kesar Singh near Gangran village and battered him all over the body injuring the brain and breaking eight ribs and an arm. They waited near their victim until his sons came up to attend to him and then beat both of them. Saudagar Singh ran away after being struck twice on the head and arm. Bahadur Singh was less fortunate and was laid out senseless with an injury to his forehead which fractured the bone underneath. Kesar Singh died shortly after being carried home.

A preliminary objection is taken that the trial was vitiated by misjoinder of charges, and it has been contended with some vehemence that the appellants were prejudiced by the two murder charges being tried together. Such a trial, however, would have been perfectly regular under S. 234 (1), Code of Criminal Procedure, had the learned Sessions Judge struck out the third and least important charge, as he might well have done in order to avoid all risk of his proceedings being set aside. It seems that no objection to the joinder of the three charges was taken at any time during the trial, but since it has now been raised we have to see whether the attack on Bahadur Singh and Saudagar Singh was so connected with each other as to form one

transaction within the meaning of Ss. 235 (1) and 239 (*d*), Code of Criminal Procedure.

We are satisfied that they were. (The judgment then dealt with the evidence and concluded that the acts were closely connected by continuity of purpose and progressive action towards a single object and then showed that the alibi evidence of the two appellants was incredible.) In coming to this conclusion we have excluded the evidence which the learned Sessions Judge illegally permitted to be given by the Court witness, Head Constable Ghulam Nabi. This man was produced to describe what the alibi witnesses had said to him during the police investigation. Under S. 162, Code of Criminal Procedure, as at present enacted, no statement made by a witness to a police officer in the course of an investigation under Chapter 14 of the Code, if not reduced to writing, can be used at the trial for any purpose whatsoever. It cannot be used either to corroborate or to contradict a witness, either for the benefit of the accused or against him. If such a statement has been reduced to writing, its use for any purpose whatsoever is also prohibited unless (*a*) it is the statement of a witness called for the prosecution ; (*b*) the Court has ordered the accused to be furnished with a copy ; and (*c*) the written record of the statement has been duly proved. It may then be used within the limits set forth in the proviso to S. 162.

In the present trial it was illegal for the learned Sessions Judge to permit the Public Prosecutor to ask the defence witness Saadat Ali what he had said to the police officer, Ghulam Nabi. It was illegal to ask Ghulam Nabi any questions and to record his answers about anything said to him by the defence witnesses at Jhelum and Chak Haidarabad. It was illegal to use those answers to contradict what the defence witnesses said in Court, It was illegal for the learned Sessions Judge to allow questions to be put to various prosecution witnesses both by the Public Prosecutor and by counsel for the defence about what they said to the police, without the procedure detailed in the proviso to S. 162 having been carried out. It was also illegal to allow the investigating officer, Sub-Inspector Abdul Haq, to give evidence that such and such persons during the investigation gave him the names of the five accused. The interpretation of S. 162 to be adopted by the Courts of this Province is that set out in *Labh Singh* v. *Emperor* (1) and *Rakha* v. *Emperor* (2), and should not be one deduced from the rulings of other High Courts quoted by the learned Sessions Judge.

There is no suggestion that any of these irregularities has prejudiced the appellants and they were, as it transpires, quite immaterial, but we deem it necessary to point them out since we have observed their occurrence in other cases.

The medical evidence of the manner in which the deceased were pounded to death stamps both murders as particularly brutal in character. The guilt of each of the appellants has been established and we dismiss all three appeals.

The sentences of death in the cases of Ujagar Singh, Budha and Dina are confirmed.

Appeal dismissed.

(1) A. I. R. 1925 Lah. 337.
(2) A. I. R. 1925 Lah. 399.

A. I. R. 1926 Lahore 368

LEROSSIGNOL, J.

Gandoo—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1762 of 1925, Decided on 29th January 1926, from an order of the Dist. Mag., Amritsar, D/- 28th July 1925.

Criminal P.C., S. 109—*Scope.*

An attempt to avoid a police patrol does not bring a person, resident and shopkeeper in a town, within the ambit of S. 109.

Devi Dayal and *Amar Nath Chopra*—for Petitioner.

Judgment.—Even on the facts found the petitioner should not have been ordered to find security under S. 109 Criminal P. C. He is a resident and shopkeeper at Amritsar, and an attempt to avoid a police patrol does not bring a person within the ambit of S. 109 Criminal P. C.

I accept the petition and discharge the petitioner from his security.

Petition accepted.

A. I. R. 1926 Lahore 369

SHADI LAL, C. J., AND ADDISON, J.

Karman and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 895 of 1925, Decided on 28th January 1926, from an order of the S. J., Jhelum, D/- 1st September 1925.

Criminal P. C., S. 154—First information report made by one, not eyewitness, on third-hand information—Report not professing to contain names of all culprits—Omission of some names in report does not discredit eye-witnesses.

Where the first information report was made by one not an eyewitness of the affair, and he based his report upon third-hand information, and the report itself did not profess to mention the names of all the culprits, and did not definitely state even the number of the persons who came to the house of the deceased, the omission of the names of some persons cannot be regarded as an adequate ground for distrusting an eyewitness's deposition to the contrary.

[P. 369, C. 2]

Muhammad Rafi and *Khurshid Zaman* for *Mian Muhammad Shafi*—for Appellants.

Des Raj Sawhney—for the Crown.

Judgment.—On the morning of the 26th March 1925, the house of Sultan Muhammad, a Jat of the village Jhakkar in the Gujrat district, was raided by a large number of persons who were armed with hatchets and dangs. They subjected Sultan Muhammad to a brutal assault and inflicted upon him numerous injuries, to which the victim succumbed instantaneously. The offenders also inflicted mortal wounds upon Sultan Muhammad's sister's son Haidar who died shortly afterwards; and caused simple injuries to Sultan Muhammad's brother, Hussain Muhammad, and his servants, Nizam Din and Bagh Ali. The Sessions Judge of Jhelum has convicted 15 persons under S. 302 read with S. 149, Indian Penal Code, of participation in the transaction, and has sentenced two of them, namely, Karman and Jalal to suffer the penalty of death, and the remaining 13 convicts to transportation for life.

There is abundant evidence on the record that there was bitter enmity between the deceased Sultan Muhammad on the one side, and Karman and Jalal and their faction on the other, over a plot of land which had been gifted to Sultan Muhammad by his maternal aunt, Mt. Begam Bibi. It appears that the dispute with respect to the land produced a crop of litigation, both criminal and civil, and that the aid of the Criminal Courts was repeatedly invoked by Sultan Muhammad; and this action on his part created bad blood between him and the members of Karman's faction. There can, therefore, be no doubt that the latter had an adequate motive for taking part in the transaction in question.

The story for the prosecution is described in extenso in the judgment of the learned Sessions Judge, and it is unnecessary to recapitulate it. There can be no doubt whatsoever that a concerted attack was made upon Sultan Muhammad on the morning of the 26th March, and that the other persons were beaten because they were his relatives or adherents. Now, the three injured persons, Hussain Muhammad, Nizam Din and Bagh Ali, and several other inmates of the house and neighbours have desposed to the version for the prosecution, and described the part played by each convict. We find that there are at least half a dozen witnesses who testify to the participation of each of the prisoners in the transaction, and we see no reason for dissenting from the conclusion of the learned Sessions Judge that the witnesses are telling the truth.

The learned counsel for the appellants invites our attention to the first information report, and contends that that document does not mention the names of four prisoners Ilam Din, Muhammad Din, Ahmad Khan and Buta, and that these persons have been falsely implicated by the witnesses. It must be remembered that the report was made by one Allah Ditta who was admittedly not an eyewitness of the affair, and that he based his report upon third-hand information. Moreover the report itself does not profess to mention the names of all the culprits, and does not definitely state even the number of persons who came to the house of Sultan Muhammad on that morning. In these circumstances, the omission of the names of these four persons cannot be regarded as an adequate ground for distrusting the eyewitnesses. Nor are we prepared to accept the contention that these prisoners had no motive for killing Sultan Muhammad.

As the learned Sessions Judge rightly points out, not only Ilam Din but also Wali Dad, the father of Ilam Din and Muhammad Din, had figured as accused in two criminal cases brought by Sultan Muhammad, and Buta is related to Karman, the leader of the rival faction, and Ahmad Khan is related to one Jalal who was also implicated in at least one criminal case instituted by Sultan Muhammad. Moreover, three of these persons, namely, Muhammad Din, Buta and Ahmad Khan, took away a horse belonging to Sultan Muhammad, and this incident is deposed to by a large number of witnesses.

We have carefully scrutinized the entire evidence for the prosecution, and we concur in the conclusion of the learned Sessions Judge that the guilt of all the appellants has been satisfactorily established. They have invoked the usual plea of alibi, but the oral evidence produced by them is unreliable and has been rightly rejected by the trial Court.

We accordingly uphold the conviction of the appellants and, considering that Karman and Jalal were the leaders of the faction, we are of the opinion that they fully deserve the punishment of death awarded by the Sessions Judge. Confirming, therefore, the sentences of death we dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Lahore 370

JAI LAL, J.

Roop Narain and *another*—Creditors—Petitioners.

v.

Messrs. King King & Co.—Defendants—Respondents.

Civil Revision No. 174 of 1925, Decided on 2nd February 1926, from an order of the Dist. J., Delhi, D/- 12th November 1924.

Provincial Insolvency Act (5 *of* 1920), *Ss.* 43 *and* 37—*Insolvent failing to apply for discharge —Court must annul adjudication, but to protect creditors, order vesting of his property in some third person under S.* 37, *must be passed.*

Where the insolvent fails to apply for an order of discharge, the Insolvency Court has no option but to annul his adjudication. But in order to protect the creditors, under S. 37, the proper order of the Court should be that the property of the debtor shall vest in a person appointed by the Court. [P. 370, C. 2]

Sardha Ram—for Petitioners.

Moti Sagar—for Respondents.

Judgment.—One Din Dial was adjudicated insolvent and a date was fixed for him to apply for his discharge. He failed to present an application for his discharge on the date fixed. The view of the Courts below appears to be that this was due to the fact that the insolvent had been held to be guilty of fraudulent preference in respect of some creditors. Such transactions were cancelled and the amounts paid to the creditors were refunded to the Official Receiver. The insolvent, therefore, took advantage of S. 43 which makes it incumbent on the Insolvency Court to annul his adjudication. The insolvent thought that this would enable him to receive the assets in the hands of the Official Receiver and to hand them over to those creditors to whom he had given fraudulent preference before. On an application made by some of the creditors the adjudication order was annulled on the 12th June 1924. This order was cancelled by the District Judge on appeal by other creditors who represented that the annulment of the adjudication would cause them serious loss in the manner already mentioned.

This is a Petition by some of the creditors who claim that the order of annulment should be restored as the provisions of S. 43 are mandatory and the insolvency Ccurt had no alternative but to annul the adjudication on the insolvent's failure to apply for an order of discharge within the period specified by the Court. Messrs. King King & Co., who are represented by Mr. Moti Sagar before me, claim to be the biggest creditors and they oppose this petition. Both parties are agreed that their object is to prevent the insolvent from getting possession of the assets which were originally in the hands of the Official Receiver. It appears to me that the order of the learned District Judge cannot be sustained. The insolvent having failed to apply for an order of discharge the insolvency Court had no option but to annul his adjudication. But in order to protect the creditors under S. 37 of the Provincial Insolvency Act the proper order of the Court in this case should have been that the property of the debtor shall vest in a

person appointed by the Court. This would have obviated the necessity of any further proceedings before the District Judge. I accept this revision, set aside the order of the District Judge and restore that of the Insolvency Court annulling the adjudication of the Insolvent Din Dial, and add a further direction that the property of the insolvent shall vest in Lala Basheshar Nath Goela under the provisions of S. 37 of the Provincial Insolvency Act. The parties will bear their own costs.

Order set aside.

A. I. R. 1926 Lahore 371

BROADWAY, J.

Firm Jamita Mal-Sant Ram—Defendants—Appellants.

v,

Gokal Chand—Plaintiff—Respondent.

Second Appeal No. 1844 of 1925, Decided on 28th January 1926, from an order of the Dist. J., Rawalpindi, D/- 26th May 1925.

Transfer of Property Act, S. 108 (c)—Lessee's possession disturbed for a short time—He getting in possession before expiry of lease must surrender it to his lessor.

Where the lessee's possession is disturbed for a few days and he gets back into possession before the term of the lease comes to an end, it is his duty at the termination of the lease peaceably to surrender the premises leased to him. [P. 372, C. 1]

M. S. Bhagat—for Appellants.

Hargopal—for Respondent.

Judgment.—This second appeal has arisen in the following circumstances:

One Gokal Chand leased a certain house at Kohala to the firm of Jamita Mal-Sant Ram for a a period of one year commencing on the 25th July 1923 and terminating on the 24th July 1924 at an annual rental of Rs. 150. The premises leased were destroyed by fire and it appears that within a few days Mir Zaman and others claiming to be the owners of the site entered into possession of the same and erected thereon what appear to have been certain ephemeral structures. Gokal Chand took action under S. 145, Criminal P. C., and was referred to the civil Courts for further relief. It appears, however, that the original tenants were permitted by order of the Magistrate to retain possession of the site and to erect buildings thereon. This order was passed on the 17th June 1924.

For reasons known to themselves the defendant-firm on the 18th June 1924, entered into an agreement with Mir Zaman and others apparently recognizing them as the owners of the site and agreeing to pay them a sum of Rs. 15 per annum as ground rent for the site on which they, the defendant-firm, were erecting their new building. Subsequently on the 26th August 1924, that is to say, after the term of the lease had terminated, Gokal Chand issued a notice to the defendant-firm calling upon them to vacate their premises or in default to pay a certain sum of money as rent. As this notice was not complied with Gokal Chand instituted a suit for ejectment from the shop and for the recovery of Rs. 155 against the said firm of Jamita Mal-Sant Ram.

Various pleas were raised and issues were settled the first which was whether the relation of landlord and tenant ceased after the shop was burnt. The trial Court held that the relationship of landlord and tenant had come to an end on the 15th May 1924 and dismissed the plaintiff's suit with costs. On appeal by the plaintiff to the District Judge it was held that the relationship of landlord and tenant had not ceased and that, therefore, the suit could proceed and the cause was remanded accordingly. Against this order of remand the defendant-firm have come up to this Court in second appeal through Mr. Bhagat, while Mr. Hargopal has addressed me on behalf of the plaintiff-respondent.

It has been urged on behalf of the appellant that having regard to the provisions of S. 108 (b) (e), the tenancy had come to an end when the premises were destroyed and that, therefore, S. 65 of the Contract Act came into operation and the lease became void. It was further contended that inasmuch as Mir Zaman and his companions had claimed to be paramount owners of the site and had entered into possession thereof, that fact also terminated the lease. Finally it was urged that if any notice was necessary to terminate the lease, the fact that the appellant-firm had attorned to Mir Zaman and his companions was sufficient to convey to the

plaintiff, the determination of the defendant-firm to regard the lease as ended. Now, the lower appellate Court has come to a definite finding that Mir Zaman, etc., have not been shown to have been the paramount owners. That is a finding of fact which it is impossible for me to examine and in those circumstances, it appears to me that this point must be decided against the appellant.

Mr. Bhagat relied on *Kunhayen Haji* v. *Mayan* (1), *Tayawa* v. *Gurshidappa* (2) and *Dharam Narain* v. *Labh Singh* (3). On the other side Mr. Hargopal cited *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy* (4), *Nowrang Singh* v. *Janardan Kishorilal Singh* (5) and *Srinivasa Aiyangar* v. *Rangasami Aiyangar* (6). Now with the principles enunciated in these authorities I have no quarrel. What has been therein laid down is very aptly put by Mr. Justice Mukerji in *Nowrang Singh* v. *Janardan Kishorilal Singh* (5) where it was held that upon a true construction of S. 108 (c) of the Transfer of Property Act, an unauthorized act of a co-lessee would not absolve the other lessee from the liability of paying rent in accordance with the lease and further, that the covenant implied in the Transfer of Proporty Act protected the lessee against all disturbance by the lessor whether lawful or not save under a right of re-entry, but as against other persons it protects the lessee only against lawful disturbance.

In the present case, it has not been found that there was any lawful disturbance. It has further been found that although the lessee's possession was disturbed for a few days he got back into possession before the term of the lease came to an end. It was the duty of the lessee at the termination of the lease peaceably to surrender the premises leased to him. Instead of doing so he entered into an agreement with persons, who must (or for the purpose of this case at present) be regarded as trespassers, and have been holding over since the termination of the lease.

So far as the question of the exercise of the option to terminate the lease is concerned, it has been found by the learned District Judge, that this option was never exercised, a finding which I regard as one of fact. In these circumstances I hold that this appeal must fail and I dismiss it with costs accordingly.

Appeal dismissed.

(1) [1894] 17 Mad. 98=4 M. L. J. 21.
(2) [1901] 25 Bom. 269=2 Bom. L. R. 1070.
(3) [1921] 60 I. C. 477.
(4) [1899] 23 Bom. 15.
(5) A. I. R. 1923 Cal. 41.
(6) [1914] 1 L. W. 858=25 I. C. 812.

A. I. R. 1926 Lahore 372

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Maula Bukhsh — Defendant—Appellant.

v.

Hafiz-ud-Din and *others*—Plaintiffs—Respondents

Letters Patent Appeal No. 248 of 1924, Decided on 15th March 1926, against the decree of Abdul Raoof, J., D/- 10th November 1924, in Civil Appeal No. 2220 of 1923.

Mahomedan Law—Gift to mosque is valid and deed of gift is not admissible without registration under Registration Act, S. 17 (1) (*d*) *nor oral evidence is admissible under Evidence Act, S.* 92.

A mosque is recognized as a juristic person and a valid gift of immovable property can be made in favour of a mosque. So a deed of such a gift cannot be received in evidence if unregistered nor can the terms of the instrument be proved by oral evidence : 59 *P. R.* 1914, *Foll.*

[P. 373. C, 1]

Shamair Chand—for Appellant.

Muhammad Monir—for Respondents.

Shadi Lal, C. J.—The plaintiff seeks to recover the land in dispute from the defendant Maula Bakhsh on the strength of a deed, executed by a certain person in favour of a mosque, and the question debated before us is whether the document required compulsory registration. Now the document purports to be a deed of gift and the executants describe themselves as donors. The property transferred is described as arazi mauhuba and the document itself is called hibah-nama. In view of the clear and unequivocal terms of the deed we have no hesitation in holding that it is a transfer of immovable property made without consideration. It is beyond dispute that under Cl. (a) of S. 17 (1) of the Indian Registration Act every instrument of gift of immveable property requires compulsory registration irrespective of the value of the property conveyed by the instrument.

The learned vakil for the plaintiff however, invites our attention to the

definition of the word "gift" as contained in S. 122 of the Transfer of Property Act; and contends that a transfer cannot be called a gift unless it is made by one person to another person, and that the mosque cannot be deemed to be a person within the meaning of the section. The answer to this contention is furnished by the judgment of the Division Bench in *Jindu Ram* v. *Hussain Bakhsh* (1) where Mr. Justice Shah Din, after reciting the relevant passages from Abdur Rahman's Muhammadan Jurisprudence and Tyabji's Muhammadan Law, expressed the opinion that a mosque is recognised by the Muhammadan jurist as a juristic person, and that a valid gift can be made in favour of a mosque.

In view of the exposition of the law contained in *Jindu Ram* v. *Hussain Bakhsh* (1) we must hold that the document is a deed of gift and that it cannot be received in evidence for want of registration, nor can the terms of the instrument be proved by oral evidence. We accordingly allow the appeal and dismiss the suit with costs throughout.

Appeal allowed.

(1) [1914] 59 P. R. 1914=52 P. W. R. 1914=24 I. C. 100=147 P. L. R. 1914.

A. I. R. 1926 Lahore 373

LEROSSIGNOL AND MARTINEAU, JJ.

Punjab National Bank, Limited—Petitioner.

v.

Emperor—Opposite Party.

Civil Miscellaneous No. 195 of 1924, Decided on 20th January 1926.

(a) *Income-tax Act* (11 *of* 1922), *S.* 10—*Depreciation, in high class Government securities purchased by assessee bank not for trading, does not come under S.* 10 *or any other provision of the Act.*

Where the assessee bank purchased high class Government securities, not for the purpose of trading in them but for the purpose of retaining them permanently for use in an emergency and claimed depreciation in their value :

Held : that the securities are permanent investments retained by the bank as capital in its own possession and that they represent a non-recurrent expenditure of an extraordinary nature not made to earn profit in any particular year out to ensure for the future benefit of the business for several years to come and that the deduction claimed does not fall under S. 10 nor is it admissible under any other provision of the Act. [P 374, C 1.]

(b) *Income-tax Act* (11 *of* 1922) — "*Fixed capital" defined.*

'Fixed capital' is capital which has been expended not merely for the production of profits in any given year but for the production of profits over an indefinite number of years. [P 374, C 2]

Tek Chand and *Hargopal* — for Petitioner.

Carden Noad—for Respondent.

Le Rossignol, J.—This is a reference by the Income-tax Commissioner of the Punjab under S. 66 of the Income-tax Act of 1922. The assessee is the Punjab National Bank, Limited, a company incorporated under the Companies Act, which of course, keeps its accounts on the mercantile accountancy system. In calculating its profits for the calendar year 1921, on which profits it was assessable to income-tax for the year 1922-23, the company claimed a deduction of some 3 lacs in respect of its holding of high class Government securities which it asserted had suffered that degree of capital depreciation during the year. Its claim was disallowed on the ground that this was a capital depreciation and not an expenditure incurred solely for the purpose of earning profits.

After a careful consideration of the Act and the case law on the subject, we are of opinion that the decision of the learned Commissioner that this sum is not deductible in calculating the assessable income of the company is correct. The scheme of the Income-tax Act is that profits only shall be liable to income-tax and profits are no doubt commercial profits, i. e., the net income arrived at by deducting gross expenditure from gross profits. At the same time it is not every kind of expenditure which is deductible. Admittedly no capital expenditure is deductible. But in this connexion it is very necessary to retain the difference between fixed capital and floating capital, which latter may also be conveniently called stock-in-trade. It is conceded on behalf of the Crown that income-tax profits cannot be correctly calculated unless depreciation in stock-in-trade is allowed, at any rate in all cases where the system of accounting is not on a cash basis. S. 10 of the Act, in sub-S. (2), Cls. (*i*) to (*viii*), provides for certain specific allowances. Clause (*ix*) of the sub-section is an omnibus pro-

vision which permits the deduction of
> any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains

and the question for decision is whether the depreciation in question can be allowed under this clause.

For the petitioner it is contended that the money employed by the company in purchasing these high class securities is money lent to Government and cannot be distinguished from the money employed by the bank and lent by it to its other customers. For the Crown it is replied that the depreciation claimed is not an expenditure, that the purchase of the securities in question was made long before the year 1921 and that the expenditure was not made solely for the purpose of earning profits and gains.

Now, it cannot be denied that the bank purchased these securities not for the purpose of trading in them but for the purpose of retaining them permanently for use in an emergency. It is the practice of all properly managed banks to invest a portion of their capital in high class securities in order to have a readily available supply of cash in a crisis. It would not pay a bank to employ all or the bulk of its capital in such an investment. Those securities were not held by the bank as floating capital ; they were not held by the bank with the object of being dealt in day by day in the ordinary course of business. They were held as an emergency reserve and were regarded as the equivalent of ready cash with this considerable advantage over ready cash that they brought in a small but secured amount of interest.

The ordinary daily business of the bank, the business in which it employs its floating capital, is the purchase and sale of commercial bills and the advance of loans to its customers. That the bank itself did not consider these securities a part of its floating capital but rather regarded them as a permanent investment is clear from its own balance sheet where it exhibits these securities under the special head " investment." If instead of placing this capital in these securities it had been possible for the bank to sink this money in some other form of property the case would have been clearer. Let us suppose that it would be just as easy and sure to raise money on oil paintings as on these securities and the bank by way of holding an immediately available reserve had purchased oil paintings by Rembrandt or Reynolds and had subsequently discovered that one of its most expensive pictures was a forgery and was worth not 1/10th of the price paid for it, that no doubt would cause a loss of capital but it would be a loss of fixed capital not of that portion of the capital which was used as working capital.

Another definition of ' fixed capital' is capital which has been expended not merely for the production of profits in any given year but for the production of profits over an indefinite number of years. Judged by this test also the investment in these securities represents fixed and not fluctuating or working capital. Again the alleged depreciation can hardly be called an expenditure. It is only a potential or temporary loss which, though it may affect the policy of the directors in declaring a dividend for the years may in the succeeding year be converted into an appreciation. There has been no actual expenditure in respect of that depreciation in the year 1921.

To take another illustration : If the banking company has sunk considerable capital in the construction of a head office and that building is burnt down and the company has neglected to insure that building, that depreciation in the company's assets would admittedly not be deductible from the profits accruing to the company. For the foregoing reasons we hold that the securities with which this claim is concerned are permanent investments retained by the bank as capital in its own possession. They represent a non-recurrent expenditure of an extraordinary nature not made to earn profit in any particular year but to ensure for the future benefit of the business for several years to come.

Our answer, therefore, to the reference is that the securities in question are not a part of the stock-in-trade of the bank but part of its fixed capital and, therefore, the deduction claimed does not fall under S. 10 of the Income-tax Act. Finally, if the deduction is not justifiable under S. 10 we are unable to find that it is admissible under any other provision of the Act. The petitioner must pay the costs of the Crown.

Reference answered.

A. I. R. 1926 Lahore 375

BROADWAY, J.

Emperor—Petitioner.

v.

Sain Das—Convict—Respondent.

Criminal Revision No. 99 of 1926, Decided on 15th March 1926, reported by the S. J., Gurdaspur, on 11th January 1926.

(a) *Penal Code, S. 377—Evidence of charge under S. 377 must be very convincing.*

A charge under S. 377 is one very easy to bring and very difficult to refute. Therefore, the evidence in support of such a charge has to be very convincing. [P 375, C 2]

(b) *Criminal trial—Guilt of accused is to be established by prosecution.*

The guilt of a person accused of a crime has to be established by the evidence for the prosecution. [P 376, C 1]

Fakir Chand—for Respondent.

Judgment.—Sain Das, son of Ishar Das, a Khatri of Pathankot, was convicted of having attempted to commit sodomy on a boy named Muhammad Ishaq of the same place. The boy is said to be of 12 years of age and Sain Das is about 19. Under S. 377-511 of the Indian Penal Code he was sentenced to six months' simple imprisonment. He appealed to the Sessions Court and the learned Sessions Judge, after making a remand for certain enquiries to be made, maintained the conviction and sentence. At the same time he reported the case to this Court under S. 438 of the Criminal Procedure Code, recommending that the sentence of imprisonment should be altered from six months' simple imprisonment to three months' rigorous imprisonment.

It appears that Sain Das has been in jail now for almost three months. As notice was issued to Sain Das under S. 439 (2) of the Criminal Procedure Code to show cause why the sentence should not be altered as above stated, sub-Cl. (6) of that section becomes applicable and he was, therefore, entitled to show cause against his conviction.

Mr. Fakir Chand on his behalf has urged that the evidence on the record is such as did not warrant the conclusion arrived at by the Courts below. The evidence against Sain Das consists of the statements of the boy Muhammad Ishaq, Ismail (P. W. 3). Chiragh (P. W. 4) and Chuhar (P. W. 5), As the offence of sodomy was not completed it is quite unnecessary to discuss the medical evidence. Suffice it to say that that evidence shows that there were no marks of injury either on the boy or on Sain Das.

Now, the story for the prosecution is that shortly after the 8 a. m. train had left Muhammad Ishaq went on to the railway line to collect coal and that he was there seized by Sain Das who picked him up and threw him into an empty truck about 6-1/2 feet from the ground, the doors of the truck which was an open one, being closed at the time. Having thrown Muhammad Ishaq into the truck Sain Das himself got into it and there in broad daylight forcibly attempted to commit sodomy. Attracted by the cries of this boy Chuhar (P. W. 5) asked Chiragh and Ismail to see what was going on. Chuhar himself did not go to the truck. Ismail (P. W. 3) and Chiragh (P. W. 4) went to the truck and according to Ismail, saw the boy lying naked with his head down and the accused standing by his side folding his dhoti. The boy was weeping and saying that Sain Das was committing an unnatural offence. Chiragh (P. W. 4) says that at the instance of Chuhar he and Ismail both got into the truck and found Muhammad Ishaq lying there naked and Sain Das actually committing an unnatural offence. The boy was weeping.

A charge of this nature is one very difficult to refute. Therefore, to my mind the evidence in support of such a charge has to be very convincing. Ismail is a man of 25 and Chiragh is 30 years of age. Although, according to them, they found Sain Das committing this disgusting offence nevertheless they never said anything to him. It has been urged that the whole story is improbable and that it is improbable that in broad daylight at a time when people were found to be about, Sain Das would have forcibly seized the boy, thrown him into a wagon and there forcibly attempted to commit this unnatural offence.

After a careful consideration I am forced to the conclusion that the story is an improbable one. It has to be borne in mind that the case for the prosecution is that the boy was not a willing participator in this offence. Therefore Sain Das's action was nothing less than rape, and I find it a little

hard to believe that a shopkeeper such as Sain Das would have seized a boy such as Muhammad Ishaq in a public place and attempted to commit such an offence in the manner alleged. It may be that the view taken of the defence evidence by the Courts below is correct and that it is a fabrication. Nevertheless the guilt of a person accused of a crime has to be established by the evidence for the prosecution and the evidence for the prosecution in this case is not to my mind convincing.

In these circumstances I am constrained to set aside the conviction and sentence and direct that Sain Das be released forthwith.

Conviction set aside.

** A. I. R. 1926 Lahore 376

Full Bench

SHADI LAL, C. J., BROADWAY, HARRISON, FFORDE AND CAMPBELL, JJ.

Jaswant Ram and *others*—Plaintiffs—Appellants.

v.

Moti Ram and *others*—Defendants—Respondents.

First Appeal No. 669 of 1921, Decided on 24th June 1926, from the decree of the Sub-J., 1st Cl., Muzaffargarh, D/- 13th December 1920.

(a) *Suits Valuation Act, S. 8—Valuation depends on value of subject-matter.*

The ordinary rule governing the value of a suit for purposes of jurisdiction is that the valuation of a suit depends upon the value of the subject-matter thereof. [P. 377, C. 1]

(b) *Jurisdiction—Decree beyond pecuniary jurisdiction cannot be passed.*

A Court cannot grant a decree for possession of immovable property on payment of a sum of money which exceeds the pecuniary limit of its jurisdiction : 16 *P. R.* 1908 (*F. B.*) and 19 *P. R.* 1908 (*F. B.*), *Foll.* [P. 377, C. 2]

** (c) *Suits Valuation Act, S. 8—Redemption suit—Mortgagee's charge determines value for jurisdiction—Court Fees Act, S. 7 (ix)* : 63 P. R. 1891 and 106 P. R. 1895 (F. B.), **overruled.**

In a suit for the redemption of immovable property the value for purposes of jurisdiction is the amount found by the Court to be the value of the mortgagee's charge on the property and not the amount alleged by the plaintiff to be due to the mortgagee : 63 *P. R.* 1891 ; 106 *P. R.* 1895 (*F. B.*) **overruled** ; 31 *All.* 44 and 39 *Mad.* 447, *Diss.* and 44 *P. R.* 1888, *Expl.* [P. 378, C. 2]

Tek Chand and *Hargopal*—for Appellants.

Karam Chand and *Sardha Ram*—for Respondents.

Opinion.

Shadi Lal, C. J.—This reference to the Full Bench arises out of a suit for the redemption of a mortgage, and the question of law upon which we are invited to pronounce our opinion is whether the value of such a suit for the purpose of jurisdiction is the sum found by the Court to be the amount of the mortgagee's charge on the property or the amount alleged by the plaintiff to be due to the mortgagee. The plaintiff sought to redeem the mortgaged property on payment of Rs. 790 or such sum as may be found to be due to the mortgagee ; but the defendant pleaded that the mortgage debt amounted to more than Rs. 20,000. The Subordinate Judge of the First Class, who adjudicated upon the dispute between the parties, passed a decree for redemption on payment of a sum exceeding Rs. 5,000 and against that decree the plaintiff has preferred an appeal to this Court. The point for determination is whether the appeal lay to the District Judge or to the High Court.

Now, S. 39, sub-Sec. (1) of the Punjab Courts Act, VI of 1918, provides that an appeal from a decree or order of a Subordinate Judge shall lie to the District Judge where the value of the original suit, in which the decree or order was made, did not exceed Rs. 5,000 and to the High Court in any other case. What was the value of the suit in which the decree in question was passed ? For this purpose we must turn to the Suits Valuation Act, VII of 1887, and see whether that statute lays down any rule for determining the value of a suit for redemption. It will be observed that paragraph 9 of S. 7 of the Court Fees Act, VII of 1870, furnishes a simple rule for ascertaining the amount of the Court-fee payable on a suit against a mortgagee for the recovery of the property mortgaged, namely, that the Court-fee must be computed according to the principal sum expressed to be secured by the instrument of mortgage. There is, however, nothing in the Suits Valuation Act or in the rules framed thereunder which governs the value of such a suit for juris-

dictional purposes. Section 8 of the aforesaid Act no doubt makes the value of certain suits for purposes of jurisdiction identical with their value for the computation of Court-fees, but it expressly excludes from its operation suits mentioned in paragraph 9 of S. 7 of the Court Fees Act, and, as stated above, redemption suits are referred to in that paragraph. Nor does S. 9 of the Suits Valuation Act help us in the matter. That section empowers the High Court to frame rules for determining the value of certain suits, but no such rule has been framed for regulating the value of a redemption suit.

It is clear that a suit of the character dealt with by this reference does not come within the ambit of any legislative enactment or statutory rule, and we must have recourse to general principles in order to determine the question. Now, the ordinary rule governing the value of a suit for purposes of jurisdiction is that the valuation of a suit depends upon the value of the subject-matter thereof. What then is the subject-matter of a redemption suit? It is not the immovable property mortgaged by the debtor to his creditor, for the property admittedly belongs to the mortgagor, and the dispute between the parties relates not to the ownership of the property, but to the amount which the mortgagor should, before recovering the property, pay to the mortgagee. In other words, the subject-matter in controversy is the mortgagee's interest in the property because the object of the suit is to extinguish that interest. The value of the mortgagee's interest is measured by the amount of the charge on the property and not by the market value of the property itself.

How is the charge on the property to be ascertained when there is a conflict between the parties? Now, in the first instance, the plaintiff states in his plaint the amount which, according to him, is due on the foot of the mortgage, and he being the *dominue litis* has the privilege of fixing the value of the suit. But this valuation can be regarded as only a tentative valuation and is always subject to the decision of the Court. It is beyond dispute that the amount of the charge depends, not upon the *ipse dixit* of the plaintiff, but upon the adjudication made by the Court. There is, however, a divergence of judicial opinion as to whether the jurisdiction of the Court as fixed by the plaintiff's valuation in his plaint is ousted, if the amount ascertained by the Court exceeds the pecuniary limit of its jurisdiction. The High Courts of Calcutta and Bombay have answered the question in the affirmative, but the contrary view has been adopted by the Madras and Allahabad High Courts. A Full Bench of the Punjab Chief Court in *Muhammad Khan* v. *Ashak Muhammad Khan* (1) following apparently the judgment in *Hazara Singh* v. *Lal Singh* (2) have affirmed the proposition that jurisdiction in a suit for redemption is to be determined with reference to the claim made by the plaintiff, and not to the decision upon that claim; but I am unable to endorse the view that the assertion of the plaintiff should continue to be the basis of jurisdiction even if it is found to be incorrect. As observed by Plowden, J., in *Mt. Rajo* v. *Dasu* (3) the amount alleged by the plaintiff to be due to the mortgagee must be taken prima facie the value of the suit, but the learned Judge takes care to point out that the Court taking cognizance of the suit on the strength of that allegation cannot pass a decree if the amount found to be actually due goes beyond the limit of its pecuniary jurisdiction. In this province it has been repeatedly held that a Court cannot grant a decree for possession of immovable property on payment of a sum of money which exceeds the pecuniary limit of its jurisdiction, vide inter alia, *Muhammad Afzal Khan* v. *Nand Lal* (4) and *Abdur Rahman* v. *Charag Din* (5) and there is no cogent reason for departing from this rule which has been followed for many years.

If the amount found to be due to the mortgagee exceeds the pecuniary limit of the Court it should either dismiss the suit for want of jurisdiction or return the plaint for presentation to a proper Court. It must, however, be remembered that, while the Court is competent to decide, that it has no jurisdiction to hear and determine the suit, because the amount due to the mortgagee exceeds its pecuniary jurisdiction, it has no

(1) [1895] 106 P. R. 1895 (F. B.).
(2) [1891] 63 P. R. 1891.
(3) [1888] 44 P. R. 1888.
(4) [1908] 16 P. R. 1908=73 P.W.R. 1907=146 P. L.R. 1908 (F. B.).
(5) [1908] 19 P.R. 1908 (F. B.).

authority to fix the exact amount dues to him. Such an adjudication can be made only by a Court of competent jurisdiction, and not by one which, according to its own finding, is not competent to deal with any matter in controversy except the issue relating to its jurisdiction. If the Court, to which the plaint was presented in the first instance, returns it for want of jurisdiction, it may then be presented to a Court of superior jurisdiction, and the decision of the latter Court on the amount due to the mortgagee should determine the value of the suit for purposes of jurisdiction, provided always that the amount thus ascertained does not exceed its pecuniary limit.

Our attention has been invited to the judgment of the Allahabad High Court in *Kedar Singh* v. *Matabadal Singh* (6), and to that of the Madras High Court in *M. Jalaldeen Marakayar* v. *Vijayaswami* (7), which lay down the proposition that the value for purposes of jurisdiction of a suit for the redemption of a mortgage is the amount of the principal mortgage money. With due deference to the learned Judges who decided those cases, I am unable to concur in their exposition of the law. As I have already pointed out, while the Court Fees Act contains an express direction that the Court-fee in a suit for redemption must be computed on the principal mortgage money, there is no legislative authority for treating the amount of the principal mortgage money as the basis of the value for jurisdictiou. Indeed, there appears to be a clear indication to the contrary. It is enacted by S. 8 of the Suits Valuation Act that where in suits other than those referred to in the Court Fees Act, S. 7, paragraphs V, VI and IX and paragraph X (d), Court Fees are payable ad valorem under the Court Fees Act; the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same. Now one of the classes of suits referred to in paragraph IX of S. 7 is the suit for redemption and it is incontrovertible that the Legislature has expressly excluded the suits for redemption from the category of those suits in which the value for jurisdiction is assimilated to that for the levy of Court-fee. Had the Legislature intended that the principal mortgage money, which fixes the amount of the Court-fee payable in a suit for redemption, should determine also the value for jurisdiction there is no reason why S. 8 should have removed such suits from the operation of the rule contained therein.

The result is that there is no special rule governing the valuation of a suit for redemption, and in the absence of such a rule we must act upon the general rule that the valuation of a suit must follow the value of the subject-matter thereof. And the value of the subject-matter of a redemption suit is the amount of the mortgagee's charge on the property mortgaged to him. There can be no doubt that it is the decision of a competent Court and not the assertion of either party which fixes the sum actually due on the strength of the mortgage; and I consider that it is that sum which settles the jurisdiction of the trial Court and also furnishes the test for determining the forum of appeal.

My answer to the question submitted to us in that in a suit for the redemption of immovable property the value for purposes of jurisdiction is the amount found by the Court to be the value of the mortgagee's charge on the property and not the amount alleged by the plaintiff to be due to the mortgagee.

Broadway, J.—I concur in the view expressed by my Lord the Chief Justice.

Harrison, J.—I agree with the learned Chief Justice and have nothing to add to his clear and exhaustive judgment.

Fforde, J.—I concur.

Campbell, J.—I agree.

(6) [1909] 31 All. 44=(1908) A. W. N. 276=1 I. C. 703=5 A. L. J. 713.

(7) [1916] 39 Mad. 447=29 M. L. J. 142=28 I. C. 624=(1915) M. W. N. 239.

A. I. R. 1926 Lahore 378

DALIO SINGH, J.

Ahman—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 98 of 1926, Decided on 12th March 1926, from an order of the Magistrate 1st Cl., Gujrat D/- 12th December 1925.

Criminal Trial—Identification parade—Summary of result of identification should be given by Magistrate in evidence.

It is not correct procedure to have the Magistrate who conducted the identification parade simply depose to a memo, which he prepared at the time. The summary of the result of the identification should be given ordinarily as part of the oral evidence in the case. [P 379 C 1]

Iqbal Chand Chopra—for Respondent.

Judgment.—On the night between the 2nd-3rd January, 1925, Mt. Fatima, Mt. Nawab Begam and Barkat alias Baka were sleeping in the house of Mt. Begam, widow of Subedar Uussain Shah. Certain thieves broke into the house and inflicted injuries both on Barkat and on Mt. Fatima. The factum of the burglary is amply proved by the evidence of Mt. Fatima, Mt. Nawab Begam, Barkat and other witnesses and corroborated by the severe injuries received by Mt. Fatima. As to the identity of the thieves the evidence is solely that of identification by Mt. Fatima, Mt. Nawab Begam and Barkat. The appellant Ahman was duly identified by Mt. Fatima and Barkat in an identification parade. There is no reason to doubt these witnesses and I, therefore, reject the appeal of Ahman. I would point out that it is not correct procedure to have the Magistrate who conducted the identification parade simply depose to a memo, which he prepared at the time The summary of the result of the identification should be given ordinarily as part of the oral evidence in the case.

Appeal rejected.

A. I. R. 1926 Lahore 379

CAMPBELL, J.

Piroj Shah and *Company*—Plaintiff—Petitioner.

v.

Qarib Shah—Defendant—Respondent.

Civil Revision No. 429, of 1925—Decided on 8th December 1925, from the order of Senior Sub-J., Lahore, D/- 16th October 1924.

(a) *Civil P. C., S. 115—Case—Proceedings consequent on application for setting aside ex-parte decree are "case".*

Proceeding consequent on an application for setting aside a decree ex-parte are not a mere branch of a suit, but since they involve the reversal of a final order and decree in a suit, they are in themselves a case. [P 380 C 2]

(b) *Limitation Act, Art. 164—Ex-parte decree-Setting aside—Onus is on defendant to show absence of knowledge within limitation.*

When a defendant comes forward with an application for setting aside an ex parte decree more than thirty days after the date of the decree, the onus lies on him of proving that his application is presented within thirty days of his having knowledge of the decree, and the onus lies upon him more heavily when it is found that he was perfectly well aware of the progress of the suit. [P 380 C 2]

(c) *Civil P. C., S. 115—Granting prayer in a time barred application is illegal assumption of jurisdiction.*

It is a case of illegal assumption of jurisdiction within S. 115 where a Court grants in favour of the applicant a prayer contained in a time-barred application for which the law does not permit extension of time: *A. I. R. 1924 Lah. 425, (F. B.)* and *A. I. R. 1925 Lah. 639 Ref.* [P 381 C 1]

Tek Chand—for Petitioner.

Sagar Chand and *Nur-ud-Din*—for Respondent.

Judgment.—The firm of Piroj Shah and Compay, Bombay, instituted a suit against Mian Quarib Shah, a resident of the Peshawar District in the Court of the Senior Subordinate Judge, Lahore and an ex-parte decree was passed on the 28th of February 1924. On the 18th of April 1924 the defendant applied for the exparte decree being set aside and by order, dated the 16th of October 1924, Lala Suraj Narain, Senior Subordinate Judge, directed that the ex parte decree would be set aside upon the defendant furnishing security to the amount of at least Rs. 50,000 for satisfaction of the decree and the defendant was given a month's time in which to furnish security, in default his application was to stand dismissed with costs. The defendant's allegation was that he had no knowledge of the suit. The learned Senior Subordinate Judge on the question of limitation wrote as follows:

On the question of limitation I cannot reject the plaintiff's contention. I am perfectly convinced that the defendant was not quite ignorant of the institution of the suit. Summonses went to his place several times. His son, a mukhtar-i-am, refused to accept service. The son must have kept the father informed about all the proceedings.

But there is nothing to show on what date the defendant had knowledge of the decree. He might have as well got the first notice of the decree on receipt of the letter, dated 5th April 1924, from the plaintiff's vakil. His application dated 18th April 1924, is thus within time. There is ground for setting aside of the ex parte decree.

The defendant applied unsuccessfully for review of the order of the 16th of October 1924, and eventually a security bond, dated the 1st of May 1925, by two persons Usman Ullah and Zain-ul-Ab-i-din, was produced by the defendant. It was sent for verification to the Collector, Peshawar and the Court requested that the plaintiff's counsel should be given an opportunity of appearing at the verification proceedings. This was not done and the bond was sent back with the Tahsildar's report. It came before Mehta Dwarka Nath, Senior Subordinate Judge, who had succeeded Lala Suraj Narain, on the 27th of May 1925 and he ordered that in spite of the fact that the plaintiff had not had an opportunity of being represented in the verification proceedings, nevertheless the case should not be prolonged further. The security bond was accepted and the defendant was directed to put in his pleas on the 16th of June 1925. The plaintiff protested by means of a review application that the security bond did not fulfil the necessary conditions on which the decree was to be set aside and, on dismissal of this application, has come here for revision of the order setting aside the ex parte decree.

The objections raised are : firstly, that Lala Suraj Narain had no jurisdiction to set aside the ex parte decree upon a time-barred application and secondly, that the security bond should not have been accepted because it did not create any valid charge on the property purporting to be given in security, because it was not registered, and because the plaintiff had had no opportunity of being present at the verification. On the second point I do not understand Mr. Tek Chand, who appears for the plaintiff-petitioner, to contend that S. 115 of the Code of Civil Procedure is applicable and he asked that S. 107 of the Government of India Act be utilized.

Whether this section is in fact intended to permit interference by a High Court with orders passed judicially, which are secured from appeal or revision by the Code of Civil Proceedure, is one into which I need not enter, for I do not consider the case to be one of a nature or importance to justify the exercise of extraordinary powers. I deal with the case merely with reference to the terms of S. 115 of the Code of Civil Procedure.

The learned counsel for the respondent has objected that there can be no interference under this section : firstly, because the order in question was not made in a case decided, and, secondly, because, if wrong, it was merely erroneous in law and, being not open to appeal, could not be attacked in revision.

As to the first point, reliance is placed on the Full Bench decision of this Court—*Lal Chund-Mangal Sen* v. *Behari Lal-Mehr Chand* (1)—where it was held that an interlocutory order does not constitute a case within the meaning of S. 115 of the Code of Civil Procedure. In that decision the learned Chief Justice's judgment pointed out that, while every suit is a case, it cannot be said that every case is a suit, and expressed the opinion that a branch of a suit could not be regarded as a case within the meaning of S. 115. I understand Mr. Sagar Chand for the respondent to argue that proceedings consequent on an application for setting aside a decree ex parte are merely a branch of a suit. I cannot agree. The suit is terminated when the ex-parte decree is passed and it does not revive, if at all, until after the proceedings on the application are terminated. There is no suit pending either when the application is presented or when the order disposing of it is passed and the proceedings, in my opinion since they involve the reversal of a final order and decree in a suit, are in themselves a case.

As regards the second contention of the respondent there is ample authority that a High Court will not exercise its powers of revision when the Court below has merely come to a wrong decision upon a point of law : but here the passage quoted above from Lala Suraj Narayan's judgment makes it obvious that there is something much more than a mere erroneous decision of law. When a defendant comes forward with an application for setting aside an ex-parte decree more than thirty days after the date of the decree, the onus lies on him proving, for the purposes of Art. 164 of the Limitation Act, that his application is presented within thirty days of his having knowledge of the decree, and the onus lies upon him more heavily when, as in the present case, it is found that he was perfectly well aware of the pro-

(1) A. I. R. 1924 Lah. 425 (F. B.).

gress of the suit. Lala Suraj Narai cannot be presumed to have been ignorant of the law on this point. He says distinctly that there is nothing to show en what date the defendant had knowledge of the decree, yet he granted the application. The sentences following the sentence about knowledge to my mind are quite meaningless and I cannot conjecture what the learned Senior Subordinate Judge was thinking of. He has not decided erroneously that the onus was on the plaintiff to show when the defendant had knowledge of the decree, and he has not come to a definite finding that the defendant's first knowledge of the decree was obtained from the letter, dated the 5th of April 1924, for the words "he might as well have got" cannot be supposed to mean "he got," particularly in view of the preceding sentence.

If there is to be any meaning or authority in Section 3 of the Limitation Act, this is a case of illegal assumption of jurisdiction by the learned Senior Subordinate Judge in granting in favour of the applicant a prayer contained in a time-barred application for which the law did not permit him to extend time, and one which requires the interference of this Court under S. 115 of the Code of Civil Procedure. There was similar interference in a much weaker case by Willberforce, J. in *Sungru Mal-Harcharan Das* v. *Sham Lal-Gokal Chand* (2), where a lower appellate Court had reversed an order dismissing a time-barred application to set aside a decree ex parte. The lower appellate Court had held that it was for the plaintiff to show that the defendant had knowledge of the ex-parte decree and that he had failed to do so, and the order of the first Court was restored by this Court in revision.

Subsequent to the delivery of the Full Bench decision cited above—*Lal Chand-Mangal Sen* v. *Behari Lal-Mehr Chand* (1)—the learned Chief Justice in *Dittu Ram* v. *Nawab* (3), interfered on revision for setting aside an ex parte decree without considering the question whether the application was or was not barred by time.

I accept the application with costs and set aside the order restoring the suit.

Revision accepted.

(2) [1918] 146 P. L. R. 1918=46 I. C. 777.
(3) A. I. R. 1925 Lah. 639.

A. I. R. 1926 Lahore 381

CAMPBELL, J.

Gurditta Mal—Plaintiff—Petitioner.

v.

Nabi Bakhsh and *another*—Defendants—Respondents.

Civil Revision No. 481 of 1925, Decided on 19th February 1926, from a decree of the Small Cause Court Judge, Jullundhur, D/- 26th April 1925.

Evidence Act, S. 21—Entry in a bond that no other sum is due is not binding on creditor but is only an admission in favour of debtor.

An entry in the body of the bond that no further account is outstanding against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interests. [P. 381, C. 2]

Dhanpat Rai—for Petitioner.

Judgment.—This was a suit based on a bond, dated the 24th October 1921. In reply to the plaint, the defendants produced a subsequent bond, dated the 7th of January 1923. which bore an endorsement by the plaintiff that it had been paid off, and they relied upon a statement in that endorsement that on the date of payment, the 7th of August 1923, no accounts remained between the parties. The rejoinder of the pliantiff was that although this statement was made in Urdu characters on the back of the bond, there was a further endorsement by the plaintiff in his own hand and in Hindi characters and in continuation of this signature, that yet another bond still remained outstanding. This plea was rejected by the learned Judge as quite false and unbelievable, but he does not appear to have taken any steps to ascertain what the Hindi writing actually stated. If the plaintiff's contention is correct, the endorsement in Urdu above the Hindi writing would have little or no effect upon the question whether the plaintiff acknowledged that all previous accounts had been cleared off. It might perhaps be shown that there was a subsequent interpolation in the Hindi writing, but since the bond was handed over to the defendants and was produced in Court by them this is not very likely. The entry in the body of the bond, dated the 7th January 1923, that no further account was outstanding against the defendants, deos not bind the plaintiff in any way and is merely an admission by the defendants in their own interests.

The method in which the Court below has treated the Hindi writing is not in accordance with law. The plaintiff swore to its interpretation and there was no denial of the correctness of that interpretation or other evidence against it. The suit demands further enquiry with special reference to this writing.

I accept the revision and set aside the decision of the Court below and return the case to him for re-decision. I wish to draw the learned Judge's attention to the fact that the order granting Rs. 20 as "compensation" in a petty suit of this character is not justified.

Case returned.

A. I. R. 1926 Lahore 382

SHADI LAL, C. J.

Mohammad Qasam — Complainant— Applicant.

v.

Anwar Khan — Accused — Opposite Party.

Criminal Reference No. 1284 of 1925 Decided on 13th March 1926, made by the S. J., Attock, Campbellpur, on 24th July 1925.

Criminal P. C., S. 531-A.—High Court's power to expunge portion of judgment by competent Court should be exercised sparingly.

Section 561-A recognizes the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. But the power to expunge a portion of a judgment delivered by a competent Court, is intended for cases of exceptional circumstances and should be exercised very sparingly. There is no precedent for entertaining an application for expunging by a subordinate Magistrate in connexion with a judgment given on appeal by his superior judicial officer. [P 282 C 2]

Niaz Mohammad—for Complainant.

Order. — The accused, Anwar Khan, was convicted of an offence under S. 403 Indian Penal Code, by an Honorary Magistrate of the Second Class, but on appeal the conviction was set aside by the Additional District Magistrate. The appellate judgment contains some observations regarding the proceeding in the Court of the trial Magistrate, and the latter has moved the High Court through the Sessions Judge to expunge those observations.

Now, the prayer of the Subordinate Magistrate, for expunging the remarks made by the appellate Court relating to the conduct of judicial proceedings taken by him is one of an extraordinary character, and it would be very difficult for the appellate Courts to discharge their functions satisfactorily if the subordinate Magistrates were allowed to criticize their judgments and to apply for the expunction of observations contained therein. A Subordinate Magistrate should not be too sensitive, and any attempt on his part to criticize a judgment of the appellate Court must be deprecated. Moreover, this Court burdened as it is with a large volume of judicial work cannot afford to waste time on applications made by Subordinate Magistrates against their superior officers. Indeed, there is no precedent for entertaining an application of this character. It is true, that there have been a few instances in which remarks calculated to expose a witness or an accused person to a criminal prosecution have been deleted, and S. 561—A of the Criminal P. C. recognizes the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. But the power to expunge a portion of a judgment delivered by a competent Court, is intended for cases of exceptional circumstances and should be exercised very sparingly. I do not know of a single case, and certainly none has been cited before me in which this jurisdiction has been invoked by a subordinate Magistrate in connexion with a judgment given on appeal by his superior judicial officer.

The learned vakil, who has appeared for the Honorary Magistrate, contends that there was no justification for the remarks objected to by his client, but it is unnecessary to enter upon a discussion of the matter. It is however, strange that Anwar Khan who had been defending himself against the accusation brought against him and who had made no less than three applications impeaching the impartiality of the Honorary Magistrate, and asking for a transfer of the case to some other Court should suddenly develop a repentant mood and plead guilty to the charge. and that after the conviction he should vehemently deny in the appellate Court that he had ever entered the plea of guilty. It ap-

pears that the Magistrate holds his Court, not at the headquarters of the district or of the Tahsil but at a place where no legal assistance is available, and it was for this reason that the accused could not secure the services of a legal practitioner who might have thrown light upon what transpired at the time of the framing of the charge.

Be that as it may, I decline to interfere with the judgment of the Additional District Magistrate and direct that the papers be returned to the Sessions Judge.

Papers returned.

A. I. R. 1926 Lahore 383 (1)

JAI LAL, J.

Bahadur—Defendant—Appellant.

v.

Saghar—Plaintiff—Respondent.

Second Appeal No. 2261 of 1925, Decided on 25th March 1925, from a decree of the Dist. J., Jhelum, D/- 12th June 1925.

Adverse possession—"Possession follows title" applies only when there is no definite proof of possession.

The presumption that posseession must be deemed to follow title arises only when there is no definite proof of possession by either of the contending parties in the case of land which is incapable of actual possession owing to its nature. [P 383 C 2]

Parkash Chandra for *Muhammad Azam Khan*—for Appellant.

N. C. Mehra—for Respondent.

Judgment.—Three khasra numbers were purchased by one Haidar. The sale in favour of Haidar was pre-empted by the respondent Saghar who, in execution of his decree for pre-emption, obtained possession of the three khasra numbers in 1923. Bahadur, appellant, thereupon instituted a suit under S. 9 of the Specific Relief Act and obtained possession. Saghar then instituted the suit out of which this second appeal has arisen for possession of three khasra numbers. The District Judge has held that in regard to two of the khasra numbers Bahadur has proved that he had been in adverse possession thereof for more than 12 years. He has, therefore, dismissed the suit with regard to them.

The present appeal relates to Khasra No. 581. This land was not cultivated, but in the revenue records Bahadur had been shown to be in actual possession throughout. The fact that Bahadur obtained a decree under S. 9 of the Specific Relief Act also shows that he was in actual possession of this khasra number. The District Judge, on the findings that Saghar is the owner of the land, that it is not cultivated, and that Bahadur could not be in adversc possession of uncultivated land, has decreed the suit as regards Khasra No. 581. In my opinion this view of the learned District Judge is erroneous. The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either of the contending parties, in the case of land which is incapable of actual possession owing to its nature. In this case Bahadur has been and is in possession of Khasra No. 581. Saghar or his predecessors in-interest have not been proved to have been in pcs ession of the khasra number at any time within 12 years of the suit excopt on the occasion when he was ejected as a result of the suit under S. 9 of the Specifie Relief Act. I hold, therefore, that Saghar's suit as regards Khasra No. 581 should also have beeu dismissed, and accepting this appeal dismiss it with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 383 (2)

BROADWAY AND FFORDE, JJ.

Harcharan Das—Defendant—Appellant.

v.

Malawa Ram and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 118 of 1922, Decided on 4th February 1926, from the decree of the Dist. J., Jullundur, D/- 20th October 1921.

Punjab Pre-emption Act (1 *of* 1913), *S.* 3 (3) *Town.*

Adampur, Dt. Jullundur, is a 'town' for purposes of the Act. [P 384 C 1]

Badri Das—for Appellant.

M. L. Puri for *Jagan Nath Aggarwal*—for Respondents.

Broadway, J.—The point for decision in this second appeal is whether Adampur is a town for purposes of the Pre-

emption Act. The Courts below have granted the respondent Malawa Ram a decree for pre-emption of a house situate in Adampur, having held that Adampur was a town.

In this second appeal Mr. Badri Das has contended that the conclusion arrived at by the Courts below was not warranted. No definition of a town is given in the Pre-emption Act beyond what is contained in S. 3 (3), which is to the following effect:

For the purposes of this Act a specified place shall be deemed to be a town: (a) if so declared by the Local Government by notification in the official Gazette; or (b) if so found by the Courts.

It does not fall within (a) but it appears that in a suit, not between the present parties, decided on the 31st May 1916, Adampur was held to be a town. The Courts below have found that Adampur possesses a police station, a telegraph office and post office, a veterinary hospital and a civil hospital, a middle school and two girls schools and two bazars with pacca pavements and that it is also a commercial centre. For these reasons Adampur has been held to be a town for purposes of the Pre-emption Act. Mr. Badri Das has urged that the Courts below have ignored the question as to what the inhabitants of Adampur do for their livelihood, and has urged that in the main they depend on agriculture. Sitting as a Court of second appeal we cannot examine the evidence on the record. The facts found as enumerated above by the Courts below certainly lend support to the view that Adampur is a town, and it was undoubtedly for the appellant-vendee to show that the inhabitants depend in the main on agriculture. After a consideration of the arguments advanced at the Bar I am unable to see any reason to differ from the view taken by the Courts below, and therefore dismiss this appeal with costs.

Fforde, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Lahore 384

MARTINEAU, J.

Amar Ali and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 72 of 1916, Decided on 13th March 1926, against an order of the S. J., Ambala, D/- 18th November 1925.

Penal Code, S. 368—Evidence that accused said that they wanted to sell the girl is not sufficient for a conviction.

Evidence, that the accused said that they wanted to sell the girl is not sufficient for a conviction for an offence under S. 368. The prosecution has to prove that the accused concealed the girl or kept her in wrongful confinement.

[P. 384, C. 2]

Sodhi Charan Singh—for Petitioners.
B. H. Bevan Petman—for the Crown.

Judgment.—I do not find any evidence to support the conviction of the petitioners for any offence under S. 368, Indian Penal Code. The girl Rahmat appears to have been kidnapped by one Karam Bakhsh of Nabha, who took her eventually to Khana Mazra, where the petitioners Karam Bakhsh and Amar Ali live. She was taken to the house of a nephew of the petitioner Karam Bakhsh and after a few hours Karam Bakhsh of Nabha took her away to the village of Chamo in the petitioner Karam Bakhsh's cart, which was hired for the purpose. On the way Amar Ali met or overtook the two Karam Bakhshs and accompanied them. At Chamo the girl was taken to the house of one Ali Hussain, who questioned her and discovered that she had been abducted.

The convictions are based on evidence of certain persons as to the petitioners having said that they wanted to sell the girl. Whether that evidence be believed or not it is not sufficient for a conviction for an offence under S. 368, Indian Penal Code. The prosecution has to prove that the petitioners concealed the girl or kept her in wrongful confinement, and of this there is no evidence whatever.

I accordingly accept this application, set aside the convictions and sentences, and acquit the petitioners.

Conviction set aside.

* * A. I. R. 1926 Lahore 385

JAI LAL, J.

Ram Chand Gurvala and *others*—Convicts—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeals Nos. 1154, 1152, 1155, 1158, 1192, 1274, 1276, 1273 and 1275, and Criminal Revision No. 2066 of 1925, Decided on 16th April 1926, from the order of the 1st Cl. Spl. Mag., Lahore, D/- 12th October 1925.

* (a) *Penal Code, S. 25—"Intent to defraud" implies infringement of some legal right of person—Person deceived need not be deprived of property.*

The expression "intend to defraud" implies deceit and consequent injury or intended injury, i. e., the infringement or intended infringement of some legal right possessed by the person deceived. It does not necessarily imply that the person deceived should be deprived of property. It includes deceit which causes or is likely to cause any damage or harm to the person deceived in respect of his property or otherwise.
[P. 387, C. 2]

* (b) *Criminal P. C., S. 477 (A)—Actual deception is not necessary — "Falsify" covers new document.*

It is not necessary for the prosecution to prove that any person or persons were actually deceived by the false document. It is quite sufficient if in the opinion of the Court the document had that tendency. The expression "falsify" applies to the preparation of an entirely new document containing false information. To falsify means "to render false" and a new document containing false information can be correctly described as a false document and the act of preparing such a document is falsification of the document. [P. 388, C. 1 P. 389, C. 2]

* (c) *Companies Act, S. 196 (5)—Examination under—Person examined is not protected under Evidence Act, S. 132.*

Section 196(5), Companies Act, was enacted in order to enable the Court in charge of the liquidation proceedings to examine the persons mentioned therein inter alia to ascertain their conduct with regard to the management of the Company and to find out its financial condition and its assets. In these proceedings there is no contest between two parties and therefore the proviso to S. 132 of the Evidence Act does not confer any special privilege on the persons so examined.
[P. 388, C. 2]

* (d) *Evidence Act, S. 132—Privilege applies only to particular questions objected to—Objection to answer is necessary.*

Proviso to S. 132 applies only to answers given to particular questions. It does not confer a general immunity on a person who is examined even after his protest. In order to substantiate the privilege he must object to the particular questions which are put to him if he desires that answers to those questions be not used against him in any subsequent criminal proceedings. A general objection is not sufficient. [P. 388, C. 2]

* (e) *Companies Act, S. 196(7)—Words "in civil proceedings" are not added to restrict the use to civil proceedings only — S. 196, Companies Act, does not override Evidence Act.*

The intention of the Legislature in using the words "in civil proceedings" in S. 196(7) was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned and in criminal proceedings subject to the provisions of S. 132, Evidence Act. S. 196, Companies Act, was not intended in any way to override the provisions of the Indian Evidence Act. [P. 389, C. 1]

* (f) *Practice—Criminal—Offences punishable under two provisions of law — Prosecution may choose any one.*

An offence may fall and may be punishable under two separate provisions of the law, and in the absence of an express prohibition to the contrary it is open to the prosecution to choose the law under which the offender should be prosecuted. [P. 390, C. 2]

(g) *Penal Code, S. 409—War bond entrusted to Bank for sale—Endorsement by owner in favour of Bank does not pass property in Bond to Bank—Bank is guilty in dealing with bond contrary to instructions of endorser.*

A Municipal Committee handed over a war bond to a Bank with instructions to sell it at its market value and to remit the sale proceeds to the Committee. The bond was endorsed in favour of the Bank in order to facilitate its sale. Instead of selling the war bond, according to instructions received by the Bank, the directors of the Bank pledged it with another Bank against cash payment and that amount was utilized by the directors to meet some urgent demands made on their Bank as the Bank was short of cash at that time and the customers were pressing for payment.

Held: that the property in the bond as between the Municipal Committee and the Bank was still retained by the Municipal Committee and did not vest in the Bank. By making use of the bond in a manner which was contrary to the conditions under which it was entrusted to the Bank the directors, who knew of this fact, caused unlawful loss to the Municipal Committee and unlawful gain to the Bank and were guilty under S. 409. [P. 390, C. 2, P. 391, C. 1]

* (h) *Penal Code, S. 405 — Actual taking of tangible property is not necessary.*

In order to establish a charge of dishonest misappropriation or criminal breach of trust it is not necessary that the accused should have actually taken tangible property such as cash from the possession of another and transferred it to his own possession. The transfer of certain amount from the account of another to one's own account is sufficient to constitute the offence.
[P. 391, C. 2, P. 392, C. 1]

G. C. Narang—for Appellants.

Diwan Ram Lal—for the Crown.

Judgment.—The Amritsar National Bank was registered under the Indian Companies Act at the commencement of 1922. The Articles of Association were filed with the Registrar, Joint Stock

Companies, in January, and a prospectus was issued by the promoters early in February. The Bank commenced business on the 24th of February 1922. Raghu Nath Sahai Sondhi and Ram Chand Gurwala, appellants were, its directors throughout.

Gobind Sahai Vastav, appellant, was the manager of the office at Lahore, in the beginning and thereafter the General Manager of the Bank.

Section 77 of the Indian Companies Act requires that every company registered under the Indian Companies Act shall, within a period of six months from the date at which it is entitled to commence business, hold a general meeting of its members. This meeting is called the 'statutory meeting.' The section further provides that a report, which is called the statutory report, shall be presented at this meeting in the manner provided the rein and shall contain the information there prescribed.

Under the provisions of this section a meeting of the members of the Company was held on the 27th of August 1922 at which a statutory report for the period ending with the 31st of July 1922 was presented. The Bank went into voluntary liquidation on the 15th of May 1923, but on the application of some of its members, 'official liquidators' were appointed by this Court. These liquidators discovered that the figures in the statutory report were inflated and misleading, and gave the members of the Company an entirely wrong idea of the progress made by the Bank till the 31st of July 1922. In consequence of these discoveries the appellants were tried under S. 477-A of the Indian Penal Code by Lala Nand Lal, Manchanda, a Magistrate of the 1st Class, exercising enhanced powers under S. 30 of the Criminal P. C. Raghu Nath Sahai Sondhi and Ram Chand Gurwala have been convicted and sentenced to seven years' rigorous imprisonment, and Gobind Sahai Vastav to two years' rigorous imprisonment.

The Magistrate has found that the working capital of the Bank on the 31st of July 1922 was actually about Rs. 3 lacs. The statutory report showed that it was about Rs. 6 lacs. The number of shares actually sold was exaggerated. The amount of deposits was also falsely inflated. The books of the Bank kept at its various branches showed that about the end of July a number of bogus entries of deposits were made in such books and that they were reversed soon after the expiry of the month. These facts are sufficiently established by the evidence on the record which I have examined. I have therefore no hesitation in agreeing with the conclusions of the Magistrate that false entries were made in the books of the Bank and that the statutory report gave an entirely false information to the members of the Bank and the public as to the extent of the business done by the Bank up to the 31st of July 1922. I also hold that it is sufficiently established that these false entries were made in the books of the Bank under the instructions of Raghu Nath Sahai Sondhi and Ram Chand Gurwala. These two men were the directors of the Bank and also the proprietors of its managing agents, the firm of Ram Chand Gurwala & Co. In the books of the Lahore office two entries of Rs. 5,000 and Rs. 4,000 were made in the names of Raghu Nath Sahai Sondhi and Ram Chand Gurwala, respectively, which have been proved to be false. The fact that in all the branches of the Bank similar false entries were made lends strong support to the evidence given by the agents of these branches tbat this wss done under the instructions of the two appellants mentioned above. It consequently follows that the statutory report, which is admittedly signed by these two appellants and was presented by them to the members of the Company was prepared from the books of the Bank which were false to the knowledge of these two appellants. It has, therefore, rightly been held that the report was false and that the appellants wilfully prepared and presented it to the members of the Company.

With regard to Gobind Sahai Vastav I am not satisfied that it has been shown that he was cognizant of the false nature of the entries. He did not sign the statutory report and had therefore no hand in preparing it. As the manager of the Lahore Branch he signed vouchers relating to some bogus deposits, but then those vouchers were signed or written by the managing agents, and it is quite possible that he did not know the real nature of the transactions. I am not prepared to place much reliance on the evidence of the agent of the Simla Branch who states that on

one occasion, when he wanted instructions as to the manner in which the orders of the directors were to be carried out, it was Gobind Sahai Vastav who gave him the instructions on the telephone.

The charge as explained by the learned Assistant Legal Remembrancer who appeared for the Crown before me and also at the trial, is for falsification of the statutory report and not the books of the Bank. The falsification of the books of the Bank, according to him is relied upon to establish the falsity of the statutory report. Under these circumstances Gobind Sahai Vastav, appellant, is in my opinion entitled to the benefit of the doubt and I acquit him.

On behalf of the remaining two appellants, several contentions were raised by the learned counsel, who appeared for them respectively, and these I now proceed to examine.

It was contended that there was no proof that the appellant acted "with intent to defraud" in preparing this false statutory report. It was strenuously urged that the object of the appellants was to create a better impression in the minds of the shareholders and the public about the actual financial position of the Bank in order to attract a larger number of purchasers of the shares of the Company and larger business for the Bank and that it cannot be predicated that the appellants at that stage knew or had reason to believe that any of the shareholders of the Company or its customers were likely to lose their money. The Bank had then recently started business and there was no reason to think that it had done any bad business.

I am prepared to believe that in issuing the false statutory report the appellants had no intention to directly cause wrongful loss to any person or wrongful gain to themselves, but 'dishonest intention' is something different from fraudulent intention. It was the appellants' intention that the shareholders and the public should, as a result of the deception exercised by them by placing before them false figures about the position of the Bank, deposit their money in the Bank and purchase a larger number of shares which otherwise they would not have done. This in my opinion constitutes an intent to defraud. The term "fraudulently" is defined in S. 25 of the Indian Penal Code where it is laid down that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. This definition is obviously vague but an examination of several reported cases which bear on the point shows that the expression "intent to defraud" implies deceit and consequent injury or intended injury, i. e., the infringement or intended infringement of some legal right possessed by the person deceived. It does not necessarily imply that the person deceived should be deprived of property. It includes deceit which causes or is likely to cause any damage or harm to the person deceived in respect of his property or otherwise. I have held that the conduct of the appellants in issuing the false statutory report was calculated to deceive the public and was intended to induce them to invest their money in the Bank which they would not otherwise have invested. Any persons who might invest their money in the Bank as a result of the appellants' deceptions must be deemed to have been defrauded by them.

The learned counsel for the appellant cited *Queen-Empress* v. *Md. Sayed* (1) At page 115 of that report it is stated that if a deception results in any advantage to the accused then it is fair to presume that he intended to defraud. Relying on this the counsel argued that in this case it had not been shown that the appellants derived any personal advantage by the deception and that, therefore, there was no intent to defraud. Assuming that there was no personal advantage to the accused still it does not follow that the test laid down in the Allahabad judgment is the only test. All that is laid down there is that deceit, coupled with the advantge to the accused, is a very good test of fraudulent intention of the accused. But, as I have stated above, any harm to or infringement of any right of the person deceived is also a good test of fraudulent intention.

The next contention of the learned counsel was that it had not been proved that anybody was actually deceived by the false statutory report and that the two witnesses Prithi Chand (P. W. 14) and Dhian Singh (P. W. 23), who deposited Rs. 200 and Rs. 500 respectivel y

(1) [1899] 21 All. 113.

in January and April 1923, should not be believed when they state that they did so on being assured by the agents who showed them a copy of the statutory report that the Bank was in a flourishing condition. In my opinion, it was not necessary for the prosecution to prove that any person or persons were actually deceived by the false statutory report. It is quite sufficient if in the opinion of the Court the report had that tendency. The learned counsel then urged that the charge was indefinite and defective. In this I do not agree. As explained above the charge is about the falsification of the statutory report. A reference is made in the charge to the falsification of the books, but this was unnecessary and did not in any way prejudice the accused. Evidence was led by the prosecution about the falsification of the books in order to prove the nature of the report which was prepared from such books.

The learned counsel then contended that the Magistrate admitted evidence which was not legally admissible and that excluding that evidence there was no proof on the record to sustain the charge against the appellants. The appellants were examined by the District Judge under S. 196 of the Indian Companies Act and certain statements and admissions made by them in the course of that examination have been used by the Magistrate as evidence in proof of the guilt of the appellants. It is contended that S. 196 (5) makes it compulsory on the part of the person specified therein to submit to an examination and to answer all questions that the Court may put or allow to be put to him and that therefore under the proviso to S. 132 of the Indian Evidence Act the answers given by the appellants could not be proved against them in any criminal proceeding except as provided in that section. The contention is wrong. S. 132 of the Indian Evidence Act is as follows:

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.

If the argument of the learned counsel be deemed to be correct then every witness who is called by a party can take advantage of the proviso to S. 132, as everybody who is summoned as a witness, is bound to appear in pursuance of the summons and to answer all relevant questions that are put to him except such as he is privileged to refuse to answer under the express provisions of the law. In my opinion S. 196 (5) was enacted in order to enable the Court in charge of the liquidation proceedings to examine the persons mentioned therein inter alia to ascertain their conduct with regard to the management of the Company and to find out its financial condition and its assets. In ordinary judicial proceedings the contest is between two parties, and witnesses are summoned by them to support their respective allegations. This is not always the case in liquidation proceedings. Occasion may arise when it may be necessary to examine the directors and others to obtain information when there is no actual dispute between any parties. It was in order to enable the Judge to meet such contingencies that power was conferred on him to examine the directors and others even when there are no contending parties before him. The proviso to S. 132 of Indian Evidence Act therefore does not confer any special privilege on the persons so examined. Moreover, in my opinion this proviso applies only to answers given to particular questions. It does not confer a general immunity on a person who is examined even after his protest. In order to substantiate the privilege he must object to the particular questions which are put to him if he desires that answers to those questions be not used against him in any subsequent criminal proceedings. A general objection is not sufficient. Further, in this case it has not been shown that any objection was taken by the appellants to answer any particular questions or even that they objected to their being examined at all.

The next argument on this part of the case was that S. 196 (7) of the Indian Companies Act clearly provides that the notes of such examination may be used in

evidence against the person examined in civil proceedings' only. This objection needs examination. It appears that S. 196 of the Act closely followed the wording of the English statute and there the words '" in civil proceedings" do not exist. These have been introduced in the Indian Companies Act by the Legislature. It was therefore contended that by using these words in this sub-section the Indian Legislature intended that the notes of the examination could be used against the person examined only in civil proceedings. I have given my careful consideration to this argument, but I am of opinion that this contention must also be overruled. It appears to me that the intention of the Legislature was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned and in criminal proceedings subject to the provisions of S. 132. S. 196, Indian Companies Act, was not intended in any way to override the provisions of the Indian Evidence Act, and it was in order to express that intention of the Legislature that the words" in civil proceedings " were introduced in S. 196 of the Indian Companies Act. If the words " in civil proceedings" had not been introduced in the Indian Companies Act, then it might be argued with force that the notes of the examination have been made admissible against the person examined in all proceedings, including criminal proceedings, in spite of the proviso to S. 132 of the Indian Evidence Act. It was with a view to save the provisions of S. 132 that the words " in civil proceedings " have been introduced in the Indian Companies Act. There is no justification for introducing the word 'only' where the context does not permit I hold therefore that the statement of the appellants made before the liquidation Judge under S. 196 of the Indian Companies Act were admissible against them in this case.

Another contention of the counsel was that S. 477-A of the Indian Penal Code does not apply to the preparation of an entirely new document containing false information. In other words, that the section presupposes the existence of a document which is destroyed, altered, mutilated or falsified. It is, therefore, contended that as the statutory report was an entirely new document prepared by the appellants, they could not be punished under S. 477-A, even assuming that the figures mentioned therein were false and were entered wilfully and with intent to defraud. The expression " falsify " applies to the preparation of an entirely new document containing false information. To falsify means to ' render false ' and a new document containing false information is correctly described as false document and the act of preparing such a document is called the falsification of the document. I therefore, hold that Raghunath Sahai and Ram Chand Gurwala have rightly been convicted under S. 477-A of the Indian Penal Code for preparing the false statutory report. But in my opinion the sentence of seven years' rigorous imprisonment in the case of both the appellants is excessive. It is not the case for the prosecution and it has not been found by the Magistrate that the appellants were actuated by any motive of personal dishonesty in preparing the false statutory report. They acted in what they thought were the best interests of the institution committed to their charge. The means employed by the appellants in this case to attain what they considered to be a legitimate object were criminal. They adopted a fraudulent device for advertising the Bank which at this stage needed advertisement. They had no reason to think that the Bank would fail and consequently the customers would lose their money. Having regard to these facts I consider that a sentence of one year's rigorous imprisonment will meet the ends of justice. I reduce the sentence of Raghu Nath Sahai Sondhi and Ram Chand Gurwala from seven years' to one years' rigorous imprisonment in each case. (The judgment then dealt with Criminal Appeals Nos. 1153 and 1164 of 1925, in which Raghu Nath Sahai Sondhi and Ram Chand Gurwala were the appellants against their conviction under Section 409 of the Penal Code. After discussing the evidence the appellants were acquitted.)

Criminal Appeals Nos. 1152, 1155, 1158 *and* 1192 *of* 1925. The appellants are Mohy-ud-Din Ahmad, Ram Chand Gurwala, Raghunath Sahai Sondhi and Govind Sahai Vastav respectively. They have all been convicted under S. 477-A of the Indian Penal Code and

sentenced to various terms of imprisonment and heavy fines.

On the 8th of April 1923 a balance sheet relating to the working of the Bank till the 31st of January 1923 was presented by the directors at a meeting of the shareholders of the Bank. This balance sheet was prepared and signed by Raghunath Sahai Sondhi, Ram Chand Gurwala, as directors and Gobind Sahai Vastav as general manager of the Bank. Mohy-ud-Din Ahmad was a local director of the Simla Branch of the Bank. It has been established from the evidence on the record that this balance sheet was false, inasmuch as the working capital of the Bank which was shown to be about Rs. 22 lacs was grossly exaggerated, the real working capital being about Rs. 7 ½ lacs. The earnings of the Bank were also exaggerated by inclusion of amounts that had not actually been earned by the Bank. The net result was that the balance sheet, instead of showing considerable loss, showed a small profit. No dividend, however, was declared. The modus operandi in preparing this false balance sheet was the same as in the case of the statutory report. The number of shares alleged to be sold was wrong and the amount of deposits was exaggerated. The earnings of the Bank included interest on two debts which had been purchased by the Bank but liability for which had been denied by the debtors. The expenses for the month of January 1923 were not included in the total of expenditure.

These facts are sufficiently proved by the statement of the auditor and the official liquidator and also by the statements of several witnesses including the officials of the Bank at the head office and the branches. The fact that a number of entries were reversed immediately on the expiry of the month of January lends strong support to the evidence given as to the fictitious nature of the entries in the books of the Bank at its several branches. I have therefore no hesitation in agreeing with the conclusion of the Magistrate that the three appellants, who signed the balance sheet wilfully and with intent to defraud, prepared a false balance sheet.

The legal points raised in these appeals are the same as those raised in the statutory report case and I do not therefore propose to repeat them here.

In connexion with this as well as the statutory report case the learned counsel drew my attention to S. 282 of the Indian Companies Act which makes punishable the offence of making false statements in any return, report, certificate or balance sheet required by the provisions of that Act. The maximum punishment provided there is three years' imprisonment and fine. It was contended that as the offence of the appellants was punishable under a special enactment which governed their case, no offence under S. 477-A of the Indian Penal Code was committed by them. The argument of the counsel was that by enacting S. 282 of the Indian Companies Act the Legislature intended to prohibit the prosecution, under S. 477-A of the Indian Penal Code, of persons who could be punished under S. 282 of the Indian Companies Act. I cannot accept this contention. An offence may fall and may be punishable under two separate provisions of the law, and in the absence of an express prohibition to the contrary it is open to the prosecution to choose the law under which the offender should be prosecuted. I hold therefore that these appellants have been rightly convicted. (The judgment then dealt with the question of sentence and reduced it in the case of each of the appellants. Further, dealing with Appeals Nos. 1274 and 1276 against conviction of Ramchand Gurwala and Raghunath Sahai Sondhi his Lordship acquitted the appellants).

Criminal Appeals Nos. 1273 *and* 1275 *of* 1925: The appellants Ramchand Gurwala and Gobind Sahai Vastav have been convicted under S. 409 of the Indian Penal Code and sentenced to two years' and one year's rigorous imprisonment respectively.

The Municipal Committee of Pathankot through one of its members, Lala Jagan Nath, handed over a war-bond of the face value of Rs. 5,000 to the Amritsar National Bank, Lahore, with instructions to sell it at its market value and to remit the sale proceeds to the Committee. The bond was endorsed in favour of the Bank in order to facilitate its sale. Instead of selling the war-bond, according to the instructions received by the Bank, the two appellants pledged it on the 24th

of March 1923, with the Allahabad Bank Limited, Lahore, against cash payment of Rs. 3,700. This Rs. 3,700, was utilized by the appellants to meet some urgent demands made on the Bank as it appears that the Bank was short of cash at that time and the customers were pressing for payment. The Alliance Bank of Simla, Limited, had gone into liquidation about a week before this and consequently it seems that there was a rush on this Bank. Subsequently the official liquidator redeemed the war-bond from the Allahabad Bank, Limited, and satisfied the demand of the Municipal Committee of Pathankot.

The above facts are amply proved by the evidence on the record. Indeed they are admitted by the appellants. The learned counsel for the appellants contended that the war-bond having been endorsed to the Bank became its absolute property and the pledge thereof having been made in the interests of the Bank, no offence under S. 409 of the Indian Penal Code could be held to have been established against the appellants. This argument in my opinion, has no force. The war-bond was endorsed to the Bank for a special purpose and under an express direction to sell it and to pay the proceeds over to the Municipal Committee of Pathankot. The endorsement on the bond by the Municipal Committee in favour of the Bank, was merely to facilitate its disposal by the Bank. The property in bond as between the Municipal Committee and the Bank was still retained by the Municipal Committee and did not vest in the Bank. By making use of the bond in a manner which was contrary to the conditions under which it was entrusted to the Bank the appellants, who knew of this fact, caused unlawful loss to the Municipal Committee and unlawful gain to the Bank. In this they acted dishonestly and have therefore rightly been convicted under S. 409 of the Indian Penal Code.

The learned counsel cited some authorities in which it has been held that an endorsement of a negotiable instrument vests the property in the instruments in the endorsee, but those authorities deal with the question in order to determine the right of the endorsee to confer a good title on a third person. Here we are concerned with the criminal liability of the appellants with respect to their dealings with the war-bond and the question arises between the Municipal Committee of Pathankot and the Bank, the endorsee. I therefore uphold the convictions of the appellants. (The judgment then considered the question of sentence and reduced it in the case of both the appellants).

Criminal Revision 2066 *of* 1925—Parshotam Das petitioner was the Manager of the Ambala Branch of the Amritsar National Bank. He has been held guilty of having dishonestiy misappropriated Rs. 241/15/2, Rs. 105/- and Rs. 10/8/- respectively by debiting these amounts to the Bank and crediting them to his own account. It appears that his own account on the 15th of May 1923 stood at a debit balance of Rs. 1,132/6/6. On that date he credited to his account a total amount of Rs. 1,287/-/6. The items mentioned above are included in the amount so credited by him. It is significant that the misappropriation was made on 15th of May 1923, the date on which the Bank failed. Vouchers were prepared for the three items showing them as having been paid on behalf of the Bank to three different persons. The books of the Bank show that all three items had already been paid to such persons and debited to the Bank. There was thus no occasion for the petitioner to pay these items to the alleged respective recipients or to credit them to his own account. I may mention that the petitioner transferred these items to his account out of the Sundries Account on which he was entitled to operate to defray any miscellaneous expenses incurred by him on behalf of the Bank. No payment was actually made by the petitioner on the 15th of May.

These facts have been sufficiently proved from the evidence on the record and the Bank books. I agree with the concurrent findings of the Magistrate and the Sessions Judge that the petitioner transferred these amounts dishonestly from the Bank account to his own account.

The contention of the learned counsel for the petitioner was that mere transfer of an amount from the Bank account to his own account by the petitioner did not amount to misappropriation. In other words, that in order to establish a charge of dishonest misappropriation or

criminal breach of trust it is necessary that the accused should have actually taken tangible property such as cash from the possession of the Bank and transferred it to his own possession. This argument does not bear a moment's examination. On the transfer of the amount from the account of the Bank to his own account the petitioner removed it from the control of the Bank and placed it at his own disposal. From that moment he was entitled to deal with the amount as he liked ; and he had full disposing power over the amount transferred by him to his own account, subject, of course, to any action that the Bank might take to put the matter right. The petitioner therefore committed criminal breach of trust in respect of the three items by dishonestly misappropriating them to his own use in violation of the conditions under which he was entrusted with the funds of the Bank. The sentence is lenient and I dismiss this petition. At the close of the arguments the learned counsel asked me to order that the appellants be treated as special class prisoners but a reference to the rules shows that with the possible exception of one they are not entitled to that concession. Moreover there is other remedy open to the prisoners to attain their object. I therefore refrain from passing any orders at this stage.

Appeals partly allowed.

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* A. I. R. 1926 Lahore 392

CAMPBELL AND ADDISON, JJ.

Labh Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1167 of 1925, Decided on 16th March 1926, from an order of the S. J., Gurdaspur, D/- 14th November 1925.

* *Criminal trial—Identification—Witness not having seen accused for long period is no ground for discrediting his evidence as to identification.*

There is nothing surprising in a man's appearance altering in six years during his absence in another part of India and any person might be quite confident that a casual acquaintance had done a certain act on a particular day, but might still fail to pick that casual acquaintance (never having seen him in the interval) out of a crowd of other people six years later when asked to point him out, and therefore it is not of any great importance that such a man who has not seen the other for six years will fail to recognize him in a crowd of other persons. [P 393 C 1]

Bhagat Ram Puri and *Rattan Lal*—for Appellant.

Sundar Das—for Opposite Party.

Campbell, J.—The appellant Labh Singh was tried by the Sessions Judge, Gurdaspur, on five charges in respect of criminal acts alleged to have been so connected together as to form the same transaction. These acts were : (1) shooting at and killing Mt. Khemi ; (2) shooting at and killing Sundar Singh ; (3) shooting at and killing Nawab ; (4) firing at Ganga Singh with such intention and under such circumstances that if death had been caused the offence would have been murder ; and (5) firing at Budha with the same intention and under the same circumstances.

All these alleged offences were committed on the 30th May 1919. The learned Sessions Judge, agreeing with the unanimous opinion of the assessors, has held Labh Singh guilty on all five charges. and has sentenced him to death on each charge of murder and to transportation for ten years on each charge under S. 307.

There is no doubt that these murders and attempts at murder were committed on the date named and at the village of Ghanieke Bangar in the Gurdaspur District. The first information reports given to the police named the culprit as Labh Singh of the village of Jagdev Kalan in the Amritsar District, and the present appellant answers to this description. The only question is whether he is really the murderer.

The learned Sessions Judge has relied upon two eyewitnesses, Ishar Singh and Kesar Singh, who say that they knew the appellant Labh Singh before and that the man with the gun who committed the offences was the appellant. Much reliance has been placed in this Court upon admissions by these two witnesses that they did not recognize the appellant when asked to identify him in the jail after his arrest. The appellant was arrested in Bengal and it is the case of both sides that he had been absent from the Punjab for a considerable time. There

is no evidence beyond the admissions of the two witnesses referred to about the nature of the jail identification parade. Assuming, however, that it was properly conducted and that the appellant was not allowed to disguise himself, as we have known to happen at other identification parades conducted by Magistrates, it does not seem to us of any great importance that the witnesses who had not seen the appellant for six years failed to recognize him in a crowd of other persons. Both witnesses explain that in the jail the appellant had his beard loosened whereas when they knew him before it used to be tied up, and Ishar Singh says that the appellant had also blackened his face. However this may be, there is nothing surprising in a man's appearance altering in six years during his absence in another part of India, and any person might be quite confident that a casual acquaintance had done a certain act on a particular day, but might still fail to pick that casual acquaintance (never having seen him in the interval) out of a crowd of other people six years later when asked to point him out.

The murderer had come to Ghanieke Bangar on that particular day in order to carry off a woman named Mt. Tejo who was the wife of Hazara Singh, son of Kehr Singh, a cousin of the appellant and there is evidence that in accordance with the usual custom the family of the deceased husband wanted the widow, while her parents were reluctant to give her up, and that shortly after the murders a party from Jagdev Kalan came to Ghanieke Bangar and carried off Mt. Tejo who has never been seen by any of her people again. The shots were fired at the persons resisting the taking away of Mt. Tejo and at other persons who subsequently pursued the murderer and attempted to catch him. There is no doubt that the murderer was a member or a supporter of the late husband's family and this character also fits the appellant. There is further confirmation in the fact that a police gun and police ammunition were used. It has been proved that the appellant enlisted in the special police at Lahore under a false name on the 19th May and deserted with his gun and uniform on the 25th May 1919, five days before the murders. A great deal of trouble was taken by the prosecution to establish the identity of the appellant with the deserter and in our judgment it has been successful.

We are satisfied that the conviction is correct. We dismiss the appeal and confirm the sentence of death.

Sentence confirmed.

A. I. R. 1926 Lahore 393

COLDSTREAM, J.

Fakhr-ud-din Khan alias *Harbans Rai*—Appellant.

v.

Mt. Biro—Respondent.

Misc. First Appeal No. 15 of 1926, Decided on 5th May 1926, from the order of the Senior Sub.-J., Jullundur, D/- 2nd December 1925.

Guardians and Wards Act (8 *of* 1890), *S.* 19—*Without finding that father is unfit no other person can be appointed—Ward's welfare is main consideration.*

Without a finding that the father is unfit, the law forbids the appointment or declaration of any other person to be guardian. In such cases the welfare of the minors is the main consideration. [P 393 C 2]

Niaz Muhammad and *Muhammad Amin*—for Appellant.

Badri Das—for Respondent.

Coldstream, J.—Harbans Rai and his wife Mt. Biro had two children, boys aged 11 and 8. Harbans Rai became a convert to Islam and changed his name to Fakhr-ud-din. The father and the mother each applied to be appointed guardian of the children. The Sub-Judge, proceeding ex parte on the mother's application, appointed her to be guardian temporarily. On the date fixed for the hearing of the father's petition the petitioner was absent and the Sub-Judge's successor confirmed the mother as guardian, dismissing the father's application, and remarking in its order:

Section 19 of the Guardians and Wards Act is against an application being given by a father for his appointment as guardian. His remedy lies by civil suit.

Against this order the father Fakhr-ud-din has appealed. For the appellant, Mr. Niaz Muhammad points out that so long as the father is alive and not proved to be unfit, no guardian at all can be appointed. Mr. Niaz Muhammad has also referred, as regards the merits of the case, to various rulings upon the effect

upon a parent's right of a change in his religion and upon the question whether the fact that a child is of tender age justifies the removal of the child from the custody of his father. In reply to these references Mr. Badri Das cites the judgment: *Mokoond Lal Singh* v. *Nobodip Chandar Singh* (1). It is not necessary at this stage to have regard to these rulings; for the order appealed against is obviously defective inasmuch as there is no recorded finding that the father is unfit. Without such finding the law (S. 19 of the Guardians and Wards Act) forbids the appointment or declaration of any other person to be guardian. Nor has the Sub-Judge considered whether the appointment of a guardian is necessary for the welfare of the minors, or, if there is such necessity, whether from the point of view of their welfare (which in such cases is the main consideration) the mother is the fittest person to be appointed.

I accept the appeal, and, setting aside the order appealed against with costs, remand the case to the Sub-Judge who will proceed to adjudicate upon the matter in accordance with the law to which his attention has been cited in this order.

Case remanded.

(1) [1898] 25 Cal. 881=2 C. W. N. 379.

A. I. R, 1926 Lahore 394

ADDISON, J.

Barkat Ali—Accused—Appellant.

v.

Ghulam Hussain—Respondent.

Criminal Appeal No. 68 of 1926, Decided on 13th March 1926, from an order of the Dist.-J., Gujranwala, D/- 19th November 1925.

Criminal P. C., S. 476—Sessions Judge can take action even though offence is committed before his predecessor under Penal Code, S. 193.

There is a permanent Court of the District and Sessions Judge with successive incumbents in the Office of Judge, so a Sessions Judge can take action under S. 476 even though the alleged offence under S. 193, I. P. C. may have been committed before his predecessor. *A. I. R.* 1924 *Lah.* 101, *Foll.*; 6 *P. R.* 1909 (*Cr.*), *Dist.* [P 394 C 2]

M. A. K. Janjua—for Appellant.

Judgment.—This is an appeal under S. 476B, Criminal P. C. One Ghulam Hussain applied before Rai Bahadur Lala Ganga Ram Soni, District Judge of Gujranwala, for the transfer of a case between him and one Barkat Ali. An affidavit was filed by Ghulam Hussain making certain allegations. Barkat Ali later moved the District Judge to take action under S. 476 of the Criminal P. C, and to prosecute Ghulam Hussain under S. 193, Indian Penal Code, as regards allegations made by him in the affidavit, Rai Bahadur Lala Ganga Ram Soni issued notice as regards this application but Ghulam Hussain failed to appear.

In the meantime he was transferred and was succeeded by Rai Bahadur Lala Rangi Lal as District Judge. He has dismissed the application to take action under S. 476, Criminal P. C. upon the ground that only his predecessor could take such action. He followed *Emperor* v. *Dauli* (1).

It is clear, however, that *Emperor* v. *Dauli* (1) was dissented from in *Khan Muhammad* v. *Emperor* (2), That was a case very like the present. In it one Sessions Judge took action under S. 476, Criminal P. C., the alleged false evidence having been given before his predecessor. It was held that he had power to do so. There is no distinction between a Sessions Judge and a District Judge. In fact the Court is that of the District and Sessions Judge.

I would also refer to *Phina Singh* v. *Empress* (3). It was held in it that there is no Court of a Magistrate of the First Class as a "permanent Court with a perpetual succession of Judges." but the following words occur in the body of the judgment and they apply to this case:

> It is no doubt true of a High Court, of a Court of Session, and of a permanent Court such as the Court of a Cantonment Magistrate, and possibly of the Court of a District Magistrate that there is but one Court with successive incumbents in the Office of Judge.

It is clear, therefore, that there is a permanent Court of the District and Sessions Judge with successive incumbents in the office of Judge. The ruling relied upon, therefore, by the District Judge does not apply. It followed *Begu Singh* v. *Emperor* (4) and *Kartic Ram Bhakat*

(1) [1909] 6 P. R. 1909 Cr.=104 P. L. R. 1909 =2 I. C. 812=12 P. W. R. 1909 Cr.
(2) A. I. R. 1924 Lah. 101.
(3) [1889] 25 P. R. 1889 Cr.
(4) [1907] 34 Cal. 551=11 C. W. N. 568 =5C. L. J. 508.

v. *Emperor* (5) which were, however, disapproved in *Sheikh Bahadur* v. *Sheikh Eradatullah Mallick* (6).

I accordingly accept this appeal holding that the District Judge can take action under S. 476, Criminal P. C., and I direct him to proceed with the petition on the merits.

Appeal accepted.

(5) [1908] 35 Cal. 114.
(6) [1910] 37 Cal. 642=12 C. L. J. 45=6 I. C. 801=14 C.W. N. 799.

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* A. I. R. 1926 Lahore 395

ZAFAR ALI AND CAMPBELL, JJ.

Wazir Singh—Plaintiff—Appellant.

v

Moti Singh and *others*—Defendants—Respondents.

First Appeal. No. 1439 of 1920, Decided on 19th March 1926.

(a) *Hindu Law—Applicability—Sodhis of Anandpore, Dist. Hoshiarpore, are not governed by Hindu Law in matters of inheritance.*

Hindu Law is not the personal law of the Sodhis of Anandpore, District Hoshiarpore, and they do not follow it in matters of inheritance. That being so, there can be no presumption that an Anandpore Sodhi family constituted a coparcenary body in accordance with the Hindu Law of Mitakshara. [P 397 C 1]

* (b) *Hindu Law—Joint family—Jagir or pension though continuing from father to son is self-acquisition.*

A pension is always allowed on condition of good conduct and loyalty to Government and though it may be continued from father to son, each recipient possesses unrestricted power of expending his pension. The same may be said of jagir moneys paid by way of charity or dharamath. [P 397 C 2]

* (c) *Hindu Law—Joint family—Property purchased by income from priestly offerings is self-acquired.*

Income derived from sources as priestly offerings is the personal income of the recipient and does not form part of his family funds, and consequently the property acquired by him with that money is his own self-acquired property and he has full power of disposition over it. [P 398 C 1]

(d) *Hindu Law—Joint family—Father can fully dispose of his self-acquired immovable property.*

The father of an undivided family subject to the Mitakshara law has full power of disposition over his self-acquired immovable property: 20 *All.* 267 (*P. C.*) and 10 *Bom.* 528, *Foll.* [P 398 C 1]

Gokal Chand Narang and *Fakir Chand*—for Appellant.

Tek Chand and *Badri Dass*—for Respondents.

Zafar Ali, J.—The suit which gives rise to this first appeal is based on a Will under which Wazir Singh, the plaintiff-appellant, is the principal legatee, the other legatees and beneficiaries being Defendants Nos. 4 to 9.

The properties willed away are of four kinds described in the petition of plaint under heads A, B, C and D and Wazir Singh sues for possession of properties A and B and for a declaration that he is entitled to realize the talukdari dues, etc., set forth under the heads C and D.

The testator Narindar Singh was a Sodhi Khatri by caste and was one of the family of Sodhi Khatris of Anandpore in the Hoshiarpore District. These Sodhis of Anandpore are treated as Gurus or spiritual guides and are held in great esteem by Sikhs because they (the Sodhis) are lineal descendants of Ram Dass, the fourth Sikh Guru and the common ancestor of the remaining Sikh Gurus who succeeded him one after the other: see the pedigree table Ex. A-8.

Narindar Singh had an only son Moti Singh but the father and son fell out in about 1897 and ever since remained at daggers drawn. Wazir Singh was an old servant of Narindar Singh but could have no family relationship with him because he is a Jat by caste. He had ostensibly no claim on Narindar Singh but his long and faithful services. As stated in the Will, Narindar Singh had a two-fold object in making it (1) to disinherit Moti Singh whom he characterized as disobedient, undutiful and worthless and (2) to reward Wazir Singh for his good services. He bequeathed all his self-acquired estate to Wazir Singh and left his ancestral property to his two grandsons the sons of Moti Singh to the exclusion of the latter. But on the death of Narindar Singh which occurred on the 15th December 1912 Moti Singh quietly succeeded to his entire property both ancestral and self-acquired.

The Will is dated the 15th April 1908 and it was duly proved by the evidence of the scribe (P. W. No. 3) and an attesting witness (P. W. No. 4). It was further proved that it was deposited by Narindar Singh with the Registrar in a sealed cover and that after his death the cover was opened and the Will was duly registered.

The only contesting defendant in the case is Moti Singh who impugned the Will on various grounds; but his plea that the Will was made under undue influence was overruled by the learned Senior

Sub-Judge who tried the case and it is not pressed before us. It is, therefore, not necessary to detail here all the facts and evidence on which this plea was based but a few facts which throw a side-light on the other aspects of the case may be stated here very briefly. Moti Singh stated that after the death of his mother an illicit intimacy sprang up between his father and Musammat Raj Mani, the married daughter of Wazir Singh and that the boy named Hari borne by her was the issue of this illicit connexion. Móti Singh further asserted that he alienated from himself the affection of his father by objecting to his laison with Musammat Raj Mani which was creating a scandal and that Narindar Singh made the bequest to Wazir Singh not in recognitlon of his services as a menial servant for which he had already been sufficiently remunerated but to make a provision for the boy Hari Singh. Musammat Raj Mani had, however, died on the 13th April 1906 full two years before the date of the Will and her son Hari did not survive her long, the date of his death being 28th September, 1908. But the deaths of these persons led to no reconciliation between Narindar Singh and Moti Singh and there was nothing in evidence to indicate that Wazir Singh exercised an undue influence over his master and induced him by the use of it to make the Will.

The main pleas of Moti Singh, however, were : (1) that the Will had beeu revoked by Narindar Singh; and (2) that the Will was invalid and not binding on them.

The findings of the Court below on both these points are in favour of Moti Singh but after a careful consideration of the evidence on the record we came to contrary conclusions. (The judgment then dealt with evidence and held that no subsequent Will was made by Narindar Singh and that he never revoked the Will or the codicil.) Turning now to the plea of invalidity of the Will, the defendant's contention is that Narindar Singh and his son, grandsons, etc. constituted a joint Hindu family and were co-parceners in all family funds and ancestral property, and that Narindar Singh was, therefore, not competent to will away the property which had been acquired by him with the income derived from the ancestral property. The plaintiff's reply is : (1) that Narindar Singh was not a Hindu but a Sikh ; (2) that even if he was within the pale of Hinduism, he did not follow the Hindu Law and he and his son and grandsons did not constitute a family of co-parceners as contemplated by that law and (3) that in any case he had acquired the properties with the money earned by himself over which he possessed and enjoyed unrestricted power of disposal.

As regards (1) and (2) it is not denied that the Sodhis of Anandpore are followers of Guru Gobind Singh and are "Kesadhari Sikhs" or "Singhs." They are not only Singhs of Guru Gobind Singh but claim to be Gurus themselves and constitute the only priestly class among Sikhs whose function is to convert non-Sikhs to Sikhism by administering Pahul, i.e., baptism by the dagger and sweetened water. The right called Pahul was initiated by Guru Gobind Singh when a person who receives the Pahul is made to declare that his birthplace is Patna Sahib etc., (where Guru Gobind Singhwas born), that his father is Guru Gobind Singh and that his mother is Máta Sahib Devi (wife of Guru Gobind Singh). In this way he renounces all connexion with Hindusim and becomes a true Sikh or Singh. Guru Gobind Singh abolished caste and rejected the authority of Vedas and other Hindu sacred books and laid the foundation of a religion quite distinct from Hinduism. Kesadhari Sikhs of the present day generally say that they are not Hindus. In Civil Appeal No. 559 of 1923 it was asserted that Sikhs are not Hindus and the finding was that in view of the teachings of Guru Gobind Singh his followers may well say that they are not Hindus.

But in the present case the Sodhis of Anandpore claim to be Hindus and this claim rests mainly on the circumstance that they inter-marry with Hindu Khatris. That is the link which connects them with Hindus ; otherwise they are Sikhs as distinguished from Hindus and admittedly they do not follow the Hindu Law in many respects. For instance, they do not wear the sacred thread, do not follow the Hindu rules of adoption, do not perform the tonsure ceremony, etc. Further according to Tikka Ram-Narayan Singh (D. W. No. 7) Anandpore Sodhis do not recognize a widow's right to a life-estate, nor do they allow a daughter or daughter's son to succeed even if the property

were self-acquired. All this is contrary to Hindu Law. The defendant's principal witness. Tika Ram-Narayan Singh (D. W. No. 7), stated that in his family a son has no share in the property of his father during his lifetime even if the property were ancestral, but has added that his heirs could restrain him from alienating his self-acquired property to non-Sodhis. No instance, however, could be cited in suppport of the latter proposition. Succession among the Sikh Gurus from Nanak downwards was in several cases not from father to son or to the eldest.

Further, there is nothing in evidence to show that the position of an Anandpore Sodhi father is the same as that of a father in a joint Hindu family. Narindar Singh was not subject to any restriction in disposing of his property. He gifted a shop to Ralla Singh as will appear from the judgment printed at pages 48—50 of the paper-book and he gifted to Wazir Singh, plaintiff, by a registered deed, dated the 19th April 1905, certain lands which he held in mortgage for Rs. 1,358 : vide Ex. P-111 at page 65 of the paper-book. According to the Mitakshara law a son even if adult is entitled to maintenance out of the ancestral property but Moti Singh defendant did not succeed in getting maintenance from his father.

From all that has been stated above it follows that Hindu Law is not the personal law of the Sodhis of Anandpore and that they do not follow it in matters of inheritance, etc. This being so, there can be no presumption that an Anandpore Sodhi family constituted a coparcenary body in accordance with the Hindu Law of Mitakshara. It, therefore, lay upon the defendant to establish that the constitution of his family was in accordance with that law, but he has failed to discharge it.

The learned counsel for Moti Singh argued that though in the written statement filed by Moti Singh he had expressly stated that he and his father constituted a joint Hindu family this was nowhere denied by the plaintiff. But the replication if filed by the plaintiff has not been printed and it is clear that the point was raised by him as it was put in issue and both parties produced evidence thereon : vide Issue No. 3.

Now we will consider the nature of the property that was in the hands of Narindar Singh and his sources of income. He had a share in Chak Guru a village founded by Guru Tej Bahadur. From him it descended through several generations to Tilok Singh a brother of Narindar Singh's father Diwan Singh.

On the death of Tilok Singh his widow succeeded to it and it was after her death that Diwan Singh's branch inherited it : see the pedigree table Ex. P-8. The Chak thus came to Diwan Singh's branch hy collateral succession, that is to say it was according to Hindu Law obstructed heritage and was separate and self-acquired and not joint family property of the person on whom it devolved. His immovable ancestral property, as stated in the Will, consisted of : (1) a one-third share in a haveli situate at Hardwar ; (2) certain residential houses situated at Anandpore ; (3) one-third share in a shop at Anandpore ; and (4) certain shares in certain Gurdwaras and the property attached thereto. It is not shown what his income from these properties was, but there is nothing to show that it was considerable. Besides the income from the above properties, his other sources of income were threefold: (1) a pension of Rs. 860 per annum from Government ; (2) a jagir of Rs. 2,878 per annum from the Patiala State : see Ex. D. W. No. 6 at page 223 of the printed paper-book : and small jagirs from Bilaspore Tirathpore, Nalagarh and Kalsia States ; (3) offerings from Sikhs generally.

These jagirs are no doubt described in the Will as ancestral property but the word "ancestral" is apparently used here as indicating that the jagirs had descended to the testator from his forefathers. It does not follow from this that the jagir moneys that he realized from time to time constituted ancestral property ; and the moneys received from any of the above sources can by no stretch of language be called ancestral property. A pension is always allowed on condition of good conduct and loyalty to Government, as stated by Moti Singh in his application to the Deputy Commissioner : vide Ex. P-48, para 5 : and though it may be continued from father to son each recipient possesses unrestricted power of expending his pension. The same may be said of jagir moneys

which were paid by way of charity or dharamath : see the evidence of Lala Bansi Lal of the Revenue Department of the Patiala State at page 231 and also Exs. D. W. No. 6 and D. W. No. 7 at pages 223 and 224 in which Narindar Singh himself described the jagir money as dharamarth muafi. In Ex. D-10 also, at page 88, the jagir is stated to be dharamarth. The jagir was evidently liable to forfeiture at the will of the State and payment of the jagir from Patiala was once stopped as would appear from the order of the Patiala State: Ex. D-24 at pages 133-134. As regards the offerings even the ladies of the family receive the same and no recipient, therefore, is liable to account for them to anybody. The income derived by Narindar Singh from all these sources was his own personal income and did not form part of his family funds, if any, and consequently the property acquired by him with that money was his own self-acquired property and he had full power of disposition over it, even if it were assumed that his family was a joint Hindu family. In *Balwant Singh* v. *Rani Kishori* (1) their Lordships of the Privy Ccuncil held that the father of an undivided family subject to the Mitakshara law had full power of disposition over his self-acquired immovable property. In *Jagmohondas Mangaldas* v. *Sir Mangaldas Nathubhoy* (2) it was held that a man is at perfect liberty to dispose of property which he has inherited collaterally.

It has been stated that Narindar Singh had an ancestral money-lending business, but the evidence as to his money lending was that he lent money at a rate lower than that on which he borrowed it. It is, therefore, clear that he could have made no profit by money lending, Further, it appears that the offerings that Narindar Singh received constituted the bulk of his income because he says in his letter (Ex. D-30) that he had acquired his property with the money earned by turning in pursuit of his ancestral (priestly) occupation (*apne abai peshe or phir kar paida ke hai.*)

From all the evidence reviewed above the conclusions that follow are : (1) That there could be no presumption that the testator and his son were coparceners and that the defendant on whom the onus was shifted had failed to establish that they were; and (2) that as the testator's ancestral immovable property was as much as could build but little income and was not sufficient even for his household expenses as indicated by the fact that he had to take large advances of money from the Patiala State for celebrating the marriages of his children; and as his income from other sources was large, the presumption is that the property willed away had been acquired by the testator with the income from those sources and that there was no evidence to rebut that presumption.

We, therefore, accept the appeal, and, reversing the judgment and decree of the Court below, we decree the plaintiff's suit with costs throughout.

Campbell, J.—I have had the advantage of reading the judgment of my learned brother. It seemed to me at the argument that the learned counsel for the respondents in supporting the trial Court's dismissal of the suit relied mainly upon the finding that the property bequeathed to the plaintiff was ancestral property of the joint Hindu family ; and upon the reasons for that finding, the decision, that the Will of the 15th April 1908, was subsequently revoked before the testator's death, was not defended with any great vigour and in my judgment that decision was incorrect. (His Lordship then examined evidence and agreed in decision with Zafar Ali, J.) The following are the learned Subordinate Judge's grounds for deciding that the property bequeathed to the plaintiff was in reality ancestral property belonging to the joint Hindu family consisting of Narindar Singh and his son and grandsons. He has held first that Sikhs are Hindus ; secondly , that being Hindus and Khatris, there is a presumption that they follow the Hindu Law of the Mitakshara; thirdly, that where there is a joint ancestral nucleus the presumption is that subsequent acquisitions are acquired from the proceeds of the nucleus ; fourthly, that Narindar Singh's jagir income was ancestral property and fifthly, that there was no proof of the amount of Narindar Singh's income from offerings or of how

(1) [1898] 20 All. 267=25 I. A. 54=2 C.W.N. 273=7 Sar. 279 (P. C.).
(2) [1886] 10 Bom. 528.

much was utilized in acquiring the property styled self-acquired in the Will.

The answer to the question whether a Sikh is a Hindu depends very much upon the sense in which the word Hindu is used. It is probably correct to say generally that Khatri Sikhs, who are not agriculturists and who do not follow agricultural custom observe the same principles of law as are observed by Hindu Khatris of the Punjab regarding rights in inheritance to property. It was observed obiter by Sir Meredyth Plowden in *Jowahir* v. *Chandi* (3) that in the Punjab at least generally the Mitakshara doctrine of a son being born with a share is not known, nor has a son a right to compel partition. This remark has been cited with approval in more than one later judgment but the first proposition as far as I am aware has never been laid down authoritatively and specifically. The second has and in *Hart Kishen* v. *Chandu Lal* (4) a Full Bench decided that in the Punjab the Mitakshara rule that a son can enforce partition during his father lifetime is not in force. It follows necessarily that in the Punjab a joint Hindu family consisting of a father and son or sons is something different from such a family under the Mitakshara Law.

In the present case we are dealing not merely with a Khatri Sikh family, but with members of the family of the tenth Sikh Guru whose mission in life is to preach and practise Guru Gobind Singh's doctrine of revolt from many essential beliefs and observances of the Hindu religion. A great deal of the evidence given about the rules and customs observed by this family is vague but it appears that many of their rules and ceremonies differ from those of orthodox Hindus. The witness who ought to have the best knowledge of the family rules of inheritance is Tikka Ram-Narayan Singh, Honorary Magistrate and Civil Judge, Viceregal Durbari and head of the family. He was cited for his kinsman the defendant with whom inevitably all his sympathies must be and this is what he says:

I have not studied the Hindu Law and, therefore, cannot say on what points our law resembles the law of other Khatris. I do not know what is the custom of the Khatris in our ilaqa. If two brothers are joint and third is separate and one of the joint brothers dies I cannot say if the separate brother will get a share or not. No such instance has occurred in our family. No instance has occurred in our family in which the nephew and a brother have been left by a third brother who died leaving property. I cannot say whether the nephew will succeed with the uncle or not. I cannot say if difference would be made if all the brothers were joint.

The son has no share in the property of the father during his lifetime even though the property is ancestral. Adoption is admissible only of agnatic by male, the female cannot adopt even with the permission of the husband. Two adoptions took place before me. No ceremonies were performed. In one case a deed also was written and in both declarations were made before baradri and the adopted son was taken by the adoptive father. I cannot say if any limit is fixed as to the age of the adopted boy or whether there is any restriction as to the adoption of the only or eldest son. I do not know any instance in which a daughter's son was adopted or a suit brought for the cancellation, I cannot tell any instance in which the self-acquired property of a person was not inherited by a daughter or daughter's son nor is there any instance on the other side. My heirs whoever they may be can restrain me from alienating any self-acquired property in favour of non-Sodhis. No instance of this sort can be cited.

It seems to me impossible that this important witness contemplated the existence in the Anandpore Sodhi family of the strict Mitakshara co-parcenary system with all its technical incidents and presumptions.

In the written statement the defendants pleaded that Narindar Singh, his son and his grandsons constituted a joint Hindu family, that the entire property was joint acquired with ancestral funds, that all the members were owners of it, and that it belonged only in name to Narindar Singh because he was the manager of the family. The plaintiff's reply given orally and briefly was that Narindar Singh was joint with his grandsons but not with his son and that the property willed to the plaintiff was self-acquired by Narindar Singh. This was no admission of the existence of the Mitakshara co-parcenary and the pleadings do not take us any further.

I cannot agree with the Trial Court that the deceased Narindar Singh's jagir has been shown to be ancestral family property. The fact that he calls it ancestral in the Will does not make it ancestral in the technical sense and means nothing. The so-called patiala jagir is stated by the defendant's witness Lala Bansi Lal, Assistant Superintendent, Revenue Department to have been a charitable allowance and there is evidence that at one time payment of it was

(3) [1892] 90 P. R. 1892.
(4) [1917] 105 P. R. 1917=43 I. C. 667.

stopped. There is no evidence about the character of the allowances received from other States or of the pension stated to have been given by Government and although all the allowances may have been granted because Narindar Singh was a member of the Anandpore Sodhi family they were his separate property in default of proof that the grants were for the benefit of his own joint family. These jagir allowances amounted annually to a substantial sum and were enjoyed by Narindar Singh for many years.

The offerings by disciples were no doubt made because the recipient was a member of this priestly family but they were manifestly personal gains acquired without the aid of joint family property. There is evidence that the deceased's income from this source was considerable. The witness speaks of thousands of rupees. The deceased Narindar Singh and his son are on the worst of terms. The learned Subordinate Judge has found that since 1897, until his father's death the son was refused maintenance and the fact is clear indication that there was no blending of self-acquired property with ancestral property of Narindar Singh.

The issues drawn by the Trial Court were as follows :—

The first was on a preliminary point and is omitted.

(2) Did Sodhi Narindar Singh make a Will in favour of plaintiff on 15th April 1919? On plaintiff.

(3) Is the Will valid in law and custom and was deceased Sodhi Narindar Singh competent to make it in the presence of his son and grandson ? On plaintiff.

(4) Is the bequeathed property ancestral and was Sodhi Narindar Singh not competent to bequeath the same in favour of plaintiff ? On defendant.

(5) If the existence of the Will is established was the Will made under undue influence and did he make the Will on account of immoral connexion with the daughter of the plaintiff and the Will was therefore, invalid and inoperative. On defendants.

(6) Did Narindar Singh make any partner (?) and subsequent Will cancelling the previous one, if he did when did he do it ? On defendants

(7) Did plaintiff so conduct himself as to show that he treated the will as fictitious and practically cancelled and is, therefore, estopped from bringing this suit ? On defendants.

(8) Is there any custom of riwaj amongst Sodhis which disabled Shodhi Narindar Singh to make a Will in favour of a stranger and a man of low position ? On defendant.

The Trial Court found in favour of the plaintiff-appellant on Nos. 2 and 7 and the findings are not disputed on No. 3 I hold that the Will was valid since the property bequeathed to the plaintiff was not that of a co-parcener under the Mitakshara Law but was self-acquired separate property which belonged exclusively to Sodhi Narindar Singh and which under Hindu Law and general custom he could gift or bequeath to any person he chose. No. 4 is covered by the same decision. The property was not ancestral. It was not inherited from an ancestor and the means of acquistion were Sodhi Narindar Singh's separate property. On No. 5 I hold that the Will was not invalid for any of the reasons suggested and on Nos. 6 and 8 in the negative. There was no clear finding by the Trial Court on No. 8 but no claim that such a custom has been proved was made in the lengthy argument addressed to us in support of the lower Court's decree. The signature by several members of the family of a statement of custom appended to the genealogical tree, to which Justice Zafar Ali has referred could have been at the very most an attempt to create customs and in the circumstances in which the signatures were obtained, was not even this. There is no evidence whatsoever of the existence of the particular custom propounded in the 8th issue.

As a result I concur in the order accepting the appeal and decreeing the suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 400

LE ROSSIGNOL AND MARTINEAU, JJ.

Benarsi Das—Petitioner.

v.

Commissioner of Income-tax, Lahore—Respondent.

Civil Miscellaneous No. 543 of 1924
Decided on 11th January 1926.

Income-Tax Act (11 *of* 1922), *S.* 66 (3)—*Assessee debarred from making application to Commissioner cannot move High Court.*

The High Court may be moved under S. 66 (3) only when the assessee is competent to apply to the Commissioner under S. 66 (2) but where the assessee is debarred from making such application to the Commissioner, he is not entitled to move

the High Court for requiring the Commissioner for stating the case.

Moti Sagar and *Jagan Nath Aggarwal* —for Petitioner.

Carden-Noad—for Respondent.

Le Rossignol, J.—The petitioner assessee applied to this Court for the issue of a *mandamus* to the Income-tax Commissioner to state a case. The power of this Court in this class of proceeding is defined in S. 66 (3) of the Income-tax Act of 1922, and this Court may be moved under S. 66 (3) only when the assessee is competent to apply to the Commissioner under S. 66 (2).

Now the assessee in this case was debarred from making such application to the Commissioner, for the reason that he had failed to comply with the assessing officer's demand for accounts and consequently had no right of appeal. For the foregoing reasons, we hold this petition to be incompetent and we dismiss it with costs.

Application dismissed.

A. I. R. 1926 Lahore 401

BROADWAY AND FFORDE, JJ.

Orient Bank of India, Limited—Objector—Appellant.

v.

Secretary of State—Respondent.

First Appeal No. 2934 of 1922, Decided on 23rd February 1926, from the order of the Dist. J., Lahore, D/- 29th May 1922.

Land Acquisition Act. S. 9—Notice of claim.

Merely placing an uncertified copy of a sale deed before the Collector is not a sufficient compliance with the provisions of S. 9. [P 402 C 1]

Hargopal—for Appellant.

The Govt. Advocate and *Mehr Chand Mahajan*—for Respondent.

Judgment.—This appeal has arisen out of a reference uuder the Land Acquisition Act. Three kanals 12 marlas out of a large area that had been acquired by Government belonged to the Orient Bank. An award was made on the 26th April 1920, under which the Orient Bank which was in liquidation, was to receive Rs. 197-10-0 as compensation for the said 3 kanals 12 marlas. On the 14th June 1920, an application was made on behalf of the Orient Bank in liquidation by the joint liquidator to the Collector in which objection was taken to the amount awarded. It was admitted in this application that the Bank had not thought it necessary to put in any formal statement as required by S. 9 (2) of the Land Acquisition Act. In this application no specific amount of compensation was claimed, but it was asked that a reference should be made to the District Court relating to the value of the property acquired. This reference was made in due course and in it it was stated that notice under S. 9 of Act 1 of 1894 had been served on the Orient Bank on the 14th August 1919. No appearance was made on behalf of the Bank before the Collector, but an uncertified copy of a sale deed in favour of the Orient Bank was sent to the Collector which was returned. It will be seen that up to the date of the reference no specific amount had been claimed as compensation for the land acquired. On the 8th November 1921, another application was filed on behalf of the Orient Bank by the joint liquidator to which was attached the original sale deed. It was pointed out that the joint liquidator had on the 16th November 1920, made a statement in Court claiming Rs. 300 per kanal for the land acquired. On this application the learned District Judge recorded an order that the whole case had been finished and judgment was about to be delivered. For that reason nothing could be done on this application. The learned District Judge's award confirmed the Collector's award, that is to say, the award of Rs. 197-10-0 was maintained. Against this order the Orient Bank in liquidation has preferred this appeal through Mr. Hargopal.

On behalf of the respondent the learned Government advocate has raised an objection founded on S. 3 (2) of the Land Acquisition Act which requires every person whose land is taken under this Act and who has any occasion to advance any specific claims to the land which require to be considered, to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. Admittedly no such claim was ever made to the Collector; that is to say, that no specific amount was ever stated by the Orient Bank in liquidation as being what they wanted for their land

Mr. Hargopal has urged that the fact that on behalf of the Orient Bank an uncertified copy of a sale deed, was placed before the Collector was a sufficient compliance with the provisions of this section. That sale deed purports to convey to the Orient Bank an area of 4 kanals and some marlas of land for Rs. 1,200. The land acquired is 3 kanals 12 marlas out of the land referred to in the sale deed. The mere fact that the Collector was notified that this land had formed a portion of a plot of land purchased by the Orient Bank, Limited, cannot, in my opinion, be regarded as the statement of the amount claimed by the Bank as compensation for the land acquired. It was not until the 16th November 1920, that Mr. Mukerji, the joint liquidator, stated that the amount he claimed was at the rate of Rs. 300 per kanal. The learned District Judge has not acted under the third subclause of S. 25, and, therefore, under the second clause of that section he could not award a sum exceeding the amount awarded by the Collector. This view is supported by *Secretary of State* v. *Gobind Lal Bysak* (1) and the *Secretary of State* v. *Bishen Dutt* (2). In these circumstances the appeal fails and I would dismiss it with costs.

Appeal dismissed.

(1) [1907] 12 C.W.N. 263.
(2) [1911] 33 All. 376=9 I.C. 423=8 A.L.J. 115.

A. I. R. 1926 Lahore 402

CAMPBELL, J.

Duni Chand—Plaintiff—Petitioner.

v.

Ram Dhan and *others*—Defendants—Respondents.

Civil Revision No. 131 of 1925, Decided on 25th February 1926, from a decree of the senior Sub-J., Hissar, D/- 18th November 1924.

(a) *Civil P. C., S. 99—"Jurisdiction."*

In S. 99 by 'jurisdiction of the Court' is meant the jurisdiction of the trial Court. [P. 402, C. 2]

(b) *Civil P. C., S. 99—Lower Court not paying heed to S. 99 acts with material irregularity and its decision can be set aside in revision under S. 115.*

Where the lower Court acts with irregularity in the exercise of its jurisdiction in not paying heed to the provisions of S. 99 and that irregularity is material, in that it results in the appeal being accepted on a pure technicality, its decision is liable to be set aside in revision. [P. 403, C. 1]

Fakir Chand—for Petitioner.

Nanak Chand—for Respondents.

Judgment.—Two persons Ram Dhan and Shibu Mal are alleged to have owed a debt of Rs. 700 increased by interest to Rs. 1,000 to Duni Chand and Arjan Mal. Duni Chand and Arjan Mal subsequently separated and two suits were brought each for Rs. 500, (a) by Duni Chand against Ram Dhan and Kanwar No. 1; and (b) by Kanwar No. 2, son of Arjan Mal, against Ram Dhan and Kanwar No. 1. In the trial Court the same issues were framed in both cases and with the consent of the parties and their counsel the evidence in both suits was recorded in one of them. In each suit the plaintiff was given a decree. Ram Dhan, one of the defendants, appealed in one suit only i. e., that of Duni Chand. No appeal was preferred in the other. When the appeal came before the learned Senior Subordinate Judge a point was raised that the plaintiffs could not split up the agreement and sue separately each for his half share. This contention was never put forward either in the trial Court or in the memorandum of appeal to the Senior Subordinate Judge. It appears to have been made for the first time at the hearing of the appeal. It was accepted by the Senior Subordinate Judge and in consequence the appeal was decreed.

Duni Chand has come to this Court on revision. Whether or not the two suits were competent was a question of law which the learned senior Subordinate Judge had jurisdiction to decide, and, even if his decision were erroneous, there would be no ground for interference with it by this Court on revision. The learned senior Subordinate Judge, however, has overlooked S. 99 of the Civil P. C. which prohibits an appellate Court from reversing a decree on account of misjoinder of parties or causes of action or of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. By 'jurisdiction of the Court' is meant the jurisdiction of the trial Court. In the present instance it is clear that the merits have not been affected from the facts: (a) that no objection was taken in the trial Court; (b) that in the trial Court both

parties agreed to the suits being heard together and this was done; (c) that no appeal was preferred in the other suit although the issues and the decisions on them were precisely the same; and (d) that there was no objection raised in the written memorandum of appeal.

The learned senior Subordinate Judge acted with irregularity in the exercise of his jurisdiction in not paying heed to the provisions of S. 99 and that irregularity was material since it resulted in the appeal being accepted on a pure technicality. I accept the petition, set aside the decree of the lower appellate Court and return the appeal to him for re-decision on the other points which arise.

Costs in this Court will follow the result.

Appeal returned.

A. I. R. 1926 Lahore 403

BROADWAY, J.

Gauri Shankar—Defendant—Appellant.

v.

Anant Ram—Plaintiff—Respondent.

Miscellaneous Appeal No. 1941 of 1925, Decided on 13th January 1926, from a decree of the Dist. J., Amritsar, D/- 25th May 1925.

Court-fees Act, Sch. 1, Art.,—Appeal from decree on an award on reference under Civil P. C., Sch. 2, R. 1, must bear ad valorem Court-fee.

Where a decree is passsd in terms of an award on a reference under Civil P. C., Sch. 1, R. 1, Court-fee for an appeal from such decree is ad valorem. [P 403 C 2]

Lal Chand Mehra—for Appellant.

Badri Das—for Respondent.

Judgment.—A suit was pending in the Court of the Subordinate Judge, Amritsar, between Anant Ram and Gouri Mal. During the pendency of the suit, the parties took action under para. 1 of the Second Schedule to the Civil P. C. of 1908, and the dispute between them was duly referred to arbitration. An award followed to which objection was taken. The objection was set aside and judgment pronounced according to the award as required by para. 16 (1). A decree followed upon that judgment so pronounced.

Gauri Mal thereupon preferred an appeal to the learned District Judge attacking the judgment pronounced under para. 16 (1). Objection was taken to the hearing of the appeal on the ground, that it was improperly stamped. This objection was given effect to by the Additional District Judge and the appellant was directed to make good the necessary Court-fee. This he refused to do and the appeal was rejected. Gauri Mal has now come up to this Court through Mr. Lal Chand Mehra, and I have heard Mr. Badri Das for the respondent.

It was argued by Mr. Mehra that inasmuch as the order filing the award was appealable under S. 104 (*f*) of the Civil P. C., such an appeal would lie with a Court-fee of Re. 1. As a matter of fact there are authorities which may lay down that although an appeal under S. 104 (*f*) is competent notwithstanding the fact that an award though filed has been the basis of a decree in its terms, nevertheless the Court-fee payable on such an appeal would be ad valorem: see in this connexion *Lala Dharam Das* v. *Ajudhia Pershad* (1) and *Hari Mohan Singh* v. *Kali Prosad Chaliba* (2). It is, however, not necessary for me to discuss this matter any further inasmuch as the view taken by the District Judge is correct in this particular case. Mr. Lal Chand Mehra claimed to be entitled to appeal under S. 104 (*f*) Civil P. C. A reference to that section, however, shows that it relates to an order filing or refusing to file an award in an arbitration without the intervention of the Court. In the present case, the arbitration was made under the provisions of para. 1 of the Second Schedule and that being the case there was no order necessary nor was one passed within the meaning of S. 104 (*f*).

In the present case the proceedings were governed by para. 16, and Mr. Lal Chand has been unable to show me under what law he is entitled to appeal against the judgment pronounced under para. 16. Whether or not an appeal against the decree was competent, the Court-fee, undoubtedly, should have been paid as calculated by the learned District Judge.

This appeal is, therefore, dismissed with costs.

Appeal dismissed.

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(1) [1881] 70 P. R. 1881.
(2) [1906] 33 Cal. 11.

A. I. R. 1926 Lahore 404

ADDISON, J.

Firm Chhota Lal-Amba Parshad—Plaintiffs—Appellants.

v.

Firm Basdeo Mal-Hira Lal—Defendants—Respondents.

Second Appeal No. 1371 of 1925, Decided on 18th February 1926, from a decree of the Dist. J., Delhi, D/- 23rd January 1925.

(a) *Civil P. C., O. 41, R. 1—Presentation of appeal with unattested copy of judgment is proper when attested copy is not available.*

It is sufficient compliance with law if second appeal is presented with unattested copy of first Court's judgment, when an attested copy was applied for, but the report was that the record could not be traced. [P. 404, C 1]

(b) *Limitation Act, Art. 115—Limitation for suit for non-delivery of goods of various shipments begins from last day of arrival of last shipment.*

No cause of action for a suit for non-delivery of goods of various shipments accrues to the plaintiff until the last day of arrival of the last shipment and limitation for such a suit begins from that day. *A.I.R. 1925 Lah. 513, Foll.* [P. 404, C 2]

Jagan Nath Aggarwal—for Appellants.

Shamair Chand—for Respondents.

Judgment.—A preliminary objection was taken on behalf of the respondents that this second appeal was time-barred as though it was filed within time it was not accompanied by an attested copy of the first Court's judgment though there was an unattestsd copy of that judgment filed with the appeal. It is clear, however, that an attested copy was applied for but was not supplied, the report being that the record could not be traced. In my opinion there has been a sufficient compliance with the law in these circumstances. It is true that up to date no attested copy has been placed on this record but the appellant is ready to do so. I see no reason to call upon him to put such an attested copy upon the record and overrule the objection.

The suit was one for non-delivery of five bales of white mulls which the defendants had contracted to sell to the plaintiffs on the 17th November 1916. The suit was instituted on the 30th July 1920. The contract was for five bales of white mulls, December shipment three lots, 60 days grace, payment to be against railway receipts and invoices. Various defences were raised and the plaintiffs' suit was dismissed by the Court of first instance. On appeal the learned District Judge held that the due date of the first instalment, i. e., the December shipment, expired about the 30th June 1917, and that the suit as regards that instalment was accordingly time-barred. He held, however, that the suit for the other two instalments was within time and he accepted the appeal and granted the plaintiffs a decree for Rs. 356-4-0 with proportionate costs in both Courts. Against this decision the plaintiffs have filed cross-objections.

The principal point argued before me was the question of limitation. It was contended that the lower appellate Court erred in dividing the contract into several parts for purposes of limitation and that the whole contract should have been treated as an indivisible one and not an instalment contract. It is unnecessary to labour this point ; for it is covered by authority. Two Division Benches of this Court have held that a contract such as the present one was not an instalment contract, that the defendants could have delivered goods under it up to the last day of arrival of the last shipment and that the plaintiffs could not sue for damages for breach of contract until that date had expired. These rulings are *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Pershad* (1) and Civil Appeal No. 1000 of 1925. All the points taken in this appeal and in the cross-objections are covered by these two authorities. I, therefore, hold that the whole claim was within time.

The District Judge found that the due date for the last instalment was the 30th August 1917. It was contended, however, that here again he erred as there is good evidence which he did not consider that March shipments were arriving in September 1917. It is clear that the defendants could have shipped the goods up to March 1917 at least, and as such shipments were still arriving at Karachi in September 1917 no breach of contract took place till then. After the goods arrive it takes about a week to clear them and then the documents have to be posted to Delhi through some Bank for acceptance. This would certainly take us to the 26th September 1917 and there is evidence that on that date the rate was Rs. 6-10-0. The contract rate plus for-

(1) A. I. R. 1925 Lah. 513.

warding charges comes to Rs. 5-6-0. The difference is Re. 1-4-0. This has to be multiplied by Rs. 750 so that the plaintiffs suit should have been decreed for Rs. 937-8-0 whereas the learned District Judge only allowed Rs. 356-4-0.

I accordingly accept this appeal by raising the amount decreed by the learned District Judge from Rs. 356-4-0 to Rs. 937-8-0, i. e., by raising it by the sum of Rs. 581-4-0. The appellant will have his costs on the latter sum in this Court and on the sum of Rs. 937-8-0 in the two lower Courts. The cross-objections are dismissed but without costs.

Appeal accepted.

A. I. R 1926 Lahore 405

BROADWAY AND FFORDE, JJ.

Mehr Singh—Accused—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 757 of 1925, Decided on 23rd March 1926.

Criminal Law Amendment Act (14 *of* 1908), *S.* 17 (2)—*Person taking active part in assisting to organize a meeting is promoting it.*

A person who takes an active part in organizing or assisting to organize a meeting must clearly be regarded as promoting or assisting to promote it. In the ordinary dictionary sense to promote an undertaking is to forward, further or encourage it, and a person who takes a part in the actual management of a meeting is obviously furthering or encouraging such meeting. [P. 405, C 2]

Man Singh—for Petitioner.

Ram Lal—for Opposite Party.

Fforde, J.—The finding of the appellate Court in this case is that the petitioner assisted in the arrangements for the reception of the audience at meetings of an unlawful association which took place on the 9th and 10th July. He also assisted in keeping order in a procession which took place on the 9th in connexion with these meetings, and is proved to have taken charge of sums of money which were raised on this occasion.

Upon these facts the lower Courts have held that the offence has been established under the provisions of S. 17 (2) of the Criminal Law Amendment Act, which provides, inter alia, that a person who promotes or assists in promoting a meeting of an unlawful association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine or with both. In my opinion the conclusion of the Court on this point is sound. A person who takes an active part in organizing or assisting to organize a meeting must clearly be regarded as promoting or assisting to promote it. In the ordinary dictionary sense, to promote an undertaking is to forward, further or encourage it, and a person who takes a part in the actual management of a meeting is obviously furthering or encouraging such meeting.

The petitioner was sentenced by the trial Court to two years' rigorous imprisonment and a fine of Rs. 100, or, in default of payment of fine, to undergo a further two months' rigorous imprisonment. He appears to have been given a further concurrent sentence by the trial Court under the provisions of S. 17 (1) of the Act, but from the judgment before me it is not clear what that sentence was. The appellate Court has reduced the imprisonment imposed under S. 17 (2) to 18 months.

The petitioner has already undergone a little over 10 months' rigorous imprisonment. The learned Sessions Judge in the course of his judgment stated that "this man seems not to have played so prominent a part as the other accused." Under these circumstances I do not think that it would be in the interests of justice to inflict a greater punishment upon him than has been imposed upon the other petitioners before us, and therefore I do not think that he should be ordered to undergo the unexpired portion of his term of imprisonment. I would accordingly, while maintaining the conviction, reduce his sentence to the period already undergone, and direct that his bail bond be discharged.

Broadway, J.—I agree.

Sentence reduced.

A. I. R. 1926 Lahore 406

BROADWAY AND FFORDE, JJ.

Basant Singh—Accused—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 668 of 1925, Decided on 23rd March 1926.

Criminal Law Amendment Act (14 of 1908), S. 17 (1)—Accused admitting to be jathadar of the organization with which he is charged is guilty under S. 17 (1) but not under S. 17 (2) unless there is a Jatha in existence.

An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged to disclose an offence under that section.

Where the charge stated that the accused was the jathadar of the Akali Dal and as such addressed meetings of the Akalis and appealed to the Sikhs to organize themselves into jathas, and he admits himself to be a jathadar of that organization, he is admitting that he is a member of an unlawful association, therefore pleading guilty to an offence under the provisions of S. 17 (1).

[P. 406, C. 2, P. 407, C. 1]

The words "jathadar" means a person who leads or controls a jatha, and if it is proved that there was any jatha being at that time led or controlled by the accused, he would obviously be guilty of managing an unlawful association.

[P. 407, C. 1]

Man Singh—for Petitioner.

Ram Lal—for Opposite Party.

Ffrode, J.—In this case the petitioner has been convicted on a charge which runs as follows :

That you, on or about the 15th May 1924 and 22nd August 1924 at the Singh Sabhas, Rawalpindi and Gujar Khan, respectively, as jathadar Akali Dal, Gujar Khan, addressed the meeting of the Akalis and appealed to the Sikhs of the district to organize themselves into jathas to proceed to Jaito in the Nabha State and Bhai Pheru in Lahore district in the name of the Shiromani Gurdwara Prabandhak Committee. The Akali Dal and the G. P. C. and all the jathas organized by or affiliated to these bodies are declared unlawful associations under Punjab Government Notifications Nos. 23772 and 23773 dated 12th October 1923, and thereby committed an offence punishable under S. 17 (2) of the Criminal Law (Amendment) Act and within my cognizance.

After evidence had been led for the prosecution, establishing the acts set out in this charge, the charge was explained to the petitioner, and on his being asked to plead to it he pleaded guilty and added that he was prepared to repeat the offence in future. He declined to produce any evidence in his defence.

Mr. Man Singh for the petitioner has argued that the charge does not disclose an offence under S. 17 (2) of the Criminal Law (Amendment) Act. He contends that even assuming that the petitioner was the jathadar of the Akali Dal, Gujar Khan, and that he addressed meetings of the Akalis of that district urging them to organize themselves into jathas and proceed to Jaito and Bhai Pheru in the name of S. G. P. C., this did not amount to managing or assisting in managing an unlawful association or promoting or assisting in promoting a meeting of any such association or of any members thereof as such members.

Mr. Ram Lal for the Crown on the other hand argued that the petitioner, having pleaded guilty generally to the charge, must be deemed to have admitted the committing of an offence punishable under S. 17 (2), Criminal Law Amendment Act, as that section is specifically mentioned in the charge. I will first deal with Mr. Ram Lal's contention. In my opinion the plea of guilty amounted to an admission that the petitioner occupied the position as stated in the charge and committed the acts therein specified, but unless the facts averred in the charge amount in law to an offence under S. 17 (2) Criminal Law (Amendment) Act, the plea cannot amount to the admission of guilt under that section. An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged to disclose on offence under that section. Accordingly we have to consider whether the facts set out in the charge establish an offence within the provisions of the Criminal Law (Amendment) Act.

The respondent's admission amounts to this : He was the jathadar of the Akali Dal, Gujar Khan, and as such addressed meetings of the Akalis and appealed to the Sikhs of the Gujar Khan district to organize themselves into jathas for the purpose of proceeding to Jaito in a Native State and Bhai Pheru in the Lahore district in the name of the S. G. P. C. Now, by Notification No. 23772, dated 12th October 1923, the S. G. P. C. and all jathas organized by or affiliated to this body were declared to be unlawful associations. By Notification No. 23773 of the same date the association known as the Akali Dal, otherwise known as the Shiromani Akali

Dal, and all jathas organized by or affiliated to this body are declared to be unlawful associations, and a person who admits himself to be a jathadar of that organization is admitting that he is a member of an unlawful association. He has, therefore, pleaded guilty to an offence under the provisions of S. 17 (1) of the Criminal Law Amendment Act, which provides that whoever is a member of an unlawful association or takes part in meetings of any such associations, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations, shall be punished with imprisonment for a term which may extend to six months, or with fine or both. A further admission by the petitioner that he addressed meetings of the Akalis and asked them to form jathas in the name of the S. G. P. C. clearly amounts in my opinion to an admission that he is assisting the operations of S. G. P. C. There can therefore be no question whatsoever as to his having pleaded guilty to an offence under S. 17 (1) of the Act.

The evidence moreover conclusively established an offence under this sub-section. He has not, however, been charged under this section but under S. 17 (2), and the question therefore is whether the facts set out bring him within the provisions of that sub-section. To come within the latter provisions he must be proved to have managed or assisted in managing or to have promoted or assisted in promoting, a meeting of the Akali Dal or of any members thereof as members. To this effect he has not pleaded guilty and it does not appear to me that the finding of the lower appellate Court establishes an offence under this sub-section. I understand the word "jathadar" to mean a person who leads or controls a Jatha, and if it had been proved that there was any Jatha in being at that time led or controlled by the petitioner, he would obviously be guilty of managing an unlawful association. It appears, however, that the object of the meeting in question was to bring such a jatha into being. The charge brought by the petitioner against the people of Gujar Khan was that they had not done their duty to the S. G. P. C. in forming jathas, and it is not suggested in evidence that any jatha had been formed at that place. It cannot therefore be said that the petitioner by describing himself as a jathadar has been proved to have managed or assisted in managing an unlawful association.

I do not see, either, how he can be said to have promoted or assisted in promoting a meeting of a proclaimed association. It is true that he was the principal speaker at the meeting of 15th May, but speakers at public meetings are not necessarily the persons who organize these meetings, and there is no evidence to the effect that the petitioner either promoted or assisted in promoting the meeting, using these words in their ordinary significance. I am, therefore, of opinion that the conviction under S. 17 (2) cannot stand. Under S. 17 (1) the maximum punishment which may be imposed is imprisonment for a term of six months and a fine. The petitioner has already undergone a term of more than six months imprisonment and accordingly if he had been charged with and convicted of an offence under S. 17 (1), he would have served the maximum term of imprisonment for such an offence.

For the reason given I would accept the petition to the extent of altering the conviction to one under S. 17 (1), and would direct that his bail bond be discharged and he be set at liberty.

Broadway, J.—I agree.

Conviction altered.

A. I. R. 1926 Lahore 407

SHADI LAL, C. J.

Bishambar and *others*—Complainants—Petitioners.

v.

Ram Chand and *others*—Accused—Respondents.

Criminal Reference No. 43 of 1926, Decided on 12th March 1926, made by the Dist. Mag., Hoshiarpur, on 26th December 1925.

Criminal P.C., S. 344—One of the accused absent—Complainant failing to produce evidence should not be burdened with costs of adjournment.

A Magistrate is not justified in ordering costs of adjournment to be paid by complainant for failure to produce evidence when one of the accused is not present on the date and an adjourn-

ment is necessary in order to procure the attendance of the absent accused.

N. C. Pandit—for Respondents.

Order.—There can be no doubt that the complainants had committed default in producing their evidence, and that the trial Magistrate would have been justified in ordering them to pay costs of the adjournment, had it not been for the fact that one of the accused was not present on the date in question, and an adjournment was necessary in order to procure the attendance of the absent accused.

In these circumstances I set aside the order directing the complainants to pay Rs. 30 to the accused as costs of the adjournment.

Order set aside.

A. I. R. 1926 Lahore 408

CAMPBELL AND ZAFAR ALI, JJ.

Atma Singh—Defendant—Appellant.

v.

Nathu Mal and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 1371 of 1922, Decided on 30th January 1926, from the decree of the Sub-J., 1st Class, Amritsar, D/- 3rd February 1923.

Court-Fees Act, Sch. 1, Art. 1—Decree providing realization of portion of decretal amount from certain property—Appeal for release of that property from decree must be valued ad valorem.

Where a vendor obtained a decree against his vendees and subsequent transferees for the balance of purchase-money for property consisting of a house and a shop, and the decree provided portion of the decretal amount to be realized by selling the shop of which appellant was last vendee and he appealed against so much of the decree as rendered his property liable and sought that he should be released from the decree;

Held: that the proper stamp to be paid was one ad valorem on the value of the decree, not exceeding however, the value of the shop : 30 *Mad.* 96 (*F. B.*), *Foll.* [P. 408, C. 2]

J. G. Sethi—for Appellant.

Jagan Nath Aggarwal, Balwant Rai, Hakumat Rai and *Lal Chand*—for Respondents.

Campbell, J.—A preliminary objection is taken that there has been no proper presentation of this appeal which was filed on a Court-fee stamp of Rs. 10 on 1st May 1922. The nature of the suit is as follows : In 1919 the plaintiff sold a shop and house to Ganga Bishen, Lalu Mal and Sain Das for Rs. 18,500. A stipulation was made that Rs. 12,000 of the sale price were to remain in deposit with the vendees to be paid within a year, together with interest, the properties being hypothecated for the amount due. The three vendees subsequently resold the house and shop which passed through several hands until finally the house was acquired by Karam Chand and the shop by Atma Singh. The suit is by the original vendor against his own vendees and the subsequent transferees for Rs. 13,051-12-0.

The lower Court has decreed in favour of the plaintiff as follows : Jamna Das one of the intermediate transferees is to pay Rs. 528. The balance is to be realized from the house. In case of deficiency it is then to be realized from the shop aud if there is any further deficiency the original vendees are responsible for it. Atma Singh, who holds the shop, has now appealed on four grounds, of which the first is that the lower Court erred in holding that the appellant was not entitled to prove that payment of money was conditional on delivery of possession, and the other three maintain that Atma Singh is in no way liable for the claim and that the plaintiff has no lien on the shop.

The law is clear as to the proper Court-fee to be paid on such an appeal It was pointed out in *Venkappa* v. *Narasimha* (1), the decision which was approved by a Full Bench in *Kesavarapu Ramakrishna Reddi* v. *Kotta Kota Reddi* (2). The Full Bench decision was followed in *Jugal Pershad Singh* v. *Parbhu Narain Jha* (3) and *Tharu Mal* v. *Chandu Ram* (4). The appellant's appeal was against so much of the decree as rendered his property liable and sought that he should be released from the decree. The proper stamp to be paid was one ad valorem on the value of the decree, not exceeding, however, the value of the shop. The appellant should have valued his shop and paid Court-fee on that valuation, and if the respondents had challenged the correctness of the valuation, the matter would

(1) [1887] 10 Mad. 187.
(2) [1906] 30 Mad. 96=16 M.L.J. 458 (F.B.).
(3) [1910] 37 Cal. 914=8 I.C. 1145.
(4) [1916] 11 P.R. 1916=33 I.C. 138=59 P. W.R. 1916.

have been investigated and adjudicated upon in the usual manner. Instead of this, and in spite of objections raised by the office the appellant insisted upon appealing on Rs. 10 stamp and declaring the value of his appeal for purposes of Court-fee to be declaratory.

There is no force in the appellant's learned counsel's argument that for all practical purposes there was an adjudication on the question of Court-fee stamp by the taxing officer. The case was never before the taxing officer. In our opinion the appellant's learned counsel could have had no reasonable doubt about the law governing his case and there was no bona fide mistake. We refuse, therefore, to extend time under S. 149, Civil Procrdure Code, and we dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 409

BROADWAY AND FFORDE, JJ.

Lachi and *others*—Appellants.

v.

Surja and *others*—Respondents.

Second Appeal No. 648 of 1923, Decided on 17th March 1926, from a decree of the Dist. J., Karnal, D/- 9th January 1922.

Custom—(Punajb)—Alienation—Buying a house to live in is necessity.

Where the only ancestral house belonging to a person is sold in execution of decree and his ejectment from that ancestral house is imminent, and it is not easy to rent a house in the village, his buying a house to live in is a necessity.

[P. 409, C. 2, P. 410, C. 1]

Shamair Chand—for Appellants.

Balwant Rai and *Badri Das*—for Respondents.

Judgment.—This second appeal has arisen in the following circumstances: On the 16th February 1921 one Chelu, a Jat of Karnal, sold 39 bighas 10 biswas of land to Lachhi Ram and Banu Mal, sons of Telu Mal, for Rs. 6,000. On the 26th April 1921, Surja, one of Chelu's reversioners instituted a suit for the usual declaration to the effect that the sale would not be binding on him on the ground that it had been effected without consideration and necessity. The vendees claimed that there had been necessity for the sale and that full consideration had passed. They also pleaded that the property was not ancestral. The Courts below have held that the property was ancestral, by which conclusion we are bound, and further that the whole consideration passed, and that out of it all but a sum of Rs. 2,115 was for necessity. Accordingly the sale was transformed into a mortgage charging a sum of Rs. 3,885 on the property, and Surja was granted a decree accordingly,

In this second appeal, before us, Mr. Shamair Chand has urged that the conclusion arrived at by the Courts below that the balance of the consideration which had been advanced to Chelu for the purpose of purchasing a house and with which a house had actually been purchased was not for necessity. No direct authority has been brought to our notice on this point. It appears that Telu Mal, the father of the vendees, had held the ancestral house belonging to Chelu on mortgage. He had obtained a decree on this mortgage and had brought the house to sale, the auction sale taking place in October 1919, and the sale had been confirmed. It is obvious that Chelu had done his level best for as long a period as he could. It is equally clear that he was being pressed to vacate; for he actually did surrender possession of his house to the auction-purchaser on the 25th February 1921. In order to have a house to live in he entered into an arrangement by which he bought a house on the 13th February 1921, and in order to obtain the funds necessary to pay for it sold the land in question on the 16th February 1921. The vendees are non-agriculturists and the sale had, therefore, to be sanctioned by the Deputy Commissioner.

The point for determination is whether in this case it was necessary for Chelu to part with ancestral property in order to purchase a house to live in. The Courts below have held that it was not necessary for Chelu to purchase "another house." The use of the words "another house" by the learned District Judge indicates that the learned District Judge was under the impression that Chelu was the owner at least of one house other than the one purchased, whereas that is not the case. His ancestral house had already been sold in execution of the decree as already pointed out and his

ejectment from that ancestral house was imminent. He is an old man of 80 without any son and accustomed to live in a house of substantial dimensions which is evident from the fact that his ancestral house which was sold realized a sum of Rs. 2,000. There is no evidence on the record to show that any houses were available in this village to be rented, and as a rule it is not easy to rent a house in a village. I would also point out that in the Court below the respondents' counsel appears to have admitted that a house to live in was a necessity, his argument being that it was not necessary to buy one. As already stated there is nothing to show that a house could be rented, and in the special circumstances of this case, I think that the purchasing of this house by Chelu must be regarded as a necessity.

I would, therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 410

JAI LAL, J.

Trilok Singh and *another*—Accused—Petitioners.

v.

The Crown—Opposite Party.

Miscellaneous Criminal Application No. 33 of 1926, Decided on 4th May 1926, for transfer of cases.

Criminal P. C., S. 526—One prosecution witness friend of complainant and of Magistrate also—Case should be transferred.

Where one of the prosecution witnesses is alleged to be a great friend of complainant and the Magistrate also is on friendly terms with the witness, the case should be transferred to another Magistrate. [P 411 C 1]

Nand Lal—for Petitioners.

Judgment.—A chalan under S. 325, Indian Penal Code, was presented against Trilok Singh, the petitioner, in the Court of the Magistrate, 2nd Class, Samrala. The petitioner filed a complaint under Ss. 392/148 of the Indian Penal Code and S. 107 of the Criminal Procedure Code against Man Singh the complainant in the first case, and others. This complaint was sent by the District Magistrate of Ludhiana to Sardar Dhian Singh, Magistrate, 1st Class, Ludhiana. The latter, after examining the complainant on the 14th November 1925, decided to enquire into the case under S. 202 of the Criminal Procedure Code and fixed the 5th December 1925 for the evidence of the complainant. In the meantime the Magistrate, 2nd Class, of Samrala, commenced the trial of the case under S. 325.

The petitioner applied to the District Magistrate on the 16th November 1925 for the transfer of the case from the Court of the Magistrate, 2nd Class, Samrala, on two grounds : (1) that his complaint under Ss. 392/148, Indian Penal Code, and S. 107, Criminal Procedure Code, was pending before the Magistrate, 1st Class, and it was desirable that both the cases should be tried by the same Magistrate. A complaint under S. 392 not being cognizable by the Magistrate, 2nd Class, a prayer was made that the complaint under S. 325 be transferred to the Court of Sardar Dhian Singh. Allegations were also made that the petitioner did not expect justice in the Court of the Magistrate, 2nd Class, Samrala. The District Magistrate asked Sardar Dhian Singh to report whether the case pending before him had any connexion with the other case. He also asked for a report as to the section under which the complaint before him had been made. On this Sardar Dhian Singh reported on the 1st December that the complaint was made under Ss. 392/148 and 107, Criminal Procedure Code, but the facts alleged disclosed an offence under S. 323, Indian Penal Code.

The District Magistrate thereupon ordered on the 4th December that both the cases be heard by the 2nd Class Magistrate, Samrala. A further application by the petitioner for transfer of the cases from that Court was dismissed by the District Magistrate. The present petition is for transfer of the cases from the Court of the Magistrate, 2nd Class, Samrala. Allegations have been made that the Magistrate has expressed an opinion against the petitioner and has told him that he would convict him, and that the Magistrate has already convicted the petitioner in another case and is, therefore, prejudiced against him.

I am prepared to accept the explanation of the Magistrate as regards these allegations. It appears, however, that one Karta is a witness for the prosecu-

tion and the petitioner has made an allegation that the Magistrate is very friendly with Karta. It is alleged that both play chess together. This Karta is alleged to be a great friend of the complainant also. The Magistrate has given a prevaricatory explanation regarding the allegations about Karta. I must, therefore, accept the allegations of the petitioner as true so far as the connexion of Karta with the complainant and the Magistrate are concerned.

Moreover, I consider that there was no justification for transferring the S. 392 case from the Court of Sardar Dhian Singh to that of the Magistrate, 2nd Class, Samrala, because the statement of the complainant disclosed an offence under S. 392, Indian Penal Code, and Sardar Dhian Singh had not before him the complainant's evidence to enable him to decide whether the case under S. 392 had or had not been made out. At that stage there was no reason to hold that the case was merely one under S. 323, Indian Penal Code. The Magistrate of Samrala was not, therefore, competent to hear the complaint of the petitioner. Both the cases are closely connected with each other and it is desirable that both should be heard by the same Magistrate. For this reason, and for the reason already mentioned, I order that both the cases be transferred from the Court of the Magistrate, 2nd Class, Samrala, to the District Magistrate of Ludhiana, with the direction to try them himself or to send them for trial to some other competent Magistrate.

Transfer directed.

A. I. R. 1926 Lahore 411

MARTINEAU, J.

Hansraj—Accused—Petitioner.

v.

The Crown—Respondent.

Criminal Revision No. 1625 of 1925, Decided on 2nd February 1926, from the order of the District. Mag., Gujranwala, D/- 23rd September 1925.

Extradition Act (15 *of* 1903), *S. 7—Magistrate to whom warrant is addressed need not enquire as to its legality.*

Section 7 lays down that the Magistrate to whom the warrant is addressed shall act in pursuance thereof and does not require him to take evidence; hence it is no part of his duty to ascertain whether the warrant issued under S. 7 was a legal warrant: 3 *P. R.* (*Cr.*) 1909, *Rel. on.* [P. 411, C. 2]

Moti Sagar—for Petitioner.

Judgment.—It is alleged in this application that a warrant for the arrest of the petitioner, who lives at Gujranwala, for an offence under S. 420, Indian Penal Code, was issued by the Political Agent in Indore State under S. 7 of the Extradition Act and sent to the District Magistrate of Gujranwala; that the warrant was executed and the petitioner released on bail under S. 8; and that the District Magistrate has ordered the petitioner to present himself before the Indore State authorities on such date as may be fixed for the hearing of the case. Mr. Moti Sagar, on behalf of the petitioner, contends that it is the duty of the District Magistrate to assertain whether the warrant issued under S. 7 of the Extradiction Act was a legal warrant and he asks that the District Magistrate may be directed to inquire into this matter.

In *Giyan Chand* v. *King-Emperor* (1), where a warrant had been sent by a Political Agent to the District Magistrate of Gujrat, it was held that it was no part of the duty of the Chief Court or of the Gujrat authorities to ascertain whether a prima facie case existed against the petitioner, and that the responsibility rested with the officer by whom the warrant had been issued. I agree with that view. S. 7 of the Extradition Act lays down that the Magistrate to whom the warrant is addressed shall act in pursuance thereof, and does not require him to take evidence. Had it been intended that he was to take evidence in regard to the legality of the warrant before acting upon it there would have been an express provision to that effect as there is in the case of proceedings under Ss. 3, 4 and 10. It is unnecessary to discuss the various authorities which have been cited before me as S. 7 itself is perfectly clear. I dismiss the application.

Application dismissed.

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(1) [1909] 3 P. R. 1909 Cr.=1 I. C. 198=36 P. W. R. 1908 Cr.

A. I. R. 1926 Lahore 412

HARRISON, J.

The Crown

v.

Atma Singh and *another*—Accused.

Criminal Revision No. 1373 of 1925, Decided on 25th January 1926, reported by the S. J., Rawalpindi.

Penal Code, S. 160—Prosecution should not lodge a complaint simply for exchanging abuse in a public street—Penal Code, S. 95.

If a prosecution were to be launched whenever two or more people exchanged abuse in a public street, the Courts would not have time for doing their necessary work, and where the Sessions Judge recommends the obvious course of acquitting people convicted of such trifling and technical misconduct, it would be letter if the District Magistrate were to raise no protest. [P 413, C 1]

Ram Lal—for the Crown.

Nand Lal—for Accused.

Judgment.—Fourmen—Atma Singh, Waryam Singh, Gurdit Singh and Sant Singh—were convicted under S. 160, Indian Penal Code, and sentenced to pay a fine of Rs. 25 each. The sentence was passed by a First Class Magistrate and the Sessions Judge of Rawalpindi has reported the case for orders on three grounds:—

(1) The accused were not asked if they had any cause to show why they should not be convicted as is required by S. 242, Criminal Procedure Code.

(2) The Magistrate imported into the case his own knowledge of the reputation of the accused and this was highly improper.

(3) The affray was not serious.

On ground No. 1 I do not think there is any reason for interference as the accused had pleaded guilty and thereby ended the matter for all practical purposes, though of course they might still have pleaded that the affray in question was a mere nothing. On the other hand the trial Magistrate and the District Magistrate might have been expected to realize that this was so without being told.

On grounds Nos. 2 and 3 I think there is reason for taking action and I accept the application and acquit the accused.

The facts of this case were that the police reported that there had been a technical affray in the village of Gujar Khan, words being exchanged between two men on the one side and two on the other. It is not alleged that either side was armed or any blows were struck. Apparently there was only the usual exchange of abuse such as may be heard from morning till night. On this the police quite unnecessarily saw fit to chalan all four men apparently without enquiring who started the quarrel and who began the abuse. When this trivial case reached the First Class Magistrate Mr. Amin-ud-Din, he proceeded to transfer it, having no authority to do so, to the Court of the Tahsildar, Mr. Amin-ud-Din is, I understand, a First Class Magistrate. He is neither an Additional District Magistrate, nor a Sub-Divisional Magistrate. The order in vernacular was apparently written by his Reader and is to the following effect—

The case is transferred to the Tahsildar. Post script. It is to be sent up with a report under S. 107, Criminal Procedure Code.

The case had been unnecessarily started, was illegally transferred and after transfer, was unnecessarily exaggerated into a case under S. 107. As proceedings under this section can only be taken by a First Class Magistrate, the postscript was understood as an illegal cancellation of the illegal order of transfer and a further order of re-transfer to the Court of Mr. Amin-ud-Din. On the accused appearing the offence was explained to them and they pleaded guilty. An order was then written into which the reputation of the accused was imported although no mention was made of it even in the police report and acting apparently on wholly inadmissible evidence, which has never been tendered, let alone admitted, the Magistrate convicted them. The Sessions Judge dismissed the first application for revision and on being moved to do so he re-opened the question and forwarded his recommendation to this Court.

Whether the action of the Sessions Judge was strictly regular or not in reopening the matter in the form in which he did, I do not think there is any question of the competency of this Court to look into the case. The most amazing feature is that when notice issued automatically, as it does, to the District Magistrate, he saw fit to move the Crown to instruct counsel to resist the miscarriage of justice being put right. Apart from the waste of the time and money of the Crown and Crown Counsel, which is no concern of mine, I wholly fail to understand what prompted the District Magistrate to take this action. The First Class Magistrate had behaved illegally—a point which must have struck the District

Magistrate when he examined the record. Four men had been ordered to pay heavy fines without any adequate reason, and yet he questioned the sound action taken by the Sessions Judge in endeavouring to get the matter put right. Counsel for the Crown, while not attempting to support the conviction, has urged that the Sessions Judge has acted with technical irregularity and presumably the District Magistrate took up this attitude and ignored the general principle that the Crown does not usually take technical objections either on the criminal or the civil side, whereby the doing of substantial justice may be defeated.

The main ground on which I have interfered in this case is to be found in the maxim *de minimis non curat lex*. If a prosecution were to be launched whenever two or more people exchanged abuse in a public street, the Courts would not have time for doing their necessary work, and where the Sessions Judge recommends the obvious course of acquitting people convicted of such trifling and technical misconduct, it would be better if the District Magistrate were to raise no protest.

Application accepted.

Advocate High Court
Jammu & Kashmir

A. I. R. 1926 Lahore 413

ZAFAR ALI, J.

Sundar Singh and *another*—Defendants—Appellants.

v.

Ganda Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 2585 of 1925, Decided on 20th March 1926, from a decree of the Addl. Dist. J., Amritsar, D/- 9th July 1925.

Custom—(Punjab)—Alienation by widow without consideration — Assent by reversioner is not bona fide and does not bind his sons.

Where the alienation by a widow of her husband's property is devoid of consideration, the assent given to it by a reversioner is not given bona fide and therefore it does not bind his sons. [P 413 C 2]

Dev Raj Sawhney—for Appellants.
Shamair Chand—for Respondents.

Judgment.—The parties are jat agriculturists, and the question for determination in this second appeal is whether the assent given by Bhagat Singh to the mortgage by the widow Premi of her late husband's property is binding on his (Bhagat Singh's) sons—the plaintiffs, who are minors, and debars them from maintaining the present suit for a declaration that the mortgage is inoperative as against their reversionary rights. The Courts below have answered this question in the negative and the plaintiffs' suit has been decreed. The facts are briefly as below :

Mt. Premi at first mortgaged only a portion of her late husband's land for Rs. 600 and Bhagat Singh, the nearest reversioner of her husband, obtained a declaratory decree that the mortgage was valid to the extent of Rs. 200 only. Subsequently the widow mortgaged to the same mortgagee, namely, Sundar Singh, 67 kanals and 15 marlas of land with the consent of Bhagat Singh and his two adult sons and they expressed their consent by associating their names with that of Mt. Premi as mortgagors, so that the mortgage was executed by all four. The mortgage money, Rs. 8,600, was made up of (1) Rs. 7,000 left in the hands of the mortgagee for payment to former mortgagees Jhanda Singh and Bir Singh ; (2) Rs. 1,000 paid cash ; (3) Rs. 600 due to the mortgagee on the prior mortgage referred to above.

As regards item No. (1) it is alleged that only Rs. 1,350 out of it had been paid, and the mortgagee offers to pay the balance. But the payment of even Rs. 1,350 was not proved nor was there anything on the record to show that Rs. 7,000 was really payable by the widow or Bhagat Singh to the mortgagees mentioned in the deed, namely, Jhanda Singh and Bir Singh. Bir Singh was not put in the witness-box at all and Jhanda Singh when examined by the defendant Sundar Singh deposed that Sundar Singh made no payment to him. The large amount of item No. (2) was not paid before the Sub-Registrar nor was a receipt taken for it and the Courts below found that this item as well as item No. (1) was fictitious. In view of the evidence on the record this finding appears to be unassailable. Thus the alienation being devoid of consideration it follows that the assent given to it was not given bona fide.

Counsel for the appellants contends that the suit was collusive. But this was

never pleaded in the Courts below. He further contends that the mortgage should have been declared valid to the extent of Rs. 200 in respect of the third item. But there is already a declaration on this point and no further declaration is necessary.

I am, therefore, of opinion that the plaintiffs' suit has been rightly decreed and I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 414

CAMPBELL, J.

Waryam Singh—2nd Party—Appellant.

v.

Official Liquidator, Eastern Commercial and Banking Coy. Ltd., Amritsar—1st Party—Respondent.

Miscellaneous First Appeal No. 2840, of 1925, Decided on 23rd February 1926, from the order of the Addl. Dist. J., Amritsar, D/- 29th June 1925.

(a) *Companies Act* (7 *of* 1913), *S.* 40—*Burden of proving conditions and failure to send notice of allotment is on propounder.*

The register of members is prima facie evidence of membership and the burden of proving allegations as to conditions and failure to send notice of allotment is on the person alleging.

[P 414 C 2]

(b) *Companies Act, S.* 184—*Order bringing the name of a person as contributory is final if not appealed against.*

An order passed by Court bringing the name of a person as a contributory on the list of contributories if not appealed against becomes final and the question as to the liability of such person as contributory cannot be re-opened.

[P 414 C 2]

K. J. Rustomji—for Appellant.

Mukand Lal Puri—for Respondent.

Judgment.—This is an appeal arising out of proceedings in the District Court. Amritsar, in the matter of the Eastern Commercial and Banking Company, Limited, in liquidation. Notice was issued by the Court to Captain Waryam Singh, described as Director of the Patiala Branch of the insolvent concern, directing him to appear and show cause why he should not be proceeded against under S. 408, Indian Penal Code, and S. 235 of the Indian Companies Act in respect of furniture and property alleged to have belonged to the Company. Captain Waryam Singh appeared in Court on the 29th June 1925 and objected that he was not a member of the Company and that he was not liable to be placed on the list of contributories. These objections were gone into by the District Judge and he held that Captain Waryam Singh was a shareholder and that in any case he could not at that stage object to having been placed on the list of contributories.

Captain Waryam Singh appeals, and it is urged on his behalf, firstly, that his name is not on the register of members and hence he could not have been regarded as shareholder; secondly, that his application for shares was conditional and the conditions were not complied with; thirdly, that no notice of allotment was sent to him; and fourthly, that under S. 85 of the present Act, a person can be a Director for two months without being shareholder.

The record shows that the Liquidator, on the 1st December 1924, put before the Court a list of contributories compiled from the register of shareholders, that the Court directed notice to issue to the persons named in the list and that on the 2nd of March 1925, after hearing various objections, the list of contributories was settled under S. 184 of the Act and it included the name of Captain Waryam Singh. The record further shows that notice was sent to and received by Captain Waryam Singh. In these circumstances the order of the 2nd of March 1925 became final against him after expiry of the limitation for appeal and no appeal was preferred by him. His liability as a contributory cannot now be re-opened. Furthermore, Mr. Mukand Lal Puri for the Liquidator has produced the Company's register which contains the name of Captain Waryam Singh as a member. This under S. 40 of the Act is prima facie evidence of his membership and the burden of proving his allegations as to conditions and failure to send notice of allotment was on him and has not been discharged.

There is no force in the appeal and it is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 415

CAMPBELL, J.

Jhanda Singh and *another*—Plaintiffs—Appellants.

v.

Harnam Singh and *others*—Defendants—Respondents.

Second Appeal No. 1611 of 1924, Decided on 23rd February 1926, from the decree of the Addl. J., Amritsar, D/- 15th March 1924.

(a) *Evidence Act, S. 65—Admissibility—To make principle of acquiescence applicable for secondary evidence to be admitted, the document itself must be admissible.*

Where the reception of secondary evidence is in direct contravention of an imperative prohibition of law, the fact that there was no objection cannot convert irrelevant evidence into relevant evidence. The principle of acquiescence can only be applied when the secondary evidence has been given of the contents of a document which, if produced, itself could have been admitted under the provisions of the law. [P 416 C 1]

(b) *Transfer of Property Act, S. 3—Mere registration is by itself no notice.*

The mere registration of deed under the Registration Act is not per se constructive notice of the transaction and it is a question of fact, to be determined as each case arises, whether in that individual case the omission to search the register taken together with the other facts amounts to such gross negligence as to attract the consequences which result from notice : 48 *Cal.* 1 (*P. C.*), *Foll.* [P 416 C 1]

(c) *Evidence—Proof—Wrong manner of proof of relevant evidence cannot be objected to if once admitted.*

When a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards. [P 415 C 2]

(d) *Evidence Act, S. 115—Owner of property sold in execution permitting the purchaser to buy it cannot question the sale.*

Where the owner of a property sold in execution as the property of the judgment-debtor, stands by and allows the purchaser to buy it, he cannot question the sale and claim the property as his own. [P 416 C 2]

Badri Das—for Appellant.

Gulzari Lal Sahgal and *Fakir Chand*—for Respondents.

Judgment.—This is a second appeal against the dismissal of a suit for possession of a certain house.

The facts found by the lower appellate Court are as follows : On 30th January 1912 a sale-deed was drawn up and registered by which Wasawa Singh, father of the first four defendants, purported to sell to Narain Singh, the father of the plaintiff, the house in suit. On the 11th May 1912 Narain Singh executed a document, the contents of which were wrongly held by the lower appellate Court to be provable, as will be explained presently. In 1917 the house was openly sold in execution of a decree against Wasawa Singh and was purchased by Ram Gopal defendant No. 5, Narain Singh did not raise any objection to the attachment of the house and took no action to assert his own title. The lower appellate Court holds that he had full knowledge of the execution and sale. The decision of the lower appellate Court was that although the sale-deed was executed, there was no intention that the title should pass to Narain Singh ; that consequently there was no sale, and that, in any case, Wasawa Singh was allowed by Narain Singh to continue as ostensible owner, the execution sale was binding upon Narain Singh on the principles contained in S. 41 of the Transfer of Property Act.

The finding that there was no intention to transfer the house is based upon several grounds, but the principal one is the contents of the document of the 11th May 1912, already referred to. This document was not produced, but secondary evidence of its contents was offered without objection in the shape of a copy of the entry in the deed writer's register on the statement of an alleged marginal witness, Gurdit Singh. I may observe that what is alleged to be the copy is not endorsed as admitted in evidence by the Court below. The copy furthermore has been misread by the learned Additional Judge because it contained a great deal more than a mere statement by Narain Singh that he had no right in the house which had been sold to him by the deed. It stated in fact that Narain Singh, with effect from the date of the document, relinquished or handed back the house to Wasawa Singh.

This, however, is of no real significance since though, secondary evidence could not legally have been admitted at all, it is true that no objection was raised in the trial Court and that according to a well-known rule of practice,

> when a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law, unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards.

One of the objections, however, raised in appeal to the admission of the secondary evidence was that the document was not shown to have been properly stamped and that under S. 35 of the Stamp Act it was wholly inadmissible. The learned Additional Judge has disposed of this objection by saying that the document had already been admitted in evidence without objection and therefore the objection could not be raised in appeal under S. 36 of the Indian Stamp Act. But the document was not admitted in evidence in the trial Court ; it was never produced and has never been produced. Therefore the reception of secondary evidence was in direct contravention of an imperative prohibition of the law and the fact that there was no objection cannot convert irrelevant evidence into relevant evidence. The principle of acquiescence can only be applied when the secondary evidence has been given of the contents of a document which, if produced, itself could have been admitted under the provisions of the law.

It is unnecessary to remit the case to the lower appellate Court for a fresh decision after excluding all consideration of the document dated 11th May 1912, since the dismissal of the suit must be upheld on the alternative ground, namely, that the plaintiff's father Narain Singh stood by and permitted Ram Gopal to purchase the house in execution sale. The only argument put forward for the appellants against the contention of estoppel is that the registration of the sale-deed of 1912, was constructive notice to Ram Gopal and hence neither principles of S. 41 of the Transfer of Property Act nor the provisions of S. 115 of the Indian Evidence Act were of any assistance to him. Their Lordships of the Privy Council, however, have laid it down in *Tilokdhari Lal* v. *Khidan Lal* (1) that the mere registration of a deed under the Registration Act is not per se constructive notice of the transaction and that constructive notice is a question of fact to be determined as each case arises, whether in that individual case the omission to search the register taken together with the other facts amounts to such gross negligence as to attract the consequences which result from notice.

(1) [1921] 48 Cal. 1=57 I. C. 465=47 I. A. 239 (P. C.).

In the present case we have the facts that Ram Gopal was a purchaser in an execution sale, and that the law provides means by which the public shall be aware of attachment and intention to sell, and also for an inquiry before sale into the absolute title of the judgment-debtor and for public advertisement of the sale. Facilities are also given for third persons to come forward and lodge objections, not only before sale, but also after sale, and before confirmation. There is the further fact found by the lower appellate Court that Narain Singh knew all about attachment and sale and abstained from making any objection. In these circumstances it has been rightly held by the lower appellate Court that his heirs shall not be permitted to deny against Ram Gopal that Wasawa Singh was the owner of the house at the time of the execution sale.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 416

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Wazir Chand Trikha and *others*—Defendants—Appellants.

v.

Nathu Ram and *others*—Defendants—Respondents.

Civil Application No. 185 of 1924, Decided on 21st November 1924, for leave to appeal to His Majesty in Council.

Civil P. C., S. 110—Affidavit as to value of property—No counter-affidavit filed—Certificate should be granted.

Where an affidavit that the decree involves a claim respecting property exceeding ten thousand rupees in value, is filed and there is no counter-affidavit by the respondents, the High Court may assume that petitioner's affidavit is correct.

Sheo Narain—for Petitioner.

Mukand Lal Puri—for Respondents.

Judgment.—There is before us an affidavit by the petitioners that the decree involves a claim respecting property exceeding ten thousand rupees in value. There is no counter-affidavit by the respondents, and we consider that a substantial question of law is involved in the appeal, we accordingly order the issue of the certificate prayed for.

Order accordingly.

A. I. R. 1926 Lahore 417

HARRISON, J.

Firm Sundar Das-Vir Bhan—Plaintiffs—Appellants.

v.

Firm Jassa Singh-Jiwan Singh—Defendants—Respondents.

Second Appeal No. 2401 of 1925, Decided on 20th March 1926, from the decree of the Dist. J., Amritsar, D/- 30th May 1925.

Practice—Pleadings—Case should not be allowed to be defeated owing to technicality.

Where, on account of badly drafted plaint, the relief sought is not clearly brought out, but evidence is led on right issues and no party is prejudiced, the proper relief should be granted to the plaintiff. [P. 418, C. 1 & 2]

Fakir Chand—for Appellants.

Dev Raj Sawhney—for Respondents.

Harrison, J.—The necessary facts of this case are that the plaintiff in his plaint declared that on the 12th April 1920 the defendant contracted to sell him 50 bags of sugar at a certain price and to give delivery on 13th of May 1920. This salient fact is admitted. The plaint continued to recite that on the 12th of May 1920, or one day before the due date, the defendant contracted to buy 50 bags of sugar at the market rate of that day and so concluded the transaction and made himself liable to pay Rs. 773, being the difference between the two rates. While admitting the first agreement, and also admitting that no delivery had been made, the defendant pleaded that he had fulfilled the contract by transferring it with the approval and consent of the plaintiff to a third party, Tara Singh-Thakar Singh. He also pleaded that the first agreement was a gambling transaction and there had been no second agreement at all.

The findings are that the first admitted transaction was not a gambling transaction, that there was no second contract, that there was no transfer to the third party, and that the market rate on the due date (evidence having been led on the subject and an issue framed which covered it) was Rs. 34-12-0. On these findings the trial Court gave a decree for the difference between the contract price and the price on the due date, and the District Judge dismissed the suit, accepting the appeal, he having taken a strict view of the pleadings, and held that the plaintiff had never claimed the relief granted by the trial Court and therefore the only consequence could be dismissal.

There is much to be said for both views and counsel for the appellant-plaintiff relies chiefly upon *Ananda Chandra* v. *Broja Lal* (1) and urges that the real essential is that the defendant shall not be taken by surprise, that he must know what he has to prove and what he has to meet, and that granting this condition be fulfilled, it is necessary to look to the real facts and to give relief to the injured party. The other side relies on *Golak Chandra* v. *Nishi Chandra* (2), *Palu* v. *Rasilu* (3), *Sahdeo* v. *Raghubar* (4) and an unreported ruling of this Court, Civil Appeal No. 2731 of 1920.

Taking everything into account, and after considering all these authorities, the position, it appears to me, narrows down to this. The plaintiff has undoubtedly failed to observe the strict rules of the game. He has failed to claim the relief granted in the form in which it has been granted; he has not alleged in so many words that there has been a breach of the contract, and whether he has sustained an injury or not; he has debarred himself from claiming compensation if the rules which he has broken are essential and primary rules the breach of which carries with it these consequences. Now, in Civil Appeal No. 2731 a primary rule had been broken. The plaintiff claimed damages for short proceeds of goods, in which title had passed, when, as a matter of fact, title had not passed, and he was only entitled to unascertained damages, and he did not supply the necessary material for the ascertainment of those damages.

In this case the breach of the rules is very much serious. The plaint is in reality a statement of the case such as would be drawn up by a business man or a broker as opposed to a lawyer. The transaction or alleged transaction is treated as one which divided into two halves. The plaintiff had bought forward, the period being a month, and his

(1) A. I. R. 1923 Cal. 142.
(2) A. I. R. 1925 Cal. 521.
(3) A. I. R. 1923 Lah. 615.
(4) A. I. R. 1926 Oudh 142.

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is inadequate, but this equally applies to the contention that a false charge had been brought, for it is a little diffiicult to understand why if the assailants were other than the appellants, they should have been allowed to escape while perfectly innocent persons have beeu named in their place.

After a careful consideration of the testimony of these four witnesses and the criticisms made by Mr. Bevan Petman I am of opinion that there can be no real doubt that Harnam Singh's assailants were the appellants. It is true that the witnesses have exaggerated the actual facts and have stated from the outset that the appellants and Chet Singh were armed with deadly weapons. It has been found by the learned Sessions Judge that this portion of the story is incorrect and Mr. Mackay has admitted and I think rightly admitted that the witnesses have certainly exaggerated in this respect. This exaggeration, however, does not to my mind render their testimony as a whole unacceptable.

There remains the question of the offence committed by the appellants. They have been found guilty of murder. It has been urged that the offence committed by them was one falling under S. 325 Indian Penal Code. In my judgment there can be no doubt that appellants deliberately lay in wait for Harnam Singh in order to give him a beating. I think, however, that their intention was only to give him a beating and not to cause his death. The report in this case was not made till the morning of the 11th August 1925, although the police Station is only nine miles from the village. It seems to me that neither the appellants nor the relations of the deceased thought that the deceased was mortally injured and that the report was made when it was found that Harnam Singh had succumbed to his injuries during the night.

It has been urged, however, that S. 149 Indian Penal Code, applies to this case and that the injuries caused were such as the members of the unlawful assembly knew to be likely to be caused in prosecution of the common object which in this case was to give the deceased a thrashing. Now a reference to the medical evidence shows that there were a large number of injuries on the deceased, about 16 in all. Of these, however, 11 were marks of bruises and lathi blows of almost a trifling nature. The injuries which were serious were those which were inflicted on the head. Now the evidence of the four eyewitnesses does not disclose which of the assailants of the deceased inflicted the head injuries. From the fact that serious injuries were caused to the head an inference may be drawn that the assailants must have known that the head would be struck at. The same remark, however, applies and a similar inference may be drawn to the contrary effect from the circumstances that the remaining injuries were of a trifling nature and consistent with the intention of the administration of only a thrashing.

Having regard to the inadequacy of the motive and to the fact that the majority of the injuries inflicted were slight, I think the safer inference to draw in this case is that the assailants of the deceased neither intended to cause death, nor knew that they were likely to cause death. It has been pointed out that the word "knew" in S. 149 has been advisedly used and cannot be made to bear the sense of "might have known." In the present case all that can be said is that the appellants did not like Harnam Singh and agreed to give him a beating. In accordance with that agreement they did give him a beating. In the course of that beating one or more of the assailants apparently got carried away and struck blows on the head which proved fatal.

It is impossible to say on this record which of the assailants was responsible for the head injuries and I think that the present appellants should be given the benefit of the doubt. I would, therefore, convict them under S. 325, Indian Penal Code, and sentence each of them to undergo rigorous imprisonment for a period of 7 years' including 3 months' solitary confinement.

Sentence reduced.

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* A. I. R. 1926 Lahore 421

LEROSSINGNOL AND MARTINEAU, JJ.

Nanak Chand-Fateh Chand — Petitioners.

v.

Commissioner of Income-Tax, Lahore —Respondent.

Civil Reference No. 41 of 1925, Decided on 6th January 1926, made by the Commissioner of Income-tax, Punjab and North-West Frontier Province, Lahore, on 2nd September 1925.

* (a) *Income-Tax Act* (11 *of* 1922), *S.* 2 (11)—*"Commercial year" defined—No definition is provided in the Act.*

The expression "commercial year," for which there is no definition in the Act, means any period for which the accounts of the concern are made up, and such period, provided it satisfies the condition laid down by the Central Board of Revenue, may be deemed to be the previous year on which the assessment of any given year is based. [P. 421, C. 2]

* (b) *Income-Tax Act* (11 *of* 1922), *S.* 2 (11) (*b*) —*An assessee whose business has not been in existence for a whole year previous to the* 1st *April is liable to tax for only the next year on profits gained in the incomplete previous year.*

The assessee firm commenced business on the 18th of April 1923. In April 1924 it was called upon to furnish a return of its total income during the previous year, i. e., during the year ending the 31st March 1924, but the firm submitted a statement of its profits for the period of twelve months, 18th of April 1923 to 17th of April 1924, and contended that it was not liable to pay Income-tax for the year 1923-24, nor for 1924-25, as the business had not been in existence for a complete year before the 1st of April 1924.

Held: that the firm is not liable for 1923-24, but is liable for 1924-25 on the profits realized during the 11 months 13 days of 1923-24, because though the firm was not in existence for the first fortnight of 1923-24, nevertheless the profits realized during the broken period were the profits realized in *the course of the whole year* 1923-24. [P. 421, C. 1]

Jagan Nath Aggarwal—for Petitioners.

Carden-Noad—for Respondent.

LeRossignol, J.—This is a reference under S. 66 (2) of the Indian Income-tax Act, XI of 1922, by the Income-tax Commissioner, Punjab. The assessee firm commenced business on the 18th of April 1923. In April 1924 the Income-tax Officer required the firm to furnish a return of its total income during the previous year, i. e., during the twelve months ending the 31st of March 1924. In compliance with this notice the firm, instead of declaring its profits for the 11 months and 13 days ending the 31st of March 1924, submitted a statement of its profits for the period of twelve months, 18th of April 1923 to 17th of April 1924, and contended that it was not liable to pay income-tax for the year 1924-25 on the ground that the business had not been in existence for a complete year before the 1st of April 1924. In other words, the assessee's contention was that the firm was not liable to pay income-tax either in respect of the 11 months and 13 days ending on the 31st of March 1924 or for the whole year beginning 1st of April 1924 and ending 31st of March 1925.

Admittedly no income-tax is recoverable from the firm in respect of the period 18th of April 1923 to 31st of March 1924, nor has it been assessed to income-tax in respect of that period, and the contention that no Income-tax is payable in respect of the period 1st of April 1924 to 31st of March 1925 is not only absurd, but is founded on no provision of law. In our opinion the income-tax authorities would have been justified in assessing for 1924-25 on the profits realized during the 11 months and 13 days of 1923-24. It is true that for the first fortnight of 1923-24 the firm made no profits, because it was not in existence, at any rate, was not working; nonetheless the profits realized during that broken period were the profits realized in the course of the whole year 1923-24.

The income-tax authorities, however did not adopt this course, but in accordance with the provision of S. 2 (11) (b) of the Act accepted as the accounting period the time from 18th of April 1923 to 17th of April 1924. Before us it is contended that this course was unjustified inasmuch as that period (18th of April 1923 to 17th of April 1924) cannot be called a commercial year. The contention appears to us to be futile. There is no definition of the expression "commercial year" in the Act, and we hold it to mean any period for which the accounts of the concern are made up, and such period, provided it satisfied the condition laid down by the Central Board of Revenue, may be deemed to be the previous year on which the assessment of any given year is based.

We consider that the previous year determined by the Commissioner of In-

come-tax is justified by the instructions of the Central Board of Revenue and his action is entirely legal. The costs of these proceedings shall be paid by the objecting firm.

Order accordingly.

A. I. R. 1926 Lahore 422

MARTINEAU AND DALIP SINGH, JJ.

The firm Sham Sunder-Madan Gopal —Defendants—Appellants.

v.

Fatteh Chand and *others*— Plaintiffs— Respondents.

First Appeal No. 1067 of 1921, Decided on 11th March 1926, from the decree of the Senior Sub-J., Shahpur, at Sargodha, D/- 31st January 1921.

Civil P. C., O. 22, R. 3—Order passed by High Court setting aside abatement and bringing legal representatives on record is conditional and not absolute.

An order made by a Judge of the High Court subject to all just exceptions setting aside the abatement and bringing the legal representatives of a deceased party on to the record is passed in accordance with the usual practice of the High Court subject to all just exceptions and not an absolute order. [P. 423, C. 1, 2]

Deo Raj Sawhnay, Sohan Lal and *Mehr Chand*—for Appellants.

Badri Das and *Mukand Lal Puri*—for Respondents.

Judgment.—A preliminary objection has been raised in this appeal on the ground that the appeal has abated. It seems that the sole respondent, Malik Gur Sahai, died on the 15th of July 1925 and no application was made to bring the legal representatives on to the record until the 18th of November 1925. On the application made on that date a Judge of this Court passed an order subject to all just exceptions setting aside the abatement and bringing the legal representatives on to the record. The respondents have now put in an affidavit which shows that on the 8th of October 1925 the appellants either came to know of the date of the death of Malik Gur Sahai and who his legal representatives were or could with ordinary care have come to know both lof the factum of death and who his legal representatives were. The appellants admit that on the 8th of October 1925 they came to know of the death, but in their affidavit they alleged that they had spent the time between the 8th October and 18th November 1925 in enquiring about the date of the death of Malik Gur Shahi and the names of his legal representatives.

It appears that on the 8th October 1925 a suit which had been brought by Malik Gur Sahai against the present appellants in the Bahawalpur State on the basis of the decree now appealed against had been dismissed in default and his legal representatives had applied for restoration on the ground that Malik Gur Sahai had died and hence was absent unvoidably. It is thus clear that by inspecting the record in the Bahawalpur State the appellants could have come to know on the 8th of October or thereabout both the date of the death of Gur Shahi which is mentioned in that application and who were his legal representatives whose names are given in that application. The appellants have urged that the order bringing the legal representatives on to the record having been passed it must be taken that the abatement was set aside ex parte and, therefore, there can now be no hearing of this point. It is sufficient in reply to this contention to say that the order passed on the application of of the 18th November 1925 was an order passed in accordance with the usual practice of this Court subject to all just exceptions and was conditional, not an absolute order.

Secondly, the appellants contend that in the circumstances of the case the delay should be excused. But we are unable to see how the appellants can justify their long delay between the 8th October and 18th November 1925. The appellants seem to have awaited the appearance of one Kishen Chand in a suit in order to ascertain the names and addresses of the legal representatives of Malik Gur Sahai. There is nothing to show that this was the only way in which they could have obtained the requisite information. We hold, therefore, that the appeal has abated and no sufficient ground has been shown for setting aside the abatement, and it is dismissed with costs accordingly.

Appeal dismissed.

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* * A. I. R. 1926 Lahore 423

LEROSSIGNOL AND MARTINEAU, JJ.

Shaw Wallace and Company — Plaintiffs—Appellants.

v.

Amritsar National Bank and *others*—Defendants—Respondents.

Miscellaneous First Appeal No. 1809 of 1925, Decided on 1st February 1926, from the order of the Dist. J., Lahore, D/- 27th April 1925.

* * *Trust—Cestui que trust—Cestui qui trust can recover his moneys so long as they are identifiable—Bank collecting bills but going into liquidation before making payment of the money realized—Claim for such money is first charge on the balances of the Bank as a whole at the day of suspension of payment.*

If the sale is rightful and the proceeds of the sale are identifiable, the cestui que trust can take them. Even if the sale is wrongful, he can still take the proceeds of the sale provided he can identify them. When the proceeds are not identifiable, as in the case where the trustee has mixed trust money with his own money, the cestui que trust is still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase. The principle underlying is that the trust property so long as it can be identified never becomes the property of the trustee : *In re Hallett's Estate*, (1879) 13 *Ch. D.* 696, *Foll.*

Where before the payment was made to the appellant for the bills collected on his behalf by the Bank, the Bank went into liquidation and suspended payment.

Held : that the appellant being in the position of a cestui que trustee was entitled to a prior charge on the balances of the Bank as a whole at the date of suspension and also, if the aggregate of such balances fell below the total of trust moneys for which the Bank was responsible, upon such other assets as were acquired by the Bank from the date when the cash balance of the Bank fell below the aggregate of the trust moneys. As between the various cestui que trust themselves, the item entrusted to the Bank at the latest date is the item to be paid out first to the cestui que trust concerned : *Clayton's* case, (1816) 1 *Mer.* 572, *Foll.* [P 424, C 1]

Mackay and *Obedulla*—for Appellants.

Madan Gopal—for Respondents.

LeRossignol, J.—This appeal arises out of the liquidation proceedings of the Amritsar National Bank, and the sole question for decision is whether the appellant firm is entitled to priority over the ordinary creditors of the Bank in respect of an amount of Rs. 8,900 collected for the appellant by the Montgomery Branch of the Bank but not paid to the appellant at the time when the Bank closed its doors. The learned District Judge holds that the appellant-firm was not an ordinary creditor of the Bank, but that a fiduciary relation existed between the appellant and the Bank ; that the appellant, holding the position of cestui que trust, consequently has a charge on the balances held by the Montgomery and Karachi Branches of the Bank as they were at the date when the Bank suspended payment. The learned Judge included the balances of the Karachi Branch as well as of the Montgomery Branch on the ground that a portion of the appellant's money had been remitted by the Montgomery Branch to the Karachi Branch.

The main contention in appeal is that the appellant-firm has a charge, not merely on the balance of the Montgomery and Karachi Branches, but on the balance held by the Bank at the date of suspension in all its branches including the headquarters office.

Inasmuch as the appellant-firm trusted and employed not merely a branch of the Bank but the Bank as a whole, it is quite clear to us that it is entitled to charge its claim upon the balances wherever lying on the date of the suspension of payment, and after considerable argument this point has been conceded by the respondent. It has been conceded also by the respondent that the appellant's charge extends not only to the cash balance at the disposal of the Bank as a whole on the date of suspension of payment, but also to all moneys advanced by the Bank after the date when it recovered the moneys due on the appellant's bills. With this further concession the appellant, however, is not satisfied and contends that his charge extends over all the assets of the Bank.

Whether the respondents by agreeing to accept a charge on all moneys advanced by the Bank after the date of the recovery of the money due on the appellant's bills is making any substantial concession is very doubtful, for it is probable that after the date indicated the Bank was doing little more than pay out claims. With regard to appellant's further claim that he should be granted priority to the full amount of his debt, to be charged on the general assets of the Bank, we can find no authority for the claim. The right of a cestui que trust as regards trust property is clear. If the sale was rightful and the proceeds

of the sale are identifiable, the cestui que trust can take them. Even if the sale was wrongful he can still take the proceeds of the state provided he can identify them. When the proceeds are not identifiable, as in the case where the trustee has mixed trust money with his own money, the cestui que trust is still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase. Those are the rules laid down by the Master of the Rolls *In re Hallett's Estate* (1). The principle underlying them is that the trust property so long as it can be identified never becomes the property of the trustee.

If these principles be applied to the facts of this case it follows that the cestui que trust is entitled to a prior charge on the balances at the disposal of the Bank at the date of suspension because the law presumes that the bankrupt has expended his own money first and has not touched the trust money, if at all, until the last pice of his own money has been expended. From the foregoing it would appear that the plaintiff-firm along with all other cestui qui trust has a charge in respect of its claim on the balance held by the Bank at the date of suspension and also, if the aggregate of such balances falls below the total of trust moneys for which the Bank is responsible, upon such other assets as were acquired by the Bank from the date when the cash balance of the Bank fell below the aggregate of the trust moneys.

It is not contested that as between the various cestui qui trust themselves, the rule to be followed is that enunciated in *Clayton's* case (2), that is, the item entrusted to the Bank at the latest date is the item to be paid out first to the cestui que trust concerned.

For the foregoing reasons we accept this appeal and grant the appellant-firm a prior charge on the balances held by the Bank as a whole at the date of suspension of payment and on all moneys advanced by the Bank after the date when it recovered the monies due on the appellant's bills.

As appellant has not been successful in the whole of his claim, we direct that parties bear their own costs.

Appeal accepted in part.

(1) [1879] 13 Ch. D. 696=49 L. J. Ch. 415.
(2) [1816] 1 Mer.572=35 E.R. 781=15R.R.161.

A. I. R. 1926 Lahore 424

SHADI LAL, C. J.

Emperor—Petitioner.

v.

Mohna—Accused—Respondent.

Criminal Referenc e No. 154 of 1926, Decided on 19th Mar ch 1926, made by the Dist. Mag., Amritsar, on 19th January 1926.

Criminal P. C., (as amended in 1923), *S.* 345—*Compounding with some of several accused has not the effect of acquittal of the rest.*

The compounding of an offence with on e or more of several accused persons has not the effect of acquittal in respect of the remaining accu sed between whom and the complainant no composition has been arrived at. [P 424 C 2]

Report.—Harnam Singh, Tahal Singh, Chanchal Singh and Sunder Singh were convicted of an offence under Ss. 325 and 149, Indian Penal Code. Mohna was an absconder in this case. On appeal in the Sessions Court a compromise under S. 345 Criminal P. C., was permitted by the Sessions Judge, between the injured party Bakshish Singh and the four convicts-appellants. This compromise did not include and was not made with Mohna, absconder. The four appellants were acquitted. After this Mohna surrendered himself and was put ou his trial. The Magistrate has acquitted him on the strength of *Chandra Kumar Das* v. *Emperor* (1). This ruling is out of date. A compromise only involves the acquittal of those with whom the compromise is made. The Magistrate's order is since the revision of the Criminal P. C. by Act XVIII of 1923 absolutely wrong in law.

Order.—The compounding of an offence with one or more of several of accused persons has not the effect of acquittal in respect of the remaining accused between whom and the complainant no composition has been arrived at. This was the view adopted by this Court, and the matter has now been set at rest by the amendment of S. 345, Criminal P. C. by the Criminal P. C. Amendment Act, XVIII of 1923.

I accordingly accept the recommendation made by the District Magistrate and setting aside the order of the Court of first instance direct that the accused be tried in accordance with law.

Order set aside.

(1) [1902] 7 C. W. N. 176.

A. I. R. 1926 Lahore 425

HARRISON AND JAI LAL, JJ.

Kundan Lal and *others*—Plaintiffs—Appellants.

v.

Tirkha Ram and *others*—Defendants—Respondents.

Second Appeal No. 595 of 1922, Decided on 19th March 1926, from the order of the Dist. J., Ambala, D/- 10th November 1921.

Civil P. C., S. 92—Right to sue—Public trust—Mere worshipper cannot sue for possession.

In respect of properties which form part of a public trust a mere worshipper can have no right by way of a suit to obtain possession of the properties : *A. I. R.* 1925 *Rang.* 294, *Appl.*

[P. 425, C. 2]

Jagan Nath Aggarwal—for Appellants.

Tek Chand—for Respondents.

Judgment.—On the 14th of May 1919 ten gentlemen, who are respondents before us, instituted a suit in the Court of the Senior Sub-Judge, Ambala, against the ten defendants on the following allegations ; that the land in suit was given by one Lala Narain Das, deceased, by means of an oral Will to the Hindu panchayat of Ambala for religious purposes (Dharmarth) and for growing flowers for use in shivalas ; that there have been previous disputes about the land, but it has all along been in possession of the plaintiffs who have been using it for religious and panchayat purposes ; and that early in 1919 the defendants, who are members of the Hanuman Circus Club, Ambala, again placed gymastics and sporting materials on the land and stopped the gardener of the Hindu panchayat from planting flowers and trees thereon. It was further alleged that the defendants were not worshippers of the shivala and that the use of the ground for physical exercise did not come within the scope of the purposes for which the land was endowed. A decree for possession of the land against the defendants was consequently prayed for.

On the same date an application under O. 1, R. 8, of the Civil Procedure Code was made and a proclamation ordered to be issued by the Court. The defendants raised several pleas. One of them was that the plaintiffs had no locus standi to institute the suit and to claim the relief of possession. The Senior Sub-Judge held that the

> plaintiffs represent not the whole Hindu public but only a portion, and so on their suit it is not possible, when the majority appear to be in defendants' favour, to eject the defendants from the land in suit and to put plaintiffs in exclusive charge of it.

He, therefore, passed a decree providing for the enjoyment of the property both by the plaintiffs and the defendants for the respective purposes for which they claimed to use it. An injunction was granted against the defendants restraining them from interfering with the plaintiffs' use of the flower beds as demarcated by the decree. Both parties appealed to the Judge who confirmed the decree of the Senior Sub-Judge.

On second appeal it is strenuously contended on behalf of the appellants that the plaintiffs admittedly not being trustees of the shivala or of the land in suit, and also not being managers thereof as the term is understood when applied to property endowed for religious purposes, had no locus standi to sue for the relief that they claimed in the plaint or for that which had been granted to them by the Courts below. The learned counsel for the respondents admitted that the plaintiffs' suit was instituted in their capacity as worshippers of the temple. In our opinion the contention of the appellants must prevail. In *Salig Ram* v. *Bassao Mal* (1) a Division Bench of this Court held that the worshippers of a Gurdwara were not competent to sue for possession of property attached to the Gurdwara as it was only the trustees who could claim that relief. It was, however, held that they could sue for a declaration. The plaintiffs in that case claimed a declaration in addition to possession.

In *Saw Durmay* v. *Baggah Singh* (2) it was held that in respect of properties which form part of a public trust a mere worshipper could have no right by way of a suit to obtain possession of the properties. That judgment also disposes of the contention of the learned counsel for the respondents that the worshippers are precluded from suing for possession or injunction only when there are trustees competent to claim those reliefs and that the worshippers are entitled to sue for

(1) [1919] 1 L. L. J. 150.
(2) A. I. R. 1925 Rang. 294.

these reliefs if there are no such trustees. That was a case in which a suit by the worshippers for possession of premises alleged to be a church and auxiliary buildings was dismissed for want of locus standi. There were no trustees of the property in suit and it was indicated in the judgment of the High Court that the proper course for the plaintiff would be to have trustees properly appointed. In the well-known case of *Saklat* v. *Bela* (3) their Lordships of the Privy Council considered the question of locus standi of some of the worshippers to claim a declaration and injunction and held that

> for trespass upon land the only person to bring the action is the person in possession of the land, i. e., the trustee

and the proposition that a beneficiary, or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder was considered to be "a novel principle of jurisprudence."

Their Lordships alluded to certain circumstances under which the worshippers may be allowed to institute a suit against a trespasser for injunction or for similar reliefs, but the circumstances in that case must be such as establish that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the temple entails the departure of the other, so that it is, as it were, trespass to the person. No such circumstances are proved to exist in the case before us, and we, therefore, hold that the plaintiffs were not competent to sue for possession or for an injunction.

At the end of his arguments the learned counsel for the respondents asked us to allow him to amend the plaint so as to convert the suit into one for a declaration ; but, having regard to all the circumstances of the case, we are not prepared to accede to this request at this late stage even if we were inclined to hold that on the facts alleged the plaintiffs were entitled to sue for a declaration, a matter on which we express no opinion.

We accept the appeal and dismiss the plaintiffs' suit with costs throughout. The cross-objections filed by the respondents are dismissed with costs.

Appeal accepted.

(3) A. I. R. 1925 P. C. 298.

A. I. R. 1926 Lahore 426

DALIP SINGH, J.

Ghulam Muhammad and *another* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1196 of 1925, Decided on 22nd January 1926, from an order of the S. J., Jhelum, D/- 27th October 1925.

Penal Code, S. 304, Part II—Presumption of knowledge of likelihood of causing death arises, when a lethal blow is dealt.

A lathi is a lethal weapon and, if a person chooses to lay about with a lethal weapon with all the force at his command, it must be presumed that he knew he was likely to cause death. [P. 427, C. 1]

Balkrishna and *Chaman Lal* —for Appellants.

Din Dyal Kapur—for Opposite Party.

Judgment.—In this appeal Ghulam Muhammad and Nur Muhammad, sons of Mahmud, have been convicted under S. 304, Part II, Indian Penal Code, for causing the death of Sardara and have been sentenced to rigorous imprisonment for ten years each.

The facts as found by the learned Sessions Judge on the evidence led in the case seem to be that Ghulam Muhammad and Nur Muhammad were leading some bullocks and happened to pass by the threshing-floor of the complainants. It is amply proved on the record that there were various grounds for enmity between the party of the complainants and of the appellants. The result was that owing to certain circumstances which have not been proved at all a fight seems to have occurred between Ghulam Muhammad and Nur Muhammad on one side and Raja and Sardara on the other.

Barkhurdar, who made the First Information Report, at first mentioned four persons as having taken part in the fight and having caused the death of Sardara and injuries to Raja and Jafar. Subsequently he seems to have implicated nine more persons. Twelve persons were challaned in all of whom ten have been acquitted by the learned Sessions Judge, and two, Ghulam Muhmmad and Nur Muhammad, have been convicted. The names of these men are mentioned in the First Information Report and there seems no reason to

doubt, especially as both have injuries on their persons, that they were present in the fight. It is equally clear that Sardara and Raja were also present in the fight that took place. According to the prosecution evidence—and there is no defence evidence in the case at all—Jafar, who also received injuries, ran away before the fight, in which Sardara was killed, began. The learned Sessions Judge has found from this evidence that Jafar received his injuries at the hands of persons other than the appellants.

Be this as it may, the result is that Sardara received five injuries, two of which were fatal, one being a blow on the head with a lathi, which fractured the skull, and another being a blow on the back which ruptured the spleen. Raja received twenty injuries in all, two of which were grievous. The finding, therefore, of the learned Sessions Judge at any rate is correct to this extent that Ghulam Muhammad and Nur Muhammad laid about them with all the force at their command with lathis. Now, a lathi is a lethal weapon and, if a person chooses to lay about with a lethal weapon with all the force at his command, it must be presumed that he knew he was likely to cause death. I, therefore, consider shat the conviction under S. 304, Part II, is, in the circumstances of this case, justifiable. At the same time I do not consider that this is a case in which the maximum sentence need be inflicted, because, though there is no direct evidence on the record to prove this, the circumstances seem to point to the complainants having in all probability been the aggressors, and I, therefore, accept the appeal so far as to reduce the sentence to rigorous imprisonment for five years in the case of each appellant.

Sentence reduced.

A. I. R. 1926 Lahore 427

BROADWAY, J.

Notified Area, Kharar—Complainant—Petitioner.

v.

Karta Ram and *another*—Accused—Respondents.

Criminal Revision No. 1723 of 1925, Decided on 29th January 1926, reported by the S. J., Ambala.

Criminal P. C., S. 250—Appeal Court cannot make any order as to compensation.

It is only the trying Magistrate who, if he discharges an accused person, can order compensation to be paid. The appellate Court cannot make any order as to compensation: *A. I. R.* 1924 *All.* 224, *Foll.* [P. 427, C. 2]

Hukam Chand—for Petitioner.

Order.—This is a reference under S. 439 of the Criminal P. C. made by the learned Sessions Judge of Ambala in the following circumstances:

The Notified Area Committee of Kharar instituted a case against Karta Ram and Chajju Ram under S. 219 of Act III of 1911: [Punjab Municipal Act Ed.] The trying Magistrate found the accused persons guilty and sentenced them to certain fines. An appeal by them to the Sub-Divisional Officer of Rupar, who had appeallate powers, resulted in their acquittal and in an order under S. 250, Criminal P. C., directing the Notified Area Committee as complainant to pay to each of the persons proceeded against a sum of Rs. 5 by way of compensation. The Notified Area Committee moved the learned Sessions Judge on the revision side who has sent this case up with the recommendation that the order for compensation should be set aside as illegal.

In addition to the authorities quoted in the order of reference there is the case of *Chedi* v. *Ram Lal* (1) in which it was held that under the provisions of S. 250, Criminal P. C., it is only the trying Magistrate who, if he discharges an accused person, can order compensation to be paid. The phraseology of S. 250, Criminal P. C., seems to me to be perfectly clear on this point.

I accept this reference and set aside so much of the Sub-Divisional Officer's order as directs the complainant to pay compensation to the persons accused. The compensation, if paid, will be refunded.

Reference accepted.

(1) A. R. I. 1924 All. 224.

* A. I. R. 1926 Lahore 428

HARRISON AND FFORDE, JJ.

Waryam Singh—Accused—Appellant.

v.

The Crown—Opposite Party.

Criminal Appeal No. 852 of 1925, Decided on 20th January 1926, from the order of the S. J., Ferozepore, D/- 15th June 1925.

* *Criminal P. C., S. 367 (5)—Voluntary drunkenness is no reason for not inflicting death sentence.*

The reasons justifying the infliction of the lesser penalty under S. 367 (5) must be such as are in accord, with established legal principles; unless drunkenness either amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation and is not a reason for inflicting a sentence of transportation for life instead of the death sentence: 28 *P. R. (Cr.)* 1917, *Expl.*

[P 429 C 1]

R. C. Soni—for the Crown.

Fforde, J.—Waryam Singh has been convicted by the Sessions Judge under the provisions of S. 302, Indian Penal Code, of the murder of Kesar Singh, and has been sentenced to transportation for life. Against that conviction and sentence he has appealed through the Jail authorities. The Local Government have presented a petition for revision under S. 439 of the Criminal Procedure Code, against the sentence of transportation for life praying that this sentence may be enhanced by the infliction of the death penalty.

The facts are very simple and may be stated shortly. On the 11th of July 1922, a number of villagers, of whom the deceased was one, were taking part in a musical entertainment at about 10 o'clock at night. While this performance was proceeding, the appellant arrived on the scene and requested the party to stop the music and disperse. The deceased retorted that the appellant did not own the ground on which the entertainment was being held and had no right to interfere. The appellant thereupon left in a temper, remarking that the party could continue the performance at their risk. Shortly afterwards he re-appeared on the scene armed with a chhavi, and after making some remarks walked up to the deceased and struck him a blow upon the head with the weapon, felling him to the ground. He then struck him two more blows while he lay on the ground. (Here the judgment described the injuries and proceeded.) The learned trial Judge has found—as, indeed, he could not have otherwise found upon the facts—that the appellant struck the blow with the deliberate intent to kill the deceased. The finding of the learned Sessions Judge on this point is expressed as follows:

Taking into consideration the very dangerous weapon used, the vital part which was hit and the number, as also the extent, of injuries caused, there can be no reasonable doubt that Waryam Singh did the act by which death was caused, either with the intention of causing such bodily injuries as were likely to cause death of the assailed person, or with the intention of causing bodily injuries to him which were sufficient in the ordinary course of nature to cause death, and that the offence therefore fell within the purview of S. 300, Indian Penal Code.

Having come to this conclusion, and having held that the offence amounted to murder as defined by S. 300 of the Indian Penal Code, the learned Judge awarded the lesser punishment permitted by S. 302, Indian Penal Code, on the ground that the appellant was in a state of intoxication at the time he committed the offence—this, in the opinion of the learned Judge, being a sufficient reason for imposing the lesser penalty.

Now, so far as the guilt of the appellant is concerned, there is no possibility of doubt in this regard. He has not attempted any defence. He has produced no witnesses, but has contented himself with a bald denial. The written statement which he put in is to this effect:

I am innocent. The case has been concocted against me out of enmity. I was not in the village on the day of the occurrence.

As against this the evidence of the prosecution is overwhelming, and there is no reason to disbelieve any of the witnesses with the exception of Indar Sing (P. W. 12), who tells a somewhat different story from the rest of the witnesses. This person, however, was not on the scene at the time of the occurrence and does not profess to be an eyewitness, and no weight need be attached to his testimony

As it is obvious that the appellant has been rightly convicted, his appeal must be dismissed.

There remains to be considered the petition for enhancement of sentence. Mr. R. C. Soni, who appears for the Government Advocate, contends that in imposing the lesser of the alternative

punishments provided by S. 302, Indian Penal Code, the learned Sessions Judge has not exercised his discretion judicially. S. 300 of the Indian Penal Code, provides that :

> Whoever commits murder, shall be punished with death, or transportation for life, and shall also be liable to fine.

This leaves a discretion to the trial Court as to which penalty shall be imposed. But S. 367 (5) of the Code of Criminal Procedure enacts that where an accused person is convicted of an offence punishable with death, and the Court sentences him to any other punishment, the Court shall in its judgment state the reasons why the sentence of death was not passed. It need hardly be emphasized that the reasons justifying the infliction of the lesser penalty must be such as are in accord with established legal principles. In the present case the reason given by the trial Judge for not imposing the appropriate penalty for deliberate murder, that is, the capital sentence, is that intoxication furnishes a ground for mitigating the punishment. This is, in my opinion, an entirely insufficient reason for the course taken by the learned Sessions Judge. It is a maxim of English Law that voluntary drunkenness does not take away responsibility of any kind and, indeed, the older judicial authorities considered it rather an aggravation than otherwise. The rule is now qualified to this extent, that unless drunkenness either amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation. Any doubt which there may have been on this subject is removed by the judgment of the House of Lords in *Director of Public Prosecutions* v. *Beard* (1). I may add that the principles enunciated in this case are in strict accord with those laid down by the Full Bench of the Burma Chief Court in *Nga Tun Baw* v. *Emperor* (2) cited in *Pal Singh* v. *Crown* (3) :

Mr. C. L. Mathur, who appears for the respondent in the present petition, has argued that the discretion exercised by the learned Sessions Judge was in strict accordance with law, inasmuch as he followed the ruling of the Punjab Chief Court in *Pal Singh* v. *Crown* (3). Having carefully considered the judgment in that case it seems to me clear that it does not support Mr. Mathur's contention. The headnote does not accurately represent the decision of the Court. The case is referred to in the text-books as laying down the proposition that intoxication forms a sufficient excuse for not exacting the extreme penalty. This is not in fact, as I read it, what that decision did establish. The judgment in that case definitely states that the Court was

> unable to find directly or constructively that Pal Singh (one of the accused persons) intended to cause death or such bodily injury as would be likely to cause death.

And for these reasons the Judges considered that it was not necessary to inflict the death penalty. In other words the Judges found that the condition of drunkenness of the accused, taken in conjunction with the other circumstances of the case, negatived an intent on his part to cause death. It was not on account of his drunken condition that they imposed the lesser penalty, but because the Court found that he did not intend to kill the victim of his acts.

This is in accordance with the principles laid down in *Rex* v. *Meakin* (4), where Alderson, B. stated that :

> With regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used. If a man used a stick a jury would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon ; but where a dangerous instrument was used, which, if used must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party.

In *Pal Singh's* case (3) the weapons used for inflicting injuries were sticks. In the present case the weapon used was a particularly deadly weapon, namely, a chhavi, and the learned Sessions Judge has emphatically found that the appellant did intend to cause the death of Kesar Singh, and, as I have already pointed out, he could not upon the facts have come to any other conclusion. The evidence does not lead to the conclusion that the appellant was in any very advanced state

(1) [1920] A. C. H. L. 479.
(2) [1912] 5 Bur. L. T. 175=17 I. C. 800=6 L. B. R. 100 (F. B.).
(3) [1917] 28 P. R. Cr. 1917=41 I. C. 980=35 P. W. R. Cr. 1917.
(4) 7 C. & P. 297.

of intoxication. He was at least sober enough to walk from the scene of the occurrence to a ruined house near by, return with a chhavi and strike three deadly blows upon the head of the deceased. It would be impossible to hold upon the circumstances of this case that the state of intoxication of the appellant was such as to render him incapable of forming the intent to kill the deceased.

For the reasons I have given, I am of opinion that the learned Sessions Judge has failed to act in accordance with established principles in the exercise of his discretion in imposing the lesser sentence allowed by law, and accordingly I would accept the petition, set aside the sentence of transportation for life and impose in its place the capital sentence.

Harrison, J.—I agree. The law on the subject has been clearly explained in the Division Bench judgment of this Court in *Sheru* v. *Crown* (5).

Appeal dismissed.
Application accepted.

(5) A. I. R. 1926 Lah. 232.

A. I. R. 1926 Lahore 430

LEROSSIGNOL AND MARTINEAU, JJ.

Mehl Singh—Defendant—Appellant.

v.

Amar Nath and *others*—(Plaintiffs) and (Defendant)—Respondents.

Second Appeal No. 851 of 1925, Decided on 28th January 1926, from the decree of the Dist. J., Gujranwala, D/-7th January 1925.

Transfer of Property Act, S. 101—*In absence of contrary intention earlier mortgage though discharged is kept alive if it benefits the person discharging.*

Where there are several mortgages on a property, the owner of the property may, if he pays off an earlier mortgage, keep it alive for his benefit and then come in before the later mortgagee. In the absence of an indication to the contrary it is to be presumed that the owner intended to keep alive the previous charge if it would be for his benefit: 47 *Mad.* 190, *P. C.*; 10 *Cal.* 1035 *P.C.* and 39 *Cal.* 527 *P. C., Foll.* [P. 430, C. 2]

Tek Chand and *Nawal Kishore*—for Appellant.

G. C. Narang and *Amar Nath*—for Respondents.

Martineau, J.—Five shops belonging to Jodh Singh, Defendant No. 1, and his brother Rattan Singh were mortgaged by them in 1917 to Maya Ram with possession for Rs. 3,000. In 1918 Jodh Singh mortgaged his half share to the plaintiffs' predecessors-in-title for Rs. 900. No mention was made in the second mortgage deed of the prior mortgage. In 1920 Jodh Singh and Rattan Singh sold the shops to the second defendant Mehl Singh for Rs. 3,000. The mortgage to Maya Ram was mentioned in the sale deed, but not the mortgage to the plaintiffs. The latter have now sued on their mortgage deed for the recovery of the amount due to them by the sale of half of the mortgaged property and have been given a decree.

Mehl Singh had after his purchase paid to Maya Ram the amount due on his mortgage, namely, Rs. 3,299/6, and made improvements in the property on which it has been found that he spent Rs. 2,626, and he claimed to be entitled to a prior charge in respect of half of each of these sums. The trial Court held that he was entitled to priority in respect of both items, but the lower appellate Court has held that he has a prior charge only in respect of the payment made to Maya Ram. He has filed a second appeal and the plaintiffs have lodged cross-objections.

In 47 *Mad.* 190 it was held by the Privy Council that where there are several mortgages on a property the owner of the property may, if he pays off an earlier mortgage, keep it alive for his benefit and then come in before the later mortgagee. It was also held that in the absence of an indication to the contrary it is to be presumed that the owner intended to keep alive the previous charge if it would be for his benefit, and the same principle has been laid down in other decisions of the Privy Council reported in 10 *Cal.* 1035, 29 *Cal.* 154 and 39 *Cal.* 527. We agree, therefore, with the lower appellate Court that the appellant must be taken to have intended to keep the mortgage in favour of Maya Ram alive for his benefit, there being nothing to show the contrary, and that he is entitled to priority in respect of the sum which he paid to Maya Ram on account of Jodh Singh's share.

With regard to the expenditure on improvements, it is to be observed that Maya Ram's mortgage deed contained a

clause by which he was to be reimbursed at the time of redemption for any expenditure incurred by him during the currency of the mortgage. The appellant, who on payment of the amount due to Maya Ram stood, in the latter's shoes, is entitled to the benefit of that condition, and the sum which he spent on improving the property must be allowed as a prior charge.

We accordingly dismiss the cross-objections and, accepting the appeal, we set aside the decree of the lower appellant Court and restore that of the trial Court. The plaintiffs will pay the appellant's costs in this Court and the lower appellate Court. Costs in the trial Court will be paid as directed by that Court.

Decree set aside.

A. I. R. 1926 Lahore 431

CAMPBELL, J.

Isher Singh—Plaintiff—Appellant.

v.

Wir Singh and *others*—Defendants—Respondents.

Second Appeal No. 1983 of 1925, Decided on 29th April 1926, from a decree of the Dist. J., Sialkot, D/- 10th June 1925.

(a) *Civil P. C., O. 22, Rr. 3 and 11—Some appellants dying before decision without substitution—Their legal representatives are not necessary parties to second appeal by opposite party.*

Where before the decision of the lower appellate Court some of the appellants die and their legal representative ares not brought on record, even though the appeal is accepted, the decree of the trial Court remains good against them. The legal representatives of the deceased appellants are not necessary parties in second appeal by opposite party. [P. 432, C. 1]

(b) *Adverse possession—Plaintiff purchasing land from person without title—User open and known to owner for more than 12 years creates title by prescription.*

The plaintiff purchased the site in suit from a person who had no right to sell; the sale deed was not registered but it was attested by a lambardar of the patti to which the land belonged; on other land purchased by the plaintiff, he had constrncted a house and he had been using the land in suit as an appurtenance to his house: he enclosed it with a hedge and he had been using it as a carpenter's yard.

Held: that the plaintiff has acquired ownership by adverse possession: 16 *Bom.* 338, *Dist.* [P. 432. C. 2]

Hargopal—for Appellant.

Nandlal—for Respondents.

Judgment.—This was a suit by one Isher Singh for possession of a small spot of land within the limits of the Narowal Municipality in the Sialkot district. The defendants were numerous owners of Patti Barsal of Narowal. The plaintiff alleged that he had been dispossessed by these persons 1½ or 1¾ years before suit and that he was the proprietor. He claimed to be so on two grounds, firstly, that he had purchased the plot from one Wasawa Singh on the 6th of March 1909 and the other that in any case had established ownership rights against the defendants by adverse possession.

The trial Court held that the plaintiff and one Ahmad Bakhsh had purchased from Wasawa Singh on the 6th of March 1909 a piece of ground and that the plaintiff had subsequently bought out Ahmed Bakhsh. This ground, was held by the trial Court to have been partly in the village of Jamman and partly in Narowal Patti Barsal, and it was further found that the portion in Narowal was the plot in dispute and that Wasawa Singh was not proved to have been an owner in Narowal Patti Barsal or to have had any right to dispose of the plot in suit. The rest of the ground sold lying within the boundary of Jamman village was found to be on the north of the plaintiff's house and to be unquestionably his property so far as the defendants are concerned. On the other point, that of adverse possession, the trial Court upheld the plaintiff and granted him a decree. The defendants appealed to the District Judge who reversed tha trial Court's decision and dismissed the suit on the sole ground that taking the facts to be as held by the trial Court, the plaintiff had not established adverse possession for the period during which he had held possession according to the trial Court, namely, from the 6th of March 1909 till December 1921.

The plaintiff has come to this Court on second appeal. During the pendency of the appeal and before the hearing he submitted an application stating that two of the original defendants Mian Singh and Labhu alias Buta had been shown as appellants in the lower appellate Court and for that reason were shown in the present appeal as respondents, whereas these two persons had in fact died before the appeal in the District

Court was decided, namely, on the 24th of April 1925 and on the 5th of May 1925. The application asked that their legal representatives should be joined as respondents to this appeal, and the prayer was granted subject to all just exception. At the hearing before me the learned counsel for the respondents has pointed out that the application for joining the legal representatives was not made within the requisite period from the alleged deaths and further said that he was not in a position to contradict the affidavit of the appellant that the death had occurred on the dates stated. In this situation the affidavit must be accepted and it must be taken that Mian Singh and Labhu died before the decision of the appeal in the District Court. There was thus no decree in their favour by the District Court and the original decree against them in the trial Court was not reversed. Their legal representatives, therefore, are not necessary parties to the present appeal. I set aside the tentative order impleading these legal representatives and in lieu thereof direct that the names of Mian Singh and Labhu alias Buta be struck out from the list of respondents.

The facts found by the trial Court were as follows : The sale by Wasawa Singh of the land, including the plot in dispute, was made by deed which was attested by Mit Singh, lambardar of Patti Barsal and apparently Wasawa Singh did know the exact boundary of the two villages but considered rightly or wrongly that the plot in dispute belonged to him. From the 6th of March 1909 till the 18th of December 1921 the plot in dispute was used as an approach to Ishar Singh's house and remained as such in Ishar Singh's possession. It was also enclosed by him with a thorn hedge and used as a place for carrying on his trade as carpenter. The plaintiff had bought the land as a portion of entire plot, to the other portion of which he had acquired a sound legal title, and he began to use the plot in dispute in the belief that he had legal title to it also. The defendants live within Narowal Municipality and the plot is on a main thoroughfare. It cannot be said that the plaintiffs' user was without the defendants' knowledge and in fact he has used the plot for over twelve years under a title to the knowledge of the defendants as an approach to his house.

The learned District Judge proceeded to hold that, because the plot was a vacant site, possession of it could not become adverse against the owner, and he relied on *Framji Cursetji* v. *Goculdas Madhowji* (1) and some other cases which followed that ruling. The Bombay case is a well-known one, and it concerned a a small piece of land held to have been of no present use to its owner and to have been convenient in many ways to his neighbour who for more than twelve years without objection made use of it in various ways these various ways being the erection of structures of a privy, sheds for live-stock and a hut for a gharriwallah. The defendant moreover admittedly had a right of passage across the part of the land for the purpose of access to the well. In these circumstances it held that such user as that described was insufficient to give title to the land by adverse possession.

The circumstances of the present case are materially different. Here the plaintiff purchased the site by deed from a person who has been held to have had no right to sell. The deed was not registered but it was attested by a lambardar of the patti to which the land belonged. On other land purchased by the same vendee the plaintiff has constructed a house and he has been using the land in suit as an appurtenance to his house. He has enclosed it with a hedge, a fact which distinguished the case very conspicuously from the Bombay case, and he has been using it as a carpenter's yard, The place is not tucked away in a corner but lies on a main thoroughfare. If the facts are these and if the plaintiff has held possession in this manner from March 1909 till December 1921 his possession has been adverse for that period against the defendants. Since the decision of the learned District Judge is on a purely preliminary point the appeal must go back to him for re-decision. It is of course quite possible that he may come to a different conclusion on the facts from that arrived at by the trial Court,

The learned District Judge's judgment appears to contain in its last paragraph two findings of fact by the learned District Judge himself. One is a dissent

(1) [1892] 16 Bom. 338.

from the trial Court's decision that there was no other approach to the plaintiff's house except over the plot in dispute. Whether this was so or not does not appear to me to make any great difference to the question of adverse possession. The other is that the plaintiff has not proved that the defendants dispossessed him two years ago and that the defendants had been in possession for more than two years. This finding also does not effect the situation, since the suit was instituted on the 1st of March 1924 and the finding of the trial Court is that the plaintiff was in possession up to the 18th of December 1921, a date more than two years from the date of suit.

I accept the appeal and set aside the order of the learned District Judge. The case is returned to him for a fresh decision. The remand is under O. 41, R. 23, Civil P. C., and, therefore, stamp on the present appeal will be refunded. The other costs in this Court will follow the event.

Appeal accepted.

A. I. R. 1926 Lahore 433

ZAFAR ALI, J.

Puran Mal—Surety—Appellant.

v.

The Firm Dina Nath Hari Ram and *another*—(Decree-holder) and Judgment-debtor—Respondents.

Miscellaneous First Appeal No. 2102 of 1925, Decided on 13th March 1926, from the order of the Senior Sub-J., Simla, D/- 14th August 1925.

Civil P. C., S. 46—Court to which precept is issued for attachment of property can accept money or security—Neither surety nor judgment-debtor can object to it.

A Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connexion with proceedings for attachment, and so a Court to which a precept is issued for attachment of property should do the same under the same circumstances. It cannot therefore be said that the Court has no jurisdiction to accept money or security. But even if the Court acts without jurisdiction, the judgment-debtor and the surety are both estopped from raising the objection, and cannot be allowed to challenge the validity of an arrangement brought about by themselves.

[P 433, C 2; P 434, C 1]

Nawal Kishore—for Appellant.

Faqir Chand and *Sohan Lal Kapur*—for Respondents.

Judgment.—The facts are fully stated in the order appealed against and are briefly as below: A precept under S. 46 of the Civil Procedure Code having been issued to the Court of the Subordinate Judge, First Class, at Simla, for attachment of the property of the judgment-debtor, Ram Chand, the latter applied to that Court for stay of execution for one month and ten days offering to furnish security for payment of the decretal amount and promising to pay it within the said period. This was agreed to and the Court accepted the security of Rai Sahib Puran Mal. But instead of making payment, which the judgment-debtor had promised to do, he obtained an order from the High Court for stay of execution. This was, however, withdrawn later and the decree was then transferred to the Court at Simla for execution and the decree-holder proceeded to execute it against the surety. The latter raised the objections that the Court had no authority to take security but could only attach the property specified in the precept and that in any case the security lapsed after two months.

These objections having been overruled the surety appeals to this Court. There can be no doubt that a Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connexion with proceedings for attachment. Now, it is clear that an executing Court must stay its hand and drop all proceedings if the judgment-debtor should deposit the decretal amount, and by analogy the Court to which a precept is issued for attachment of property should do the same under the same circumstances. It cannot therefore be said that the Court to which a precept is issued has no jurisdiction to accept money or security. But even if it be assumed for the sake of argument that the Court acted without jurisdiction the judgment-debtor and the surety are both estopped from raising the objection, and

cannot be allowed to challenge the validity of an arrangement brought about by themselves. They mean to play a trick on the Court as well as the decree-holder, and this they cannot be suffered to do: see *Bunwari Lal* v. *Abdul Ghafur* (1) and *Nawab Zada Muhammad Akbar* v. *Dya Nath* (2).

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) [1909] 5 P. L. R. 1909=1 I. C. 48=4 P. W. R. 1909.

(2) [1889] 200 P. R. 1889.

A. I. R. 1926 Lahore 434

ADDISON, J.

Kura and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 157 of 1926, Decided on 30th April 1926, from the order of the Mag. 1st Cl., Ludhiana, D/- 21st December 1925.

Criminal P. C., S. 256—Prosecution witnesses from Native State—Procedure under S. 256 may reasonably be followed.

Where prosecution witnesses have come from a Native State and it would have been difficult to secure their attendance again.

Held: that it is an excellant reason for asking the accused forthwith whether they wish to cross-examine any of them. [P 434 C 2]

Bishen Narain—for Appellants.

C. L. Mathur—for Opposite Party.

Judgment.—Mohamda has been convicted under S. 457/75, Indian Penal Code, and sentenced to five years' rigorous imprisonment, while Kura has been sentenced under S. 457, Indian Penal Code, for the same offence to two years' rigorous imprisonment. Mohamda has appealed through jail and Kura through counsel.

The house of Sampuran Singh of village Malmazra, District Ludhiana, was broken into and a camel stolen on the night of the 18th-19th March 1925. The offence was reported next day at the police station and it was mentioned that Mohamda and a companion of his, who was not named, were suspected as they had been coming before this to the house of one Hardit Singh. Both the appellants were seen some two or three days later riding the camel by Mehr Singh and Natha Singh. They asked the appellants whose camel it was and received the reply that it was their own. These witnesses then pointed out that they knew it to be the property of Sampuran Singh whereupon the reply made by Mohamda was that he had bought it from Sampuran Singh through Hardit Singh. The camel was actually caught in the possession of the two appellants in Patiala State territory on the 26th March 1925. One Sant Ram saw them on it and chased them as he knew the camel. He was struck a blow with a lathi and the appellants rode off pursued by Man Singh and Arjan who caught the camel. The two appellants, however, succeeded in getting off it and running away, and were caught by Ude Singh and Bir Singh. All these facts have been satisfactorily established.

I was argued on behalf of Kura that he might have been an innocent companion of Mohamda. On the facts established, however, it must be held that both had stolen the camel. It was next argued on his behalf that the procedure laid down in S. 256 of the Criminal P. C. had not been followed. This is not correct. The Magistrate did ask the appellants forthwith whether they wished to cross-examine any of the prosecution witnesses, but he he did do so for an excellent reason, namely, because the witnesses had come from Patiala State and it would have taken a long time to have again secured their attendance. The appellants produced no evidence in their defence and gave no explanation worthy of mention. I have no hesitation in maintaining the conviction of both the appellants. Kura, however, is a first offender and it should be presumed that he was led by Mohamda. That being the case the sentence passed upon him is mnch too severe. I accept his appeal to the extent of reducing the sentence to nine months' rigorous imprisonment. I dismiss the appeal of Mohamda.

Sentence reduced.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

A. I. R. 1926 Lahore 435

ADDISON, J.

Chet Ram—Plaintiff—Appellant.

v.

Hari Bakhsh—Defendant—Respondent.

Miscellaneous First Appeal No. 1016 of 1925, Decided on 16th February 1926, from an order of the Senior Sub-J., Delhi, D/- 22nd April 1925.

(a) *Civil P. C., O. 32, R. 3—Irregularity.*

In every case an irregularity in the appointment of a guardian would not vitiate the proceedings in the suit. [P. 435, C. 2]

(b) *Civil P. C., O. 39, R. 1—Plaintiff must establish that irreparable loss or grave inconvenience would be caused if injunction is not granted.*

Where neither the equities of the case nor the balance of convenience is in favour of the plaintiff, a temporary injunction cannot be granted. It is necessary for the plaintiff to establish that irreparable injury or grave inconvenience would result to him if the injunction is not granted : 2 *L. L. J.* 283 and *A. I. R.* 1924 *Lah.* 633, *Ref. to.* [P. 435, C. 2 & P. 436, C. 1]

Sardha Ram—for Appellant.

Moti Sagar and *Balvant Rai*—for Respondent.

Judgment.— The following pedigree table is necessary to understand this appeal.

Jai Narain

Bishan Dyal	Sri Ram, (deceased).	Babu Lal, (defendant No. 2).
Murli Dhar		Chet Ram, (plaintiff).
Hari Bakhsh, (Defendant No. 1).		

Hari Bakhsh brought a suit for rendition of accounts in 1909 against Babu Lal and Chet Ram, son of Babu Lal. A preliminary decree was granted in his favour in 1914 and it was confirmed by the Judicial Committee of the Privy Council on the 22nd January 1924 so that the litigation lasted for many years. Chet Ram, the present plaintiff, was a minor and his guardian ad litem was his father, Babu Lal. The two principal pleas in that suit were that Bishan Dyal had separated from his brothers in 1903 and that Chet Ram had been adopted by his deceased uncle Sri Ram, and on both these points the Judicial Committee found against the present plaintiff Chet Ram. Chet Ram has now instituted the present suit to get the decree of the Privy Council set aside and for an injunction to restrain further proceedings in that suit.

His pleas are that his natural father was not the proper person to be appointed his guardian ad litem ; that there was no proper order for the appointment of his father as his guardian and he was guilty of gross negligence, etc. He also pleaded that he attained majority before the hearing was concluded before the Privy Council and was not brought upon the record there as a major. Pending the decision of this new suit he applied for a temporary injunction under O. 39, R. 1, Civil P. C., to stay the proceedings in the suit, the preliminary decree in which had been affirmed by the Privy Council. The senior Subordinate Judge has dismissed this application holding that prima facie the merits were not in favour of the plaintiff and that he would suffer no irreparable loss. Against this decision this first appeal has been filed.

I have no hesitation in agreeing with the lower Court. As pointed out by their Lordships of the Privy Council the plea that Chet Ram had been adopted by his deceased uncle Sri Ram was only raised in order to give Babu Lal and his son Chet Ram two-thirds of the property in suit instead of one-half. In these circumstances prima facie Babu Lal's interests were not adverse to that of his son. Further the rulings as to the appointment of a guardian ad litem under O. 32, R. 3, Civil P. C., do not go so far as to say that in all circumstances an irregularity in the appointment of a guardian would vitiate the proceedings in the suit. There also does not appear to be very much in the fact that Chet Ram attained his majority before the Privy Council decided the appeal. Further this litigation had been going on since 1909 and it was not till 1924 that the Privy Council affirmed the preliminary decree.

No final decree has yet been passed, and it seems to me that it would not be equitable to stay the proceedings. I do not see that any irreparable loss will accrue to the plaintiff if these proceedings are not stayed. Neither the equities of the case nor the balance of convenience is in favour of the plaintiff. It was held in *Firm of Manohar Lal Mahabir Pershad* v. *Firm of Jai Narain Babu Lal* (1) ; that a person asking the

(1) [1920] 2 L. L. J. 83=55 I. C. 403.

Court to exercise its discretionary jurisdiction must make out a strong case and, that the Court was not bound to restrain the defendant in that case from proceeding with the abritration merely because the refusal of a temporary injunction would render the relief as regards a permanent injunction abortive. It was necessary for the plaintiff to establish that irreparable injury or grave inconvenience would result to him : see also *Rameshwar Das* v. *Yakin-ud-din Khan* (2,) This disposes of the appeal which is dismissed with costs.

Pending the hearing of this appeal an ad interim stay of proceedings in the first suit was granted. An application was made to have this order set aside and both are still pending. As I have dismissed the appeal I set aside the temporary order of stay of proceedings in the first suit. This disposes of both the miscellaneous petitions.

Appeal dismissed.

(2) A. I. R. 1924 Lah. 633.

A. I. R. 1926 Lahore 436

ZAFAR ALI, J.

Mt. Thakari Bai and *another*—Defendants—Appellants.

v.

Jaspat Rai—Plaintiff—Respondent.

Second Appeal No. 2479 of 1925, Decided on 8th March 1926, from a decree of the Dist. J., Multan, D/- 10th July 1925.

Hindu Law—Debts—Antecedent debt does not cease to be so simply because the mortgagees in both transactions are identical.

An independent debt neither illegal nor immoral contracted by a Hindu father on the security of the joint family estate, antecedent to mortgage sued on is an "antecedent" debt and it does not cease to be so simply because the prior mortgagee and the subsequent mortgagee are the same : *A.I.R.* 1924 *P. C.* 50 and 42 *Mad.* 711 (*F.B.*), *Foll.* [P. 437, C. 1]

G. C. Narang—for Appellants.

Mool Chand—for Respondent.

Judgment.—This second appeal arises out of a suit brought by a mortgagee to recover Rs. 1,700 by sale of the property mortgaged to him. This sum was arrived at thus : (1) Rs. 600 principal mortgage-money. (2) Rs. 950 interest on (1). (3) Rs. 70 cost of improvements. (4) Rs. 103 interest on (3) Total Rs. 1,723 minus Rs. 23 realized by the plaintiff-mortgagee as rent.

The trial Court disallowed Items Nos. 3 and 4, and allowed Rs. 392-4-0 out of Item No. 1, and Rs. 630-12-0 out of Item No. 2, and gave the defendant credit for Rs. 270 on account of the rent of the mortgaged property and thus granted the plaintiff a decree for Rs. 793, but the correct amount was Rs. 753, that is, Rs. 392-4-0 plus Rs. 630-12-0 minus Rs. 270, Rs. 753. (P 2). On appeal by the plaintiff the District Judge allowed the first two items in full, upheld the trial Court's decision with regard to Items Nos. 3 and 4 and disallowed the defendant's claim to any rent more than Rs. 23, and thus gave the plaintiff a decree for Rs. 1,527 (that is, Rs. 600 plus Rs. 950) minus Rs. 23.

The defendants have come up to this Court in second appeal, and the plaintiff has filed cross-objections in respect of Items Nos. 3 and 4 which have been disallowed by both the Courts below. These cross-objections need not detain us long. The property mortgaged was one-third share in a house, the mortgagee himself being the owner of the remaining two-thirds; and the mortgage being with possession, he enjoyed possession of the whole house. The mortgagor was liable to pay costs of repairs, if any, and not cost of an addition to the house which the plaintiff appears to have made. He was, therefore, not entitled to recover the cost of it. I, therefore, dismiss the cross-objections with costs.

Turning to the defendant's appeal it may be stated that the mortgagor Bala Ram and his son, Defendant No. 1, were members of a joint Hindu family and that the property mortgaged was ancestral. Defendant No. 2 is the wife and transferee of the rights of Defendant No. 1, and the latter left her to contest the suit as the person standing in his shoes. Her main plea was that the mortgage was not binding on her; the debts contracted by the late Balla Ram were not incurred for a family necessity. It was, however, proved that Bala Ram at first gave the plaintiff himself a mortgage for Rs. 150 on this very property and subsequently executed the present mortgage for Rs. 600 which comprised the following sums : (1) Rs. 150, the prior mortgage-money. (2) 57-12-0 in-

terest on (1). (3) Rs. 392-4-0 received in cash. It was established that Item No. 3 was borrowed for a family necessity but no necessity for No. 1 was either stated in the mortgage-deed or proved. It was, however, an antecedent debt and there was nothing to indicate that it had been contracted for an immoral or illegal purpose. It is contended on behalf of the defendant-appellant that it could not fall within the definition of an antecedent debt because it was due to the plaintiff himself and that the latter was not entitled to recover it without establishing that it was contracted for a family necessity. But in *Arumugham Chetty* v. *Muthu Koundan* (1), it was decided that

> an independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to mortgage, sued on, is an 'antecedent' debt so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage.

In this Madras case, too, the prior mortgage-debt was due to the plaintiff in that case, and this case was cited with approval by their Lordships of the Privy Council in *Brij Narain Rai* v. *Mangla Prasad Rai* (2). I am, therefore, of opinion that the finding of the lower appellate Court on this point is correct.

As regards the defendants' claim for rent the plaintiff was under the terms of the mortgage bound to let the defendants' portion of the house on rent and to set off the rent realized against interest. He did let it for a short period and did realize Rs. 23 as rent, but he asserted that no tenant occupied the defendants' portion of the house after the expiration of that period. Now the house is situate in Multan which is a thickly populated city and where presumably houses do not remain unoccupied for want of tenants. Further as the plaintiff himself lived in the house it is obvious that it was much more convenient to him to enjoy possession of the whole house himself instead of letting a portion of it to strangers for the benefit of the mortgagor. In any case as he enjoyed possession of the whole house he must pay the usual rent for the mortgagors' portion of it according to the principle laid down in S. 76, Cls. (a), (b) and (h) of the Transfer of Property Act. I, therefore, allow the defendant Rs. 270 on account of rent which was allowed by the trial Court.

The result is that the decree of the lower appellate Court is modified and the plaintiff is granted a decree for Rs. 1, 280. The plaintiff will get his costs on this amount in the Courts below, but in this Court the parties will bear their own costs.

Decree modified.

(1) [1919] 42 Mad. 711=37 M.L.J. 166=(1919) M.W.N. 409=52 I.C. 525=9 M.L.W. 565 (F. B.)
A.I.R. 1924 P.C. 50.

A. I. R. 1926 Lahore 437

LE ROSSIGNOL AND MARTINEAU, JJ.

Abdul Wahab—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

Second Appeal No. 2145 of 1925, Decided on 27th January 1926, from the decree of the Dist. J., Lahore, D/- 13th July 1925.

Limitation Act, Arts. 144 *and* 149—*Art.* 144 *does not apply to a suit for declaration against Government, that plaintiff has acquired ownership by prescription—Such suit is governed by Art.* 149.

Article 144 does not apply to a suit for a declaration against the Secretary of State that plaintiff by prescription has become the owner of the property. Such suit is governed by Art. 149 and consequently it must fail unless the plaintiff is able to show that he has been in adverse possession for more than 60 years. [P. 438, C. 1]

Niaz Muhammad—for Appellant.

D. R. Sawhny—for Respondent.

Le Rossignol, J.—This second appeal arises out of an action brought by the plaintiff against the Secretary of State for India for a declaration that he was the owner of certain property.

The defendant retorted that the property in dispute belonged to Government and that the plaintiff had no right to the declaration he craved unless he established that he had been in adverse possession for over 60 years with reference to Art. 149 of the Limitation Act. It was admitted in the first Court that title lay with the Government and the plaintiff attempted to prove tbah6he been in adverse possession for overdat years. On that point he has failed in both Courts below, and in second appeal the contention raised on his behalf is that Art. 149 refers to a suit brought by the Secretary of State and cannot be

invoked as a bar to the plaintiff's suit It is contended that the article governing the present suit is Art. 144.

Now, Art. 144 does not apply to the present suit. Art. 144 governs a suit for possession of immovable property and provides that such suit shall be brought within 12 years from the date when the defendant's possesion becomes adverse. The present suit is not a suit for possession ; it is a suit for a declaration that the plaintiff by prescription has become the owner of the property in litigation, and the suit must fail unless the plaintiff is able to show that he has been in adverse possession for more than 60 years for the simple reason that Art. 149 permits the Government to sue for recovery of property at any time within 60 years of the date when the right to sue accrues. Until that period has elapsed the Government's right in the property is not lost as provided by S. 28 of the Limitation Act. Consequently the plaintiff is not entitled to the declaration he prays for, and we dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 438

CAMPBELL, J.

Mt. Nihali—Applicant—Appellant.

v.

The Crown—Respondent.

Miscellaneous First Appeal No. 99 of 1926, Decided on 26th April 1926, from the order of the Senior Sub. J., Amritsar, D/- 3rd November 1925.

Guardian and Ward—Where Court's permission for the marriage of ward is not necessary permission for repayment of marriage expenses should be given.

Where guardian is not required by the conditions of her appointment to take the leave of the Court for arranging a marriage of her ward and she celebrates the marriage and incurs a loan by charging the minor's property, she is entitled to have permission of the Court for arranging to repay the loan. [P 438, C 2]

Parkash Chandra for *Muhammad Amin*—for Appellant.

Judgment.—Mt. Nihali is the guardian appointed by Court of two minors, Fauju and Teju. On the 10th of August 1925 she applied to the Court stating that Fauju minor's marriage had been fixed in September and asking to be allowed to raise money for the purpose. She was told that the further details must be supplied. On the 18th of August she presented another application giving certain figures ; this application was fixed for kafiat on the 31st of August. On the 31st August it was noted that in order to ascertain the amount of property and the circumstances of the minors it was necessary to get the record out and for this purpose the 20th of October was fixed. On the 20th of October Mt. Nihali did not appear, and the application was dismissed in default.

On the 2nd of November 1925 she put in a petition stating that the marriage had been celebrated in September 1925 at a cost of Rs. 1,700, out of which she herself had provided Rs. 500. She detailed the sums borrowed from various sahukars and asked for permission to mortgage the minors' land in lieu of the charges. The Court's order was that the guardian should have obtained the previous sanction of the Court for the marriage and for the expenses required in connexion therewith, and that not having done so she must pay the expenses herself. Permission to mortgage the land was refused.

An appeal has been preferred. The case was one in which the guardian was not required by the conditions of her appointment to take the leave of the Court for arranging a marriage. She was also exempted from furnishing annual accounts. In these circumstances the appeal must be accepted. Mt. Nihali was at liberty to arrange the marriage without taking the permission of the Court and, when asking for permission to raise funds for it, she also asked for an early date which she was not given. It is possible that she should have applied earlier, but allowance should be made for her sex and position.

I accept the appeal and return the case to the lower Court. The amount actually spent should be investigated and an arrangement should be made for repayment of the money borrowed or such amount as may appear to be reasonable in such a manner as to secure the best interests of the minors.

Case remanded.

A. I. R. 1926 Lahore 439

ZAFAR ALI, J.

Munshi and *others*—Convicts— Appellants.

v.

The Crown—Opposite Party.

Criminal Appeal No. 468 of 1925, Decided on 20th January 1926, from the order of the Asst. S. J., Karnal, D/- 7th April 1925.

Penal Code, S. 401 — Enquiry into theft by panchayat and calling a person suspect, or accepting money for search of stolen property is not sufficient.

The evidence that a panchayat enquired into a theft and called a person before it as a suspect, or that a person accepted money and agreed to make a search for stolen property and to restore it to the owner, does not as against that person prove any of the ingredients of the offence punishable under S. 401.

[P 439, C 2; P 440, C 1]

Muhammad Shafi—for Appellants.

Amar Nath Chona—for the Crown.

Judgment.— One Hasna, who has several previous convictions against him and was under arrest on a charge under S. 458, Indian Penal Code, made an offer to the police, to give information about a gang of thieves who had been associated with him tor the purpose of habitually committing theft, if he were made an approver. This was agreed to and Hasna accepted a tender of pardon and his statement was duly recorded by a Magistrate on the 22nd and 23rd February 1924. In consequence of the information given by him, Barkat, Ghafur aud Hasham were arrested on the 23rd February and they accepted a tender of pardon on the 11th, 14th and 18th March respectively. The result of the police investigation was that seventy men in all were arrested out of whom sixty-two were sent up for trial on a charge under S. 401, Indian Penal Code. Some were discharged by the committing Magistrate and the trial of the remaining forty-seven commenced in the Court of the Assistant Sessions Judge, Karnal, on the the 11th October 1924 and ended on the 7th April 1925 on which date the judgment was announced acquitting thirty-seven men and convicting ten only. Seven out of these ten convicts have lodged a joint appeal through Mr. Muhammod Shafi, one has appealed though Mr. Shamair Chand and two have appealed separately through the Superintendent of the Jail in which they are confined.

The principal witnesses for the prosecution are the four approvers who are admittedly men of no character and whose evidence against as many as thirty-seven men was not relied upon by the Court below. Mr. Amir Nath Chona, who appears for the Crown, frankly concedes that the evidence of any one of these four approvers cannot be said in this case to corroborate others as there is nothing on the records to show that they had had no chance of collaboration before giving evidence, and that their evidence according to the general rule is unworthy of credit as against each accused unless corroborated in material particulars. It will not be out of place to give here a few excerpts from the judgment of the lower Court relating to these approvers.

In the case of Fajra whom he (Hasna) named as present in four thefts, while he was actually in the police custody when those thefts occurred; that he named Ali Mohammad accused on on account of personal grudge as an accomplice in the Panipat barber theft although he was undergoing a sentence of imprisonment in the Jind State at the time of that theft; that though Hasna was the head of this alleged gang he could not identify in jail eight persons of those accused. In my opinion all these defects are due to the anxiety on the part of these approvers to implicate a large number of persons to simply feed their personal grudge and consequently they have said many things which were not true or which could not be supported. I am distinctly of opinion that it is not proved that Hasna had any central gang consisting of a very large number of persons as alleged. All the four assessors who gave their opinion separately are unanimously of opinion that there was no gang of Hasna formed for purposes of committing habitual thefts or robberies.

Now the corroboratiye evidence that has been relied upon as against almost every appellant is: (1) that he took part in one or more of the thirty-two thefts which, according to Hasna, were committed by the members of his gang from time to time; and (2) that the members of the gang associated with each other. Against some of the appellants there is the further evidence that they appeared before certain panchayats which made enquiries into certain thefts or that they received moneys (bhungas) promising to restore stolen cattle. But it is clear that the evidence that a panchayat made an enquiry into a theft and called a person before it as a suspect or that a person accepted money and

agreed to make a search for stolen animal and to restore it to the owner, does not as against that person prove any of the ingredients of the offence punishable under S. 401, Indian Penal Code. (The judgment then dealt with the evidence as to each of the accused and proceeded.) It is not necessary to deal with the cases of the remaining appellants individually. The approver's evidence and the evidence as to association being unreliable none of them could be convicted. I, therefore, accept all the appeals, set aside the convictions and sentences and direct that the appellants be released forthwith.

Convictions set aside.

A. I. R. 1926 Lahore 440

ADDISON, J.

Shahab Din—Defendant—Appellant.

v.

Mt. Umran and *others*—Plaintiffs—Respondents.

First Appeal No. 1787 of 1925, Decided on 19th January 1926, from a decree of the Addl. J., Lahore, D/- 23rd January 1925.

(a) *Custom—Court cannot extend custom from deductions from it.*

It is outside the province of the Court to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established : 4 *L.L.J.* 336, *Fol'*. [P 440, C 2]

(b) *Custom — Definite rule of custom not found—Parties can fall back to personal law.*

Among parties generally following Customary Law it is permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable could be found : *A. I. R.* 1924 *Lah.* 698, *Foll.* [P 441, C 1]

(c) *Mahomedan Law — Succession — Brother's daughters exclude their pre-deceased's sister's descendants.*

Under Mahomedan Law, daughters of a deceased brother exclude the descendants of their sister who dies during the lifetime of the deceased : *A. I. R.* 1922 *Lah.* 217 *Dist.*

Har Bhajan Das—for Appellant.

Ganga Ram—for Respondents.

Judgment.—The parties to this second appeal are Muhammadan Jats. There were two brothers Sattar and Barkhurdar. Sattar died leaving several daughters and was succeeded by his brother Barkhurdar. Barkhurdar then died childless and in 1913 he was succeeded by Mt. Umran and Mt. Amir Bibi, two of the daughters of his brother Sattar who predeceased him. No share was given to the sons of a third daughter Mt. Bhagan, who had died during the lifetime of Barkhurdar. It would seem that they did not come forward at that time to claim any share. Then, in 1917, Mt. Amir Bibi died and was succeeded by her two daughters, Mt. Karam Bibi and Mt. Hayat Bibi.

In 1919 Mt. Umran instituted a suit against these two daughters of Mt. Amir Bibi claiming that she was entitled to all the land left by Barkhurdar. This suit was dismissed in June 1922. Then, on the 21st December 1922, the son and grandsons of Mt. Bhagan, who were given nothing in 1913, sued for possession of one-third of the land left by Barkhurdar on the ground that they were heirs along with Mt. Umran and Mt. Amir Bibi.

In April 1923 Mt. Umran brought a second suit again claiming that she alone was entitled to succeed to Barkhurdar. Her suit was tried along with the suit brought by the descendants of Mt. Bhagan. Mt. Umran's suit was dismissed and the suit brought by the descendants of Mt. Bhagan was decreed. On appeal to the Additional District Judge he held that there was no provision in Customary Law recognizing a right of inheritance in favour of the descendants of daughters of a brother of the last male proprietor, i. e., he held that none of the daughters of Sattar was entitled to succeed under Customary Law. He, therefore, accepted the appeals before him and dismissed the suit of the descendants of Mt. Bhagan as they had not established that by custom they were entitled to succeed to Barkhurdar, while they were not heirs under Muhammadan Law. Against this decision these second appeals have been filed.

It has been clearly held in *Dalipa* v. *Dallu* (1) that in that case it had not been established that by custom a brother's daughter had a right of succession in the absence of all male collaterals and that it was outside the province of the Court to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established. In the present case there is no evidence on Issue No. 8 whether Mt. Bhagan's descendants

(1) [1922] 4 L. L. J. 336.

were entitled to succeed to one-third of the land though she died in the lifetime of Barkhurdar. Further, it was held in *Tabi* v. *Saudagar Singh* (2) that among parties generally following Customary Law it was permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable could be found. Now, under Muhammadan Law, which is the personal law of the parties, it was admitted that Mt. Amir Bibi and Mt. Umran would certainly have succeeded to Bakhurdar's estate and would have excluded Mt. Bhagan's descendants, and this was what actually happened in 1913, no objection being taken to this till 1922.

Appellants' counsel, however, referred me to *Gobinda* v. *Nandu* (3), where it was held that there was no reason for holding that custom excluded a daughter's son from inheritance on the ground of his mother having predeceased her father. In that case, however, there was no dispute between the daughter's son and a daughter who was living at the time when the succession opened out. In that case also the personal law of the parties was the Hindu Law.

In my judgment, therefore, the descendants of Mt. Bhagan failed to prove that they were entitled by custom to succeed to one-third of the land left by Barkhurdar. The defendants clearly pleaded that they were the heirs both by custom and by law. It is clear that they are not the heirs by custom, but, as shown above, they are entitled to fall back on their personal law under which the descendants of Mt. Bhagan are not entitled to succeed. The decision of the learned Additional Judge of Lahore is, therefore, correct and I dismiss both these appeals with costs.

Appeals dismissed.

(2) A. I. R. 1924 Lah. 698.
(3) A. I. R. 1922 Lah. 217.

A. I. R. 1926 Lahore 441

MARTINEAU, J.

Muin-Ud-Din and *others*—Plaintiffs—Appellants.

v.

Abul Khair and *others*—Defendants—Respondents

Second Appeal No. 3112 of 1917. Decided on 12th March 1926, from a decree of Dist. J., Hissar, D/- 11th August 1917.

Practice—Procedure—Decree in second appeal set aside on the ground of a minor's improper representation—Appeal is to be reheard.

If a decree in second appeal passed by the High Court is set aside on the ground that a minor respondent was not duly represented by a guardian ad litem the second appeal is to re-heard. [P. 441, C. 2]

Shamair Chand—for Appellants.

Judgment.—The plaintiffs brought a suit in which they asked for several injunctions against the 1st defendant Nur Mustafa. The trial Court gave them a decree in full, but on appeal the District Judge set aside one of the injunctions, namely, in regard to the demolition of a wall and a room built by the defendant, and held that although these were new erections and they narrowed the way to which the parties were entitled, the relief to be given to the plaintiffs should take the form of compensation. The plaintiffs filed a second appeal in this Court. It was heard ex parte and Mr. Justice LeRossignol accepted it and restored the decree of the first Court.

During the pendency of the appeal in the Court Nur Mustafa had died, and his sons, one of whom, Niaz Mohammad, was a minor, were impleaded in his place. They brought a suit to have the decree of this Court set aside on the ground that Niaz Mohammad had not been properly represented by a guardian. They succeeded in the suit and the decree of this Court was declared to be null and void as against them. The second appeal which the plaintiff had filed in this Court has consequently to be reheard : *Bhagwan Dayal* v. *Param Sukh Dass* (1). A guardian has been duly appointed for the minor Naiz Mohammad, but no appearance has been made for the respondents. I have heard counsel for the appellants and have come to the same conclusion at which Mr. Justice LeRossignol arrived, namely, that the plaintiffs claim should have been decreed in full, and for the reasons given in Mr. Justice LeRossignol's judgment I accept the appeal and restore the decree of the trial Court with costs throughout.

Appeal accepted.

(1) [1917] 39 All. 8=36 I. C. 366=14 A. L. J. 818.

A. I. R. 1926 Lahore 442

BROADWAY AND FFORDE, JJ.

Deo Karan Das—Objector—Appellant.

v.

Secretary of State—Respondent.

First Appeal No. 2327 of 1922, Decided on 2nd March 1926, from an order of the Dist. J., Lahore, D/- 29th May 1922.

(a) *Land Acquisition Act, S. 54—Only final award or part of it is appealable.*

Section 54 only contemplates an appeal from a final award, or part of a final award of the Court, and until the District Judge decides the question as to apportionment there is no final award which can be appealed against. [P.442,C.2]

(b) *Land Acquisition Act, S. 54—District Judge must decide question as to apportionment—Pending suit does not affect his jurisdiction.*

The existence of a civil suit, in which the ownership of the land is in question, does not affect the jurisdiction of the District Judge to decide the question referred to him, but it is incumbent on him to decide the question.

[P. 442, C. 2]

Gopal Chand and *Bishen Nath*—for Appellants.

Govt. Advocate—for Respondent.

Judgment.—By Notification No. 18061-H, dated the 19th October 1918, a certain area of land was acquired by Government for the extension of Lahore Cantonment East station yard. A portion of the land so acquired consisted of a plot 0.90 acre 8 kanals 14 marlas in area situated in Mauza Ganj on which stood a saltpetre factory. Three persons claimed to be interested in this land and factory, namely, Lala Kanshi Parshad, his brother Lala Deokaran Das, and one Harnam Singh, who demanded a sum of Rs. 32,000 as compensation for the factory. There was also a dispute between the said three persons as to the ownership of the factory. Lala Kanshi Parshad claimed to be the sole owner and as such entitled to the entire amount awarded; his brother claimed to be a co-sharer to the extent of one-half, while Harnam Singh claimed that he was entitled to a 1/3rd share. On the 13th May 1920 the Collector under Act I of 1894 made an award relating to this area by which a total sum of Rs. 4,616-9-3 was fixed as the amount of the compensation. Harnam Singh accepted the award which was, however, objected to by the other two. The Land Acquisition Officer thereupon referred the matter to the District Court. Acting under the provisions of S. 30 of Act I of 1894 he also referred the question as to the apportionment of the amount awarded. All the references were dealt with together by the learned District Judge who affirmed the award so far as it related to the amount of compensation, but declined to adjudicate on the question of the apportionment. The reason given for this is that a civil suit was pending, at the time of the acquisition, relating to the ownership of this factory.

Lala Kanshi Parshad and Lala Deokaran Das preferred separate appeals against the amount of compensation awarded by the learned District Judge. Harnam Singh was not made a party to either of these appeals. At the hearing, Mr. M. S. Bhagat for Lala Kanshi Parshad asked to be allowed to make Harnam Singh and Deokaran Das respondents in his appeal (No. 2933 of 1922) and further prayed that the question of apportionment should be gone into. Mr. Gopal Chand, for Lala Deokaran Das, stated that his client did not wish to make Harnam Singh a party in his appeal (No. 2327 of 1922).

The learned Government Advocate raised a preliminary objection to the effect that both appeals were incompetent as being premature. It was urged that S. 54 of Act I of 1894 only contemplated an appeal from a final award, or part of a final award, of the Court, and that until the learned District Judge had decided the question as to apportionment there was no final award which could be appealed against. There seems to be no doubt that the learned District Judge was wrong in holding that the existence of a civil suit, in which the ownership of the factory was in question, affected his jurisdiction to decide the question referred to him. As I read the provisions of the Act it was incumbent on him to decide the question. In the present case, however, his refusal of jurisdiction is obviously erroneous for the reason that the civil suit referred to was between Kanshi Parsad and Deokaran Das alone and had no concern with Harnam Singh.

In the circumstances I am of opinion that the learned Government Advocate's objection is well founded and that both appeals are incompetent: see *Ardeshir*

Mancherji v. *Assistant Collector, Poona* (1). I would, therefore, dismiss both appeals with costs, but in order to avoid further trouble and delay I would direct the learned District Judge to dispose of the reference regarding the apportionment of the compensation as speedily as possible.

In view of the above, in Kanshi Parshad's appeal I would not allow the additional grounds of appeal or the addition of parties.

Appeals dismissed.

(1) [1908] 10 Bom. L. R. 517.

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* A. I. R. 1926 Lahore 443

HARRISON AND JAI LAL, JJ.

Prabhu—Defendant—Appellant.

v.

Kale and *others*—Plaintiffs & defendants—Respondents.

Second Appeal No. 534 of 1922, Decided on 8th March 1926, from the decree of the District J., Hissar, D/- 12th January 1922.

* *Civil P. C., S. 100—Inferences as to jointness or disruption of joint Hindu family are findings of fact.*

The inferences drawn from facts admitted or proved as to the jointness or disruption of a joint Hindu family are themselves findings of fact: *A. I. R.* 1925 *P. C.* 49, *Foll.*; and as such whatever may have been omitted or disregarded or misunderstood or misappreciated, provided always the findings be based on evidence, those findings are conclusive so far as the High Court is concerned. [P. 443, C. 2]

Jagan Nath—for Appellant.

Muhammnd Amin—for Respondents.

Judgment.—In this case a finding has been given by the District Judge that the parties to the suit are joint, and a remand order was passed accordingly. From this a second appeal has been presented and counsel for the respondent takes a preliminary objection that the finding is one of fact and cannot be impugned in second appeal.

He relies, more especially, on *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1) and the passages at pages 261 and 259. This, which deals directly with the matter, is a very recent decision of the Privy Council, in which the concurrent findings of facts of the District Judge and the High Court of Madras were reviewed by their Lordships and the appeal was dismissed. The question in that case, as in this, was what inferences of facts as to the intention of the parties were to be drawn from certain acts These inferences, it was laid down on page 259, are findings of fact. In the concluding portion of the judgment their Lordships say that they agree with those conclusions as to the facts, and further: "Their Lordships have no doubt that this joint family never did separate." In other words, they emphasize the position that the inferences drawn from facts admitted or proved as to the jointness or disruption of a joint Hindu family are themselves findings of fact.

Counsel for the appellant has taken up the usual position that an inference from a finding of fact may sometimes be an inference of law, and he points out that in *Ram Parshad Singh* v. *Lakhpati Koer* (2), *Parbati* v. *Naunihal Singh* (3), *Amritrao* v. *Mukandrao* (4) their Lordships of the Privy Council agreed with or dissented from findings of fact. This does not, in our opinion, affect the position as laid down in the recent authority: *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1). The inferences are findings of fact and as such, whatever may have been omitted or disregarded or misunderslood or misappreciated, provided always the findings be based on evidence, those findings are conclusive so so far as this Court is concerned.

We, therefore, accept the preliminary objection, and finding that no appeal lies, we dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1925 P. C. 49=48 Mad. 254.

(2) [1903] 30 Cal. 231=30 I. A. 1=7 C. W. N. 162=5 Bom. L. R. 103=8 Sar. 380 (P. C.).

(3) [1909] 31 All. 412=3 I. C. 195=36 I. A. 71 (P. C.).

(4) [1919] 15 N. L. R. 165=53 I. C. 866 (P. C.)

A. I. R. 1926 Lahore 444

CAMPBELL AND ZAFAR ALI, JJ.

Ali Hussain—Plaintiff—Appellant.

v.

Bur Shah and *others*—Defendants—Respondents.

First Appeal No. 2228 of 1921, Decided on 12th January 1925.

Civil P. C., O. 22, R. 4—Respondents, not necessary parties, dying—Appeal abates against only the representatives of deceased.

Where the respondents who are not necessary parties died the appeal abates not as a whole but only as against the representatives of the deceased respondents. [P 444, C 2]

Moti Sagar and *Ghulam Mohi-ud-din*—for Appellants.

Ghulam Rasul and *Barkat Ali*—for Respondents.

Judgment.—The vital question involved in this first appeal is one of limitation. The lower Court has held that the suit is barred by time and we also arrive at the same conclusion. The facts are briefly as below :

One Chiragh Shah had four sons, two by one wife and two by another. On his death, which occurred in 1895, the four sons succeeded to his estate, and his proprietary holding was mutated in the names of all four in equal shares. One of the four having died in 1899, his full brother Madad Hussain (Defendant 2) claimed that he was entitled to succeed to his one-fourth share in the joint holding to the exclusion of the other two brothers, namely Ali Hussain (plaintiff) and Bur Shah (Defendant 1), because the family was governed by the chundawand rule of inheritance. This claim was accepted and mutation took place accordingly. In about 1920 Ali Hussain applied for partition of the joint holding claiming one-third share in it on the ground that the rule of inheritance applicable was pagwand and not chundawand. He was directed by the revenue officer, by order dated the 12th August 1920, to establish his title to one-third share in a civil Court. He accordingly instituted the suit out of which this appeal has arisen to obtain a declaration of title. His case was that the holding being still joint he had not lost his right to his proper share therein, that he was a minor in 1899 when the mutation took place and that after that he had been absent at first in Sind and next in Burma for long periods.

The defendants' plea of limitation is borne out by the following evidence : A private partition of the holding was effected in 1901-02 according to which Madad Hussain got separate possession of about half of it and the remaining two brothers of the other half. Entries in all the jamabandis from 1901-02 to 1916-17 show that the two sets of the brothers have ever since enjoyed separate possession and have been separately effecting mortgages and giving leases of the plots then partitioned. There is a long list of mortgages that was prepared by the office kanungo from the revenue records and placed on the record which indicate that the private partition was final and was made not only for the purpose of cultivation but also to be able to make alienations as proprietors in possession. Two of these mortgages may specifically be mentioned here. These are printed at pages 11 and 13 of the supplementary printed paper-book and are dated the 27th August 1906 and 1st May 1905 respectively. Both of these were executed and registered by the full brothers Bur Shah and Ali Hussain, and it is recited in either that the plots mortgaged have fallen to their share by a private partition. Ali Hussain plaintiff's age was 23 years at the time of execution of these deeds as noted therein, and he was consequently major when the partition was effected in 1901-02.

All this documentary evidence establishes conclusively a final partition since 1901-02 and further that Ali Hussain and his brother Bur Shah accepted the decision of the revenue officer who mutated the deceased brother's share in the name of Madad Hussain in 1899, and that they partitioned the holding accordingly. The learned counsel for the appellants concedes that the suit is barred by time if the holding was partitioned in 1901-02. We find that it was and accordingly dismiss the appeal with costs.

This being the result of the appeal, the objection that it had abated because the legal representatives of three of the respondents who had died were not brought on the record loses all importance. These respondents were not necessary parties, and the appeal therefore abated not as a whole but only as against the representatives of the deceased respondents.

Appeal dismissed.

A. I. R. 1926 Lahore 445 (1)

JAI LAL, J.

Dhari Mal—Accused—Petitioner.

v.

Emperor — Complainant — Opposite Party.

Criminal Miscellaneous Petition No. 48 of 1926, Decided on 30th April 1926.

Criminal P. C., S. 526 (e)—Complaint dismissed for default by one Magistrate—Another complaint on same facts should also be tried by him.

Where a complaint has been dismissed for default by a Magistrate a fresh complaint based on the same facts, but filed in another Court. should be sent to the former for trial.

[P. 445, C. 2]

Mehr Chand Mahajan—for Petitioner.

Order.—On the 23rd January 1926 one Raja Ram filed a complaint under S. 323/504, Indian Penal Code, against the petitioner in the Court of the City Magistrate, Khan Sahib Mian Hakim Din, of Hoshiarpur, who transferred it to Sardar Gurdial Singh, Magistrate, First Class. On the 28th January this complaint was dismissed as the complainant did not appear. The accused was present with his counsel on that date. Later on the same day Raja Ram filed another complaint in the Court of Sardar Gurdial Singh on the same allegations and under the same sections. Sardar Gurdial Singh returned this complaint to be presented to the City Magistrate. The City Magistrate took cognizance of the case and issued processes for the appearance of the accused, the petitioner. On the date of hearing an application was presented on behalf of the accused that the case may be sent to Sardar Gurdial Singh for trial, as the previous one had been dismissed by him. This petition was dismissed with the remarks by Mian Hakim Din, the City Magistrate, that the case being of special importance it was necessary that he should himself hear it.

This is a petition by the accused for transfer of the case from the Court of Mian Hakim Din. Several allegations are made in support of the petition from which an inference is sought to be drawn that the accused has reasonable grounds to apprehend that he will not receive justice in the Court of Mian Hakim Din. I have examined the explanation of Mian Hakim Din, and am satisfied that there is no ground for the petitioner to entertain an apprehension that he will not get a fair trial in his Court. At the same time I consider that as the case was originally transferred for trial to Sardar Gurdial Singh, and was once dismissed by him for default, it is desirable that the fresh complaint based on the same facts should be sent to him for trial. Under S 526 (e) I order that the case be transferred from the Court of Mian Hakim Din, City Magistrate of Hoshiarpur, to that of Sardar Gurdial Singh, Magistrate, First Class, Hoshiarpur.

Case transferred.

A. I. R. 1926 Lahore 445 (2)

SHADI LAL, C. J., AND LE ROSSIGNOL, J.

Bachint Singh and *another* — Defendants—Appellants.

v.

Harnam Singh — Plaintiff — Respondent.

Letters Patent Appeal No. 235 of 1924, Decided on 18th March 1926, from the judgment of Abdul Raoof, J., D/- 23rd October 1924, in Civil Appeal No. 328 of 1924.

Limitation Act, S. 5—Exercise of discretion not on right principles—High Court can interfere under Civil P. C., S. 100.

The discretion under S. 5, is a judicial one and when it is not exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts, the High Court can interfere in second appeal. [P 446, C, 1]

Gokal Chand Narang—for Appellants.

Jagan Nath Aggarwal — for Respondent.

Judgment.—The question for determination is whether the learned Judge who heard the second appeal preferred by the plaintiff was justified in interfering with the decision of the District Judge declining to exercise his discretion under S. 5 of the Indian Limitation Act and dismissing the appeal as barred by time. There can be no doubt that, when the lower appellate Court has exercised its judicial discretion in a sound and reasonable manner and after due enquiry and careful consideration of the facts, the High Court as Court of second appeal cannot interfere with the exercise of that discretion, even though the High Court itself would have arrived at a different conclusion if it had heard

the case has a Court of first appeal. The discretion, however, is a judicial one and the test in each case is whether the discretion has been exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts.

Now, it appears that the learned District Judge overlooked the facts that the value of the suit, even after the amendment of the plaint, continued to be Rs. 100 and that no objection to that valuation was raised either by the defendants or by the Court of first instance. In these circumstances the plaintiff's vakil, finding that the value of the suit as originally fixed for purposes of jurisdiction had not been challenged, preferred the appeal to the senior Subordinate Judge and these peculiar facts constituted a sufficient cause under S. 5 of of the Indian Limitation Act for extending the period of limitation.

The Court of second appeal was accordingly competent to interfere with the decision of the District Judge and to arrive at its own independent finding. We accordingly dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 446

LEROSSIGNOL AND MARTINEAU, JJ.

Firm Gokal Chand-Jagan Nath of Sialkot—Petitioners.

v.

The Commissioner of Income-tax, Punjab—Respondent.

Civil Miscellaneous Petition No. 594 of 1923, Decided on 20th January 1926, for a reference to be made to the High Court.

(*a*) *Income-tax Act* (11 *of* 1922), *S.* 66 (3)—*Competency of High Court to issue mandamus should be questioned at hearing of application and not afterwards.*

The competency of the High Court to issue the mandamus under S. 66 (3) should be questioned at the hearing of the application made under the said section, and not after the order passed on the application : *A. I. R.* 1925 *Pat.* 352, [P. 446, C. 2] *Foll.*

(*b*) *Income-tax Act* (11 *of* 1922), *S.* 13—*Decision of Income-tax Officer as to method of accounting cannot be questioned by assessee.*

The Income-tax Officer should be the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed and the assessee is not entitled to challenge his opinion. [P. 447, C. 1]

Mool Chand—for Petitioners.

Ch. Carden Noad—for Respondent.

Order.—In accordance with a direction given by this Court under S. 66 (3) of the Income-tax Act (XI of 1922) the Commissioner of Income-tax has referred two questions of law for decision. He has at the same time doubted the competency of this Court to issue the mandamus under S. 66 (3) on the ground that the Act applicable to the case is the Act of 1918 and not that of 1922, but this is a point which should have been taken at the hearing of the application made under the said section, and in agreement with the view taken in *Trikamjee Jiwan Das* v. *Commissioner of Income-tax* (1) we hold that the order passed on the application cannot now be questioned.

The first point referred to us is whether in view of the undertaking given by the Income-tax Officer in the course of the assesment for the year 1920-21 the petitioners are entitled to receive credit in the assessment of 1921-22 for any loss which they are proved to have sustained in the sugar business in 1919-20. The learned Commisssioner urges that the Income-tax Officer did not in fact give an undertaking that any loss sustained by the petitioners in their business in 1919-20 would be taken into account in the assessment for 1921-22, but only recommended that this should be done. However this may be, we find that the Assistant Commissioner in his order of the 8th November 1922 in the appeal against the assessment found that the alleged loss had not been proved, inasmuch as it was impossible to check the profit and loss statements because weights were not stated therein. On that finding no credit can be given to the petitioners for any losses for the year 1919-20.

The second point referred is whether an assessee is entitled to challenge the correctness of the opinion of the Income-tax Officer that the method of accounting employed is such that the income, profits and gains cannot properly be deduced therefrom. We think it was

(1) A. I. R. 1925 Patna 352.

clearly intended by the proviso to S. 13 of the Act that the Income-tax Officer should be the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed.

We accordingly answer both the points in the negative and direct that the petitioners shall pay the costs of the reference.

Answers in negative.

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* A. I. R. 1926 Lahore 447

FFORDE AND CAMPBELL, JJ.

Emperor—Appellant.

v.

Barkat—Accused—Respondent.

Criminal Appeal No. 510 of 1926, Decided on 31st May 1926, from the order of the Addl. S.J., Karnal, at Ambala, D/- 12th April 1926.

* (a) *Punjab Laws Act* (4 *of* 1872). *S.* 43—*Rules of Local Government, R.* 1—*Rule applies to slaughter of kine even for religious purposes.*

The words "slaughter of kine" in S. 43 of the Punjab Laws Act mean slaughter of kine not only for commercial but also for religious purposes. [P. 448, C. 2]

* (b) *Punjab Laws Act* (4 *of* 1872), *S.* 51—*Rules are repealed by republication and not by failure to republish—Obligation to republish is directory only.*

The obligation upon the Local Government to republish the rules under S. 51 is directory and not mandatory, and accordingly a failure on the part of the Local Government to carry out that obligation does not invalidate the statutory rules. Moreover, it is republication which repeals the rules and not the failure to republish. The rules are only required to be republished when they have been amended or altered. S. 51, as it stood originally, has to be read with Ss. 43 and 50 of the original Act. [P. 448, C. 2]

* (c) *Interpretation of statutes—Criminal enactments—Powers to make rules to local bodies—Whether command to a rule-making body is directory or mandatory depends on the terms of particular enactment.*

The provisions of a penal statute must be strictly construed; and it is equally true that in penal statutes the duties cast upon bodies with delegated powers are generally construed as imperative rather than directory. But each statute has to be construed according to its own terms and no inflexible rule can be laid down to determine whether the command to a body entrusted with the power of framing rules is to be considered merely as a direction involving no invalidating consequences if disregarded or as coerve with an implied nullification if disobeyed. In each case regard must be had to the scope and object of the enactment in question. [P. 449, C. 1]

C. H. Carden Noad—for Appellant.

Muhammad Shafi, Muhammad Rafi Abdul Qadir and *Muhammad Alam*—for Respondent.

Fforde, J.—These are two appeals by the Local Government against the order of the Additional Sessions Judge of Karnal, dated 12th April 1926, acquitting the appellants of an offence under S. 43 of the Punjab Laws Act of which they had been convicted by the Special Magistrate of Karnal.

The facts out of which these appeals have arisen may be stated shortly. At the Idul-Zuha of 1925, the appellants slaughtered a cow in their own house in the performance of religious rites, having obtained permission from the Superintendent of Police to do so. For this act they were prosecuted at the instance of a private complainant, under the provisions of S. 43 of the Punjab Laws Act (Act 4 of 1872) and the rules made thereunder. The particular rule which has been contravened runs as follows:

1*—(1) Kine shall not be slaughtered in any town or on any town lands except in a place licensed for the purpose by a written license granted by the Deputy Commissioner and in accordance with the conditions of such license.*

It is admitted that this rule has not been complied with as no license was obtained from the Deputy Commissioner.

The Magistrate who tried the case found that a technical offence had been committed, and sentenced each of the appellants to a fine of Rs. 51, or, in default, to one month's rigorous imprisonment. On appeal to the Sessions Court the convictions and sentences were set aside, the learned Sessions Judge holding that S. 43 of the Punjab Laws Act did not apply to the slaughter of cattle for religious purposes and that accordingly a conviction under this section was contrary to law. The learned Judge was of the opinion that the words "slaughter of kine" in S. 43 of the Punjab Laws Act mean slaughter of cattle for commercial and not for religious purposes, and he arrived at this conclusion partly upon the construction of the section itself and partly upon the construction of the Punjab Municipal Act 1911.

I find myself, unable to accept the view of the learned Sessions Judge as to

the effect of these enactments. S. 43 is as follows :

The slaughter of kine and the sale of beef shall not take place except subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government,

It seems clear at a first glance that the slaughter of cows and the sale of their flesh was restricted by this section for the purpose of avoiding communal trouble. I think this is obvious for the simple reason that it is only the slaughter of cows that is prohibited and not any other of the animals commonly used as food. If there could be any doubt as to the correctness of this reading of the section it is removed by an examination of the Punjab Municipal Act, the material sections of which are sections 167, 188 (j) and 197.

Section 167 empowers a Municipal Committee, with the approval of the District Magistrate, to fix premises for the slaugher of animals for sale. In other words it enables the Municipal Committee to provide premises for the slaughter of all animals whose flesh is to be sold for food.

Section 188 (j) empowers the Committee to fix premises within the Municipality in which the slaughter of animals of any particular kind not for sale shall be permitted, and the proviso to this sub-section enacts that no bye-law to this effect shall apply to animals slaughtered for any religious purposes. his sub-section to S. 188, therefore is confined to fixing premises for the destruction of animals whose flesh is not to be sold, and prohibits the Muncipal Committee making bye-laws either to fix premises where animals may be slaughtered for religious purposes or to prohibit their being slaughtered elsewhere.

Section 197 enables the Committee to regulate the manufacture, preparation and sale of food and drink. But the second proviso to this section enacts that uothing in S. 197 shall affect the operation of S. 43 of the Punjab Laws Act and the rules made thereunder. In other words the power of the Municipal Committee to make bye-laws to regulate, among other things, the sale of food, is not permitted to conflict with or override the powers of the Local Government to make bye-laws restricting the sale of beef.

It seems to me quite clear from the enactments referred to that the right to regulate in town and town lands the slaughtering of kine for religious purposes is given and confined to the Local Government. And it is equally clear that the Municipal Committee not only have no power to make bye-laws in that regard, but they are prohibited from regulating the killing for religious purposes of any animals whatsoever. The object of the Legislature is obvious. It is not considered desirable that municipal bodies, in which one community may happen to have an overwhelming majority, should have the power to make bye-laws in regard to the killing of animals which might offend the religious susceptibilities of a different community.

On the other hand it is considered necessary that the Local Government should have powers to make regulations in regard to such matters which, if left uncontrolled, are calculated to create communal strife. Similarly, although under S. 197 (a) the Municipal Committee may make bye-laws to prohibit the sale of any article of food (which in the absence of the restrictive proviso would include beef), the second proviso to that section preserves the right of the Local Government to make its own rules so far as the sale of beef is concerned and to that extent the Local Government rules will control the powers conferred upon the Municipal Committee by S. 197.

The main argument of Sir Muhammad Shafi, on behalf of the appellants is, however, not based upon the reasons given in the judgment of the lower appellate Court. He contends that the rules made by the Local Government under the provisions of S. 43 are void, inasmuch as the Local Government, to whom the power of making rules has been delegated by the Government of India, has not acted in accordance with its delegated powers. His argument may be summarized as follows :

Section 51 of the Punjab Laws Act of 1872, as it stood originally, enacted that all the rules which the Local Government was empowered to issue under the Act should be republished once at least in every year. No rules under S. 43 of this Act were issued until 1890 and the rules which were then issued have never been republished. An amending Act of 1895 provided that instead of the rules

being required to be published at least once in every year they shall be republished from time to time. The effect of this, according to Sir Muhammad Shafi, is that there are now no rules in force as the Local Government, having failed to comply with the statutory provision compelling it to be republished these rules at least once in every years, the rules became void a year after publication and there are now no rules to which the amending Act can apply.

I am unable to accept this argument. In the first place S. 51 of the Act of 1872 provided that upon republication all rules previously issued shall be repealed and this seems to me to imply that if there is no republication the old rules continue in force. Moreover, the provision in S. 51 that publication is to be with the previous sanction of the Governor-General-in-Council, shows that the obligation upon the Local Government to republish is directory and not mandatory, and accordingly a failure on the part of the Local Government to carry out that obligation does not invalidate the statutory rules. It is true, as Sir Muhammad Shafi points out, that S. 43 of the Punjab Laws Act is a penal statute and accordingly must be strictly construed; and it is equally true that in penal statutes the duties cast upon bodies with delegated powers are generally construed as imperative rather than directory. But each statute has to be construed according to its own terms and no inflexible rule can be laid down to determine whether the command to a body entrusted with the power of framing rules is to be considered merely as a direction involving no invalidating consequences if disregarded or as coercive with an implied nullification if disobeyed. In each case regard must be had to the scope and object of the enactment in question.

If the failure to republish the rules necessarily involved an injustice to the persons or classes of persons who might be affected by them then the provision regarding republication would, I think, no doubt be an imperative one, and the failure to republish would invalidate the rule, if there was nothing else in the statute to control such a construction. It is only in accord with ordinary principles of justice and fair dealings that a person should not be penalized for the infringement of a statutory rule if such infringement was directly caused by the act or default of the rule-making authority, but such is not the case here. It is not suggested that the omission by the appellants to get a certificate from the Deputy Commissioner, as required by the rules, was due to the omission of the Local Government to republish those rules.

Sir Muhammad Shafi further urges that even if the rules published in 1895 are not void as the amending section permits the Local Government to republish them from time to time instead of every year, yet since they have never been republished up to the present time they must now be regarded as having lapsed.

The first objection to this argument as I have already pointed out, is that it is republication which repeals the rules and not the failure to republish. Moreover, my reading of S. 51, as it now stands in the light of the various amendments which have been made, is that the rules are only required to be republished when they have been amended or altered. S. 51, as it stood originally, has to be read with Ss. 43 and 50 of the original Act. S. 43 empowers the Local Government to make rules from time to time. S. 50 was as follows: "The Local Government may issue rules, as to the matters mentioned in Ss. 43 to 48 inclusive and may from time to time cancel or alter such rules. And then came S. 51 which provided for republication once a year. S. 51 as amended by Act 1 of 1910 now reads as follows:

> All rules which the Local Government is empowered to issue uuder this Act, and all circulars issued by the Chief Court, shall be republished "from time to time by the Local Government and upon such republication shall be arranged in the order of their subject-matter, and all such alterations or amendments as may have been made since the last preceding publication thereof, or may have become necessary or advisable, shall be embodied therewith and upon such republication all such rules and circulare previously issued shall be repealed.

Read together the sections provided that rules may be made by the Local Government from time to time, they may be altered from time to time and when new rules have been published or any alterations or amendments have been made in any rules already published hen such new rules or the rules so

altered or amended must be republished. In other words, if any rules already published under the Punjab Laws Act of 1872 have not been altered or amended, and no new rules have been issued repealing prior ones, there is no necessity to republish.

In the present case it is admitted that the only rules which have been published under S. 43 of the Act of 1872 are those which were published in 1890; and in my opinion, until those rules have been amended or altered, or any new rules have been framed in substitution for them, there is no obligation upon the Local Government under the statute to republish them.

Sir Muhammad Shafi's final contention that the Muhammadan community of Panipat have acquired the right by custom to kill cows for sacrificial purposes in their own homes at the Id festival needs no discussion. S. 5 of the Punjab Laws Act, upon which this argument is based, has obviously no application.

For the reasons I have given I am of opinion that the appellants have been lawfully convicted of failure to comply with the provisions of R. 1, sub-R. (1) issued under Act IV of 1872, and as the learned Sessions Judge in setting aside the conviction, has erred in law the appeal of the Local Government must be accepted, the order of the lower appellate Court set aside and the order of the first Court reinstated.

As, however, the offence is a purely technical one, inasmuch as the error of the appellant as to the requirements of the Act was shared by the local Police authorities a purely nominal fine alone should be imposed, and I would accordingly reduce the sentence in each case to a fine of one rupee with no imprisonment in default if it be not paid.

I may add that had the order of acquittal of the lower appellate Court not been based upon a misconception of the law I would not under the circumstances have interfered with that order.

Appeal accepted.

A. I. R. 1926 Lahore 450

CAMPBELL, J.

Firm Amar Singh-Dhoomi Mal—Plaintiffs—Appellants.

v.

Firm Jai Dial Kapur and Sons—Defendants—Respondents.

Second Appeal No. 2775 of 1925, Decided on 23rd February 1926, from a decree of the Dist. J., Delhi, D/- 31st August 1925.

Practice—Witness—No adjournment asked for—Witness present in Court—Court is not entitled to refuse to examine him.

Where no adjournment for the purpose o examining the plaintiffs is asked for and the plaintiffs are present in Court, the trial Court is not entitled to prevent them from entering the witness-box. [P. 450, C. 2]

Shamair Chand—for Appellants.

Chandar Gupt and *Fakir Chand*—for Respondents.

Judgment.—The learned District Judge has described in his judgment what happened in regard to the attempt of the plaintiff to prove his accounts, and the learned District Judge has held that the trial Court was fully justified in refusing to allow the plaintiffs to be examined and in closing their case. I cannot agree with this conclusion. No adjournment for the purpose of examining the plaintiffs was asked for. The plaintiffs were present in Court and nevertheless were prevented from entering the witness-box. The trial Court was not entitled to prevent them. The witnesses should have been examined and the value of the evidence given at the stage at which it was given could have been appreciated at the time of final judgment.

I accept the appeal, set aside the order of the lower appellate Court and return the case to him for a fresh decision. The learned District Judge should cause the evidence, which was excluded, to be taken by himself or by the trial Court and then should come to a fresh decision on the appeal. Costs will follow the event. Since the lower appellate Court has disposed of the appeal on a preliminary point, and its decree is reversed, the stamp on appeal in this Court will be refunded.

Order set aside.

A. I. R. 1926 Lahore 451

BROADWAY AND FFORDE, JJ.

Dulo—Defendant—Appellant.

v.

Muhammad Nathu and *another*—Plaintiffs—Respondents.

First Appeal No. 1 of 1923, Decided on 15th March 1926, from a decree of the Senior Sub-J., Lahore, D/- 7th October 1922.

(a) *Registration Act, S. 74--Failure to pay penalty ordered by Registering Officer is non-compliance with law.*

Failure to pay a certain penalty ordered to be paid by a Registering Officer before a certain document can be registered is non-compliance with the requirements of law within S. 74 : 11 *P. R.* 1903 and 13 *P. R.* 1904, *Dist.* [P 451 C 2]

(b) *Limitation Act, S. 3—Question of limitation can be raised at any time.*

Though point of limitation is not raised in the trial Court nor in the grounds of appeal, it can be raised for the first time at the hearing of appeal. [P 452 C 1]

Ram Lal, M. Obedulla and *Harish Chandra*—for Appellant.

Gopal Chand and *M. Akbar Khan*—for Respondents.

Broadway, J.—On the 29th of September 1920, one Dulo executed a deed of sale relating to certain land which under this deed was sold to Muhammad Nathu and Dilwar Ali Khan, the consideration being a sum of Rs. 27,300. It was said by the vendees that Rs. 11,889 had already been paid to the vendor, the balance of the money being payable at the time of registration. The vendor, however, alleged that he had only received a sum of Rs. 3,500. On the 27th of January 1921 the vendees applied to the Registrar to have the deed of sale compulsorily registered. The application was sent to the Sub-Registrar, the proper officer, by the Registrar who, on the 31st of January 1921, issued notice to the parties. The vendees were very dilatory and frequently allowed the proceedings to go by default. Finally, on the 5th of April 1921, the Sub-Registrar apparently acting under S. 25 of the Indian Registration Act, passed an order to the effect that the document would be accepted for registration on payment by the vendees of the penalty provided by that section. Notice of this order was directed to be sent to the vendees who, however, refused to accept service.

On the 26th of May 1921 the vendees again applied to the Registrar to have the document compulsorily registered. This application was sent at once to the Sub-Registrar who dismissed it on the 27th of May 1921, as the vendees had failed to appear in support of it. In the order dismissing this application the Sub-Registrar pointed out that the vendees had been constantly absent during these proceedings whereas the vendor had been present and that it was evident that the vendees were merely harassing the vendor. This order of the Sub-Registrar was an order refusing to register within the meaning of S. 72 of the Registration Act and as such was appealable to the Registrar. The vendees on the 24th of June 1924, preferred an appeal to the Registrar. The appeal, however, was dismissed on the 15th of September 1921, the order being announced to the vendees' counsel on that date. On the 15th of October 1921, the vendees prepared a plaint praying that the said sale deed should be registered. The plaint, however, does not appear to have been filed in Court till the 18th of October 1921, the 16th and 17th being public holidays. Under S. 77 of the Indian Registration Act a period of thirty days is prescribed for the institution of a suit under that section. As the plaint itself was dated the 15th of October 1921, no objection on the ground of limitation was taken before the trial Court, the suit being contested on other grounds, one of the grounds being that the requirements of law had not been fulfilled and that, therefore, the Registrar acted rightly in refusing to register the document, the requirements of law in this connexion being that the vendees had failed to comply with the direction to pay the penalty.

The trial Court fixed one issue, namely : " Did the plaintiff comply with all provisions of law to have the document registered ? This issue was decided against the plaintiff, and I think rightly. Nevertheless the trial Court granted the plaintiffs vendees a decree to the effect that the document should be registered on their paying the penalty ordered by the Sub-Registrar. The learned trial Court based its decree on *Hazuri Mal* v. *Kutab-ud-din* (1) and *Nawab* v.

(1) [1903] 11 P. R. 1903=84 P. L. R. 1903.

Arjan Das (2). A reference to these authorities, however, shows that they have no bearing on the case at all.

Against the decree so passed Dulo has preferred this appeal to this Court, and at the Bar it has been urged that the suit was barred by limitation having been instituted after the period prescribed by S. 77. Mr. Gopal Chand on behalf of respondents-vendees admitted that the suit should have been filed not later than the 15th of October 1921. He urged that this point of limitation, had not been raised in the Court below nor in the grounds of appeal, to this Court. No doubt that is the case, but the question of limitation can be raised, at any time and I think has rightly been raised in this Court. It is obvious from the record that, although the plaint is dated the 15th of October 1921, and the necessary Court-fee labels affixed on the plaint bear that date, nevertheless the actual institution of the suit must be held to be the 18th of October 1921, as that is the date on which it is shown as having been presented and that is the date on which the Court-fee labels have been cancelled. It follows, therefore, that the suit having been instituted after the prescribed time should have been dismissed. In this view of the case it is not necessary to discuss the merits in detail and I would only say that the record of the Registration Department shows clearly that the vendees, although apparently desirous of getting the document registered, were equally desirous of postponing the date of registration as long as possible. That is, to my mind, evidenced by the fact that in every case they waited till the last possible moment ; before they took action, when filing their suit they clearly overreached themselves and I consider that the orders of the Registrar and the Sub-Registrar were justified. I would, therefore, accept the appeal and dismiss the suit with costs throughout.

Fforde, J.—I agree.

Appeal accepted.

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(2) [1904] 18 P. R. 1904=78 P. L. R. 1904.

A. I. R. 1926 Lahore 452

ZAFAR ALI, J.

Thakar Singh—Plaintiff—Appellant.

v.

Ghanaya Singh—Defendant—Respondent.

Second Appeal No. 2300 of 1925, Decided on 8th March 1926, from the decree of the Senior Sub-J., Hoshiarpur. D/- 18th July 1925.

(a) *Evidence—Value of—Document once admitted loses its value by subsequent discovery of its inadmissibility.*

If a document is once admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document. [P 452 C 2]

(b) *Evidence Act, S. 35 — Rasadbandi and chowkidara papers are inadmissible.*

The rasadbandi or the chowkidara papers are not admissible in evidence as public documents. [P 452 C 2]

Balwant Rai and *Badri Das*—for Appellant.

Muhammad Amin—for Respondent.

Judgment. — The lower appellate Court held that the rasadbandi or the chowkidara papers relied on by the plaintiff were not admissible in evidence, and it is argued in this second appeal that the papers were public documents and were admissible in evidence as such under S. 35 of the Indian Evidence Act. But there is nothing on the record to show that these documents were prepared

by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country.

Next it is argued that the documents having once been admitted in evidence the lower appellate Court was not competent to exclude them from evidence. This point was not taken in the grounds of appeal and possesses no force. If a document is once admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document.

No other point is raised. The appeal fails and I dismiss it with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 453

CAMPBELL, J.

Chandras Dat—Defendant—Appellant.

v.

Ghulam Muhammad and *others*—Plaintiffs—Respondents.

Second Appeal No. 2429 of 1925, Decided on 9th February 1926, from a decree of the Dist. J., Attock, D/- 6th June 1925.

Civil P. C., O. 6, R. 17—Amendment changing character of suit is not allowable—Defendant accepting costs of adjournment granted to plaintiff can show cause against the amendment.

Amendment changing character of a suit is not allowable.

Where the defendant is granted and he accepts the costs of adjournment granted to the plaintiffs for amendment and not as compensation for submitting to any kind of amendment which the plaintiff might choose to present to the Court, he is not debarred from showing that the amendment is not allowable as it changed the character of the suit. [P. 454, C. 1]

Fakir Chand—for Appellant.

Muhammad Tufail—for Respondents.

Judgment.—The suit out of which this second appeal has arisen was brought by Ghulam Muhammad and others against Mehta Chandras and was for a declaration that the plaintiffs were in joint possession of a certain holding with the defendant as joint owners of ⅓rd share. The plaint asserted that the ⅓rd share had originally belonged to one Mt. Begam Jan who had mortgaged it to the defendant; that in 1910 the plaintiffs had acquired the rights of Mt. Begam Jan, had redeemed the mortgage and had got possession, and that they had held joint possession with the defendant since that date.

The defendant pleaded that a suit for a declaration did not lie since the plaintiffs' right, if any, had been extinguished by the adverse possession of the defendant for over 12 years. On these pleadings issues were framed on the 17th January 1925. On the 7th February 1925 three witnesses were examined for the defendant and one witness for the plaintiffs, and the suit was adjourned to the 25th February. On the 25th February one witness for the plaintiffs was examined and evidence was closed by both sides. The case was fixed for arguments on the 4th March 1925. On that day a statement by the defendant was recorded and the plaintiffs' counsel then applied for leave to amend the plaint. This was granted and Rs. 8 costs were awarded to the defendant. On the 11th March 1925 the amended plaint was put in and the costs were paid. The amended plaint stated that Mt. Begam Jan remained the owner of the ⅓rd share until her re-marriage in 1916, that she in 1910 redeemed the mortgage and took possession, and that the plaintiffs were her reversionary heirs, and succeeded to her rights in 1916 on her re-marriage, and they prayed for possession as owners who had acquired their title in 1916.

The defendant promptly objected that the amendment had changed the character of the suit. An issue was framed on this question and a date for evidence was given, the 24th March. No evidence was produced on that date and the Court proceeded to judgment on the 26th March decreeing the plaintiffs' claim for possession and holding that the defendant's objection that the nature of the suit had been changed was frivolous and that there was no change in the nature of the suit.

The defendant appealed to the District Judge and one of his contentions was that by the amendment the cause of action and the nature of the suit had been changed and that the suit legally could not be so amended. The learned District Judge observed that there was no doubt that the second suit was not exactly the same as the first one but that the facts seem to have been stated very clearly and correctly in the second suit, that the defendant had accepted Rs.8 as costs, and under the circumstances could not now object to the amendment of the plaint, and further that in any case the Court was correct in granting permission to amend. The decree of the trial Court was upheld.

The defendant has come to this Court on second appeal. There has been a little confusion, I venture to think, between the power to grant permission to amend and the propriety of accepting a particular kind of amendment. There was no reason why the plaintiffs should not have been allowed to amend their plaint so as to ask for a decree for possession instead of a mere declaratory decree. It was quite another matter for them to change the character of the suit and to allege a totally different and

quite inconsistent cause of action as they obviously did. The defendant was granted and accepted Rs. 8 merely as the costs of adjournment granted to the plaintiffs for amendment and not as compensation for submitting to any kind of amendment which the plaintiffs might choose to present to the Court. The decision of the trial Court on Issue No. 4 was clearly wrong, for the nature of the suit was completely changed.

In the first instance the plaintiffs asserted that they had redeemed the mortgage in 1910 as owners and, unless they had been able to prove that they had obtained possession on redemption, and had not allowed the defendant-mortgagee to remain in possession, the latter's plea that they had lost their rights by reason of adverse possession was one of some weight. Their second pleading that they had had nothing to do with the land until the re-marriage of Mt. Begam Jan in 1916 was quite inconsistent with their first attitude.

I accept the appeal, reverse the decision of both the Courts below on Issue No. 4 framed by the trial Court, and hold that the nature of the suit has been changed by the amendment. The suit will now go back to the trial Court for a fresh decision in the light of this finding.

The defendant will have his costs in this Court and in the lower appellate Court. The costs in the trial Court will follow the event.

Case sent back.

A. I. R. 1926 Lahore 454

SHADI LAL, C. J.

Yusif Ali—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1926 of 1925, Decided on 19th February 1926, reported by S. J., Karnal, on 20th November 1925.

Criminal P. C., S. 257—Magistrate cannot limit number of witnesses though he can refuse to summon on the ground of delay or vexation.

The Magistrate has no right arbitrarily to limit the number of witnesses to be produced by an accused in his defence, but under S. 257 he can refuse to summon a defence witness on the ground that the application for summoning is made for the purpose of vexation or delay or for defeating the ends of justice. [P 454 C 2]

C. L. Mathur—for Opposite Party.

Facts—Yusif Ali, applicant, is being tried by a Magistrate of the First Class, under S. 110 of the Criminal P. C. Prosecution evidence has been recorded. Applicant was called upon to enter upon his defence and he filed a list containing names of 46 witnesses, some of them being of Patiala. The Magistrate declined to call the first five witnesses on this list because they were high officers of the Government or big jagirdars of the district and Witnesses Nos. 9 to 11, because they were high officers of the Patiala State, and passed an order that the applicant can call at the most 20 witnesses of this district and if he wants to call more he must deposit their expenses. Against this order Yusif Ali has presented an application for revision to this Court.

Grounds—In my opinion the Magistrate's order is not right and he is not entitled arbitrarily to limit the number of witnesses for defence or to decline to call the witnesses for the reasons given by him. His refusal can only be based upon the grounds mentioned in S. 257 of the Criminal P. C.: see *Narayana Mudaly* v. *Emperor* (1) and *Emperor* v. *Purshottam* (2). The witnesses residing at Patiala could have been examined by issue of a commission. The record is submitted to the High Court for revision with a recommendation that the Magistrate be ordered to summon all the witnesses whose attendance is required by the applicant excepting witnesses residing at Patiala who can be examined on commission.

Order—The Magistrate had no right arbitrarily to limit the number of witnesses to be produced by Yusif Ali in his defence. Under S. 257 of the Criminal P. C., he can refuse to summon a defence witness on the ground that the application for summoning is made for the purpose of vexation or delay or for defeating the ends of justice. I accordingly set aside the order of the Magistrate and order him to proceed in accordance with the provisions of the aforesaid section.

Order set aside.

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(1) [1908] 31 Mad. 131.
(2) [1902] 26 Bom. 418=4 Bom. L. R. 38.

A. I. R. 1926 Lahore 455

CAMPBELL, J.

Kalian Singh—Defendant—Appellant.

v.

Fazal Din—Plaintiff and another—Defendants—Respondents.

Second Appeal No. 2793 of 1925, Decided on 27th April 1926, from the decree of the Dist. J., Rawalpindi, D/- 25th May 1925.

(a) *Limitation Act, S. 12—Time for obtaining copies.*

Where an appeal of one district is heard by the District Judge of another District in his capacity as Additional Judge of the former district and application for copies of judgment and decree is filed in the former District Court and the appellants' deposit of fees is accepted there and an order made for supply of copies but the application is subsequently returned directing it to be presented in the latter Court and copies are obtained from there :

Held : that the time from the date of first application to the date of obtaiuing copies may be excluded. [P 455 C 1, 2]

(b) *Pre-emption—General indemnifying clause in a sale deed includes loss to vendee owing to his title being defeated by a pre-emptor.*

A general clause in a sale deed making the vendor liable for any loss which might accrue in connexion with the sale can properly be held to include the risk of the vendee's title being defeated by a pre-emptor. [P 456 C 1]

Ram Chand Manchanda—for Appellant.

Mohammad Azam and *Anant Ram*—for Respondents.

Judgment.—A preliminary objection is taken that this appeal and No. 2794 are barred by time. The facts are these. The suits were Jhelum cases but the appeals were heard by the District Judge, Rawalpindi, in his capacity as Additional Judge, Jhelum. The date of the judgments is 25th May 1925. On the 24th July 1925 the appellant applied in the Court of the District Judge, Jhelum, for copies of the judgments and decrees of the appellate Court. His deposit of the fees was accepted and an order was passed on the applications that copies should be supplied. We know nothing of what happened thereafter until the 28th September 1925, on which date the appellant's applications were returned to him with endorsement that the cases had been sent to record in the Rawalpindi Court and that applications for copies should be made there. The applications were presented in the Rawalpindi Court on the 29th September 1925 and copies were obtained on the 5th October 1925 and the two appeals were filed here on the 30th October 1925.

If the time during which the appellant's applications lay in the Jhelum Court be included in the time requisite for obtaining copies the appeals were filed within time. If that period is to be excluded the last date for filing the appeals was the 12th October 1925, the date of the High Court opening. It has been argued on behalf of the respondents, who have raised the preliminary objection, that the appellant must have been negligent, since otherwise there would not be so wide a gap between the 24th July and 28th September. In view of the facts, however, that his money was taken at Jhelum and was not returned and that an order for supplying the copies was passed and further that he presented his applications at Rawalpindi without any delay after receiving them back at Jhelum entitled him, in my opinion, to count the whole period from the 24th July till the 5th October as time requisite for obtaining copies. The preliminary objection is overruled.

On the merits the facts are as follows : Uttam Chand and Hoshnak Rai, decree-holders, purchased a certain house in execution of a decree. They then sold it to Kalyan Singh for Rs. 600. Kalyan Singh, through his agent Ram Singh, sold the house again to Fazal Din and Mt. Rakhi for Rs. 1,500. Jawala Sahai, cousin of Uttam Chand and Hoshank Rai then brought a suit to pre-empt the sale by his relatives to Kalyan Singh, and obtained a decree for possession by pre-emption of Rs. 600 against Fazal Din and Mt. Rakhi who were impleaded among the defendants. Fazal Din and Mt. Rakhi then brought separate suits against Kalyan Singh to recover the balance of purchase-money paid by them to him and damages for the expenditure to which they had been put to in the litigation. Each suit was of Rs. 450 (i.e., half of Rs. 900) plus Rs. 250 damages. The trial Court dismissed the suits but on appeal the District Judge gave each plaintiff a decree for Rs. 554–10. Kalyan Singh has preferred second appeals.

The question for decision is the interpretation of the following sentence in the sale deed executed by Ram Singh as agent of Kalyan Singh in favour of

Fazal Din and Mt. Rakhi: "*agar intikal haza men mushtarian ko koi nuksan paunche to maiu zimmenwar hunga.*" It was argued before the lower appellate Court on behalf of Kalyan Singh that the word "main" indicated a personal responsibility undertaken by Ram Singh in his individual capacity and that the sentence did not bind Kalyan Singh in any way. It should be observed that the original defendants were Kalyan Singh and Ram Singh both, but in the lower appellate Court the claims against Ram Singh were given up. The learned District Judge held that it was clear from the document that Ram Singh was not taking upon himself any individual responsibility and that the guarantee given was that of Kalyan Singh.

The second point urged by Kalyan Singh in the lower appellate Court was that the word "nuksan" could not be interpreted to mean "loss" as the result of a pre-emption suit such as that which was brought by Jawala Sahai. The learned District Judge repelled this contention also and held that the word nuksan was wide enough to cover such "loss." He referred to *Khomason Bibi* v. *Shah Mali* (1), a case which has some features in common with the present case, and appears to have concluded that, as in that case, so in the case before him, the sentence quoted was inserted as much for the purpose of indemnifying the purchaser against loss due to the intervention of a pre-emptor as for any other reason.

Exactly the same argument has been put before me in second appeal by the learned Vakil for Kalyan Singh, and after hearing him and examining the sale-deed I find that the learned District Judge was correct. When the whole deed is read it is clear to my mind that the guarantee was one by Kalyan Singh, the vendor, given on his behalf by Ram Singh as agent, and I see no reason for disagreeing with the learned District Judge's view that the word *intikal haza men nuksan paunche* can properly be held to include the risk of the vendees' title being defeated by a pre-emptor. It has not been argued that Ram Singh was not empowered to give the guarantee. I, therefore, dismiss both the appeals with costs.

Appeals dismissed.

(1) [1909] 110 P. R. 1908=13 P. L. R. 1909=4 I. C. 690.

A. I. R. 1926 Lahore 456

MARTINEAU, J.

Shiv Ram and *others*—Plaintiffs—Appellants.

v.

Mt. Ishri and *others*—Defendants—Respondents.

Miscellaneous First Appeal No. 2175 of 1924, Decided on 27th January 1925, from an order of the Senior Sub-J., Ludhiana, D/- 18th August 1924.

Civil P.C., Ss. 16 and 20—Property situate in two places—Suit for declaration that probate proceedings shall not affect plaintiffs lies in that Court where probate is taken out.

A suit for a declaration that the probate proceedings shall not affect the plaintiffs and for the administration of the estate left by the testator, is not a claim for the determination of any right to or interest in immovable property within S. 16, so that the mere fact that part of the property to be administered is situate in a particular district will not give the first Court jurisdiction. The question of jurisdiction has, therefore, to be determined by S. 20. Such a suit lies in the Court at the place where the probate is taken out. [P. 456, C. 2, P. 457. C. 1]

Fakir Chand—for Appellants.

M. C. Bakhsi, Badri Das and *Nawal Kishore*—for Respondents.

Judgment.—This is an appeal from an order of the Senior Subordinate Judge of Ludhiana returning a plaint for want of jurisdiction. The plaintiffs allege that they and Indar Singh were members of a joint Hindu family owning property in the Ludhiana District and in Burma and that Indar Singh having died they are entitled to the property by survivorship. Indar Singh made a Will, of which Probate has been obtained by the defendant Parhlad Rai in Burma. The plaintiffs have brought a separate suit for a declaration of their title to the property. In the present case they ask for a declaration that the Probate proceedings shall not affect them and for the administration of the estate left by Indar Singh. The Senior Subordinate Judge has held that this suit is not triable in the Ludhiana District, and I agree with him.

Section 16 of the Civil P. C. does not apply, the claim for the estate to be administered not being a claim for the determination of any right to or interest in immovable property, so that the mere fact that part of the property to be administered is situate in the Ludhiana District will not give the Ludhiana

Court jurisdiction. The question of jurisdiction has, therefore, to be determined by S. 20. Parhlad Rai is residing in Burma and the cause of action arose in Burma having been afforded by the Probate proceedings taken by Parhlad Rai in Burma. Consequently the suit cannot be tried in the Ludhiana District. The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 457

SHADI LAL, C.J., AND COLDSTREAM, J.

Sarban Singh and *others*—Defendants—Appellants.

v.

Mt. Bhagwan Kaur—Plaintiff—Respondent.

Second Appeal No. 1442 of 1922 Decided on 7th May 1926, from the decree of the Dist J., Ludhiana D/- 6th March 1922.

Transfer of Property Act, S. 60—Term 20 years—Interest annas 8 per cent. per mensem payable at the time of redemption—Terms do not amount to clog.

Where a mortgage for Rs. 600 was for 20 years and the mortgagee was to remain in possession of the land, to take its produce and to pay the land revenue for it and it was stated in the deed that as the income from the land was small, interest on the principal money was to be payable at the time of redemption at the rate of annas eight per cent. per mensem.

Held: that the terms of the contract did not disallow the mortgagor to pay off his interest year by year or at any time before the 20 years had expired. But even if this had been the intention, this condition is not in any way an illegal or improper obstruction to redemption and there is a justification for refusing to enforce the mortgage on the ground that its conditions were unconscionably onerous. [P 457 C 1, 2]

Nand Lal and *Farrukh Hussain Khan*—for Appellants.

Kharak Singh—for Respondent.

Coldstream, J.—On the 21st August 1896 Natha Singh mortgaged by a registered deed some land to Santa Singh for Rs. 600. The mortgage was for 20 years. The mortgage was to remain in possession of the land, to take its produce and to pay the land revenue for it. It was stated in the deed that as the income from the land was small, interest on the principal money was to be payable at the time of redemption at the rate of annas eight per cent per mensem. On the 4th June 1920 Mt. Bhagwan Kaur, daughter of Natha Singh, brought a suit for redemption against the successors of Santa Singh. In the plaint she stated that the terms of the mortgage were penal and that the mortgagees had profited sufficiently from their possession of the land and asked that possession might be decreed without payment of the mortgage money.

The Sub-Judge, who tried the suit held that the terms of the mortgage disclosed no illegal clog upon redemption and gave a preliminary decree for possession on payment of the principal, i, e., Rs. 600 plus interest at annas eight per cent per mensem as claimed by the mortgagees. On appeal the learned District Judge considered that the terms of the mortgage were inequitable as improperly obstructive against redemption and accepting the appeal he gave a decree for redemption on payment of Rs. 600 the principal mortgage money only.

The mortgagees have appealed to this Court and we have heard Dr. Nand Lal for Sardar Kharak Singh against the appellants. The mere fact that the period of the mortgage was 20 years is not a sufficient ground for interfering with the contract sued upon. So far as we can see the terms of the contract did not disallow the mortgagor to pay off his interest year by year or at any time before the 20 years had expired. But even if this had been the intention we do not find in this condition any illegal or improper obstruction to redemption or any justification for refusing to enforce the mortgage on the ground that its conditions were unconscionably onerous. The rulings cited on behalf of the respondent deal with cases which can be distinguished in their circumstances from the present case, and we need not specify them here.

We accept the appeal and modify the decree of the learned District Judge so that it will become one for a preliminary decree for possession by redemption on payment of not only the principal mortgage money Rs. 600 but also interest at the rate claimed up to the date of payment. The office will draw up the decree in accordance with O. 34, R. 7 granting the mortgagor six months for payment.

Appeal accepted.

A. I. R. 1926 Lahore 458

HARRISON AND JAI LAL, JJ.

Mt. Bhuri and *others* — Defendants— Appellants.

v.

Mt. Asghari Begam—Plaintiff — Respondent.

Second Appeal No. 556 of 1922, Decided on 17th March 1926, from a decree of the Dist. J., Delhi, D/- 9th November, 1921.

(a) *Mahomedan Law — Dower — Suit for— Plaintiff basing her claim on contract but failing to establish — Amount admitted by defendant can only be decreed.*

Where the plaintiff bases her claim on a contract between the parties at the time of her marriage in a suit for dower but fails to prove the contract, the only amount of dower which the Court can allow is the amount which the defendant admits or agrees to pay : 105 *P. R.* 1914, *Foll.* [P 459 C 1]

(b) *Civil P. C., O.* 41, *R.* 1—*Copy of decree appealed against filed—Copy of decree in cross-appeal need not be filed.*

Where a party appeals from a decree passed against him, and files the decree made in his appeal the appeal is not defective because of the failure to attach a copy of the decree in the cross-appeal : *A. I. R.* 1922 *Lah.* 390 and 1 *Lah.* 83, *not Foll.*; 85 *P.R.* 1905, *Foll.* [P 458 C 2]

(c) *Limitation Act, S.* 5—*Copy of trial Court's judgment applied within time but not filed in time with memo. of appeal owing to inordinate delay in its preparation — Time should be extended.*

Where the copy of the first Court's judgment is applied for within limitation and it is only because of inordinate delay in the preparation of the copy that the appellants are unable to present it with the memorandum, under S. 5 time should be extended. [P 458 C 2]

Mehr Chand Mahajan — for Appellants.

M. Obedulla—for Respondent.

Judgment.—In this appeal a preliminary objection is taken by the respondent relying on *Muhammad Din* v. *Zeb-un-nisa* (1) and *Bhan Singh* v. *Gokul Chand* (2). The facts are that the plaintiff brought a suit claiming Rs. 5,000 as her dower, and a sum of Rs. 3,000 was decreed by the trial Court. Both parties appealed and the result of the two appeals was that the order of the trial Court was maintained and both appeals were dismissed.

The co widow of the plaintiff's husband and her co-defendants have presented this second appeal accompanied by a copy of the decree in which her own appeal to the District Judge was dismissed. No copy of the decree dismissing the cross-appeal was presented, although one had been obtained. No copy of the judgment of the trial Court accompanied the memorandum of appeal. Both these omissions were pointed out to the appellants who put in both the required copies after the period of limitation had expired. According to the view taken in *Muhammad Din* v. *Zeb-un-nisa* (1) and *Bhan Singh* v. *Gokal Chand* (2), the decree against which an appeal has not been preferred, and which does not accompany the memorandum, stands good and, therefore, the appeal proper cannot proceed, as, at the best, the only possible result would be that one and the same decree would at the same time be set aside by this Court and remain good in virtue of the operation of the law of res judicata. Counsel for the appellants has referred us not only to *Ghansham Singh* v. *Bhola Singh* (3), a recent Full Bench ruling of the Allahabad High Court, but also to *Jugal Kishore* v. *Chammo* (4), which apparently was not referred to at the time the cases reported as *Bhan Singh* v. *Gokal Chand* (2) and *Muhammad Din* v. *Zeb-un-nisa* (1) were argued. We consider ourselves bound by the decision of the Full Bench of this Court and we, therefore, overrule the objection that the appeal is defective because of the failure to attach a copy of the decree in the cross-appeal.

So far as the copy of the first Court's judgment is concerned, we see that an application for a copy was made on the 7th of February within limitation, and it was only because of inordinate delay in the preparation of this copy that the appellants were unable to present it with the memorandum. Under the circumstances we extend time under S. 5 of the Limitation Act and allow the appeal to proceed.

On the merits the point urged by the appellants rests on the clear authority, namely, *Fazl Khan* v. *Karam Begam* (5). The plaintiff in this case claimed a dower as fixed between the parties at the time of her marriage. The finding throughout

(1) A.I.R. 1922 Lah. 390.
(2) [1919] 1 Lah. 83=53 I.C. 137.
(3) A.I.R. 1923 All. 490 (F.B.).
(4) [1905] 151 P.L.R. 1905=85 P.R. 1905.
(5) [1915] 105 P.R. 1914=27 I.C. 113=241 P.L.R. 1915.

by both the trial and the appellate Courts has been that no sum was fixed and the amount allowed ; Rs. 3,000 was allowed as being a suitable amount, having regard to the history and position of the family. It is laid down in the clearest possible terms in *Fazl Khan* v. *Karam Begam* (5) that where these are the findings the only amount of dower which the Court can allow is the amount which the defendant admits or agrees to pay. The plaintiff has wholly failed to establish the position taken up in the plaint, and no question of custom having been raised the Court was not competent to decide the matter on these grounds.

We, therefore, accept this appeal and allow only Rs. 32, the amount admitted by the defendants. We dismiss the remainder of the plaintiff's claim. The legal position was apparently not understood until the parties reached this Court and was certainly not put before the District Judge. This being so, we order the parties to bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 459

BROADWAY, J.

Ahmad Hassan—Accused—Petitioner.

v.

The Crown—Respondent.

Criminal Revision No. 19 of 1926, Decided on 12th March 1926, reported by the S. J., Hissar, on 18th December 1925.

Public Gambling Act (3 *of* 1867), *S.* 5—*Superintendent of Police certifying a warrant with words "has reason to believe"—Warrant is valid.*

Where the Superintendent of Police issued the warrant and he signed it certifying that he "had reason to believe," etc., the only interpretation to be placed on the warrant is that the Superintendent of Police had reason to believe and therefore he acted upon credible information within S. 5. [P. 460, C. 1]

Nanwa Mal—for petitioner.

Govt. Advocate—for the Crown.

Report.—The petitioner Ahmed Hassan along with two other persons, Jimun and Islam-ud-Din, was challaned under S. 3 and 4 of the Gambling Act ; Jimu was sentenced to pay a fine of Rs. 20 under S. 3, while Islam-ud-Din and the petitioner Ahmad Hassan were sentenced to pay a fine of Rs. 10 each, under S. 4 of the Act. The petitioner only appealed, but it was dismissed. He has now filed a revision.

The proceedings are forwarded for revision on the following grounds :

It is contended that his conviction is wrong, firstly, because the warrant was illegal as it was issued on the information of the police and secondly because the boundaries of the house were not given in the warrant.

On the authority of *Sandhi* v. *Crown* (1) the first contention is sound, It was held by a majority of the Hon'ble Judges that a mere report of information by a police officer is not credible information justifying the issue of a search warrant. In the present case the warrant was issued on the information supplied by the Sub-Inspector as deposed to by him, therefore the warrant was illegal.

As regards the second contention, it will be seen that the boundaries of the house were not given in the warrant but it was accompanied by a plan of the house and the name of the occupier was given therein, therefore, *Jamna Prasad* v. *Emperor* (2) is not applicable in this case.

The case is submitted to the High Court with the recommendation that the conviction and sentence may be quashed because the warrant was illegal.

The fine has been paid.

Order.

Broadway, J.—One Ahmad Hassan was convicted of an offence under S. 4 of the Gambling Act (III) of 1867) and sentenced to pay a fine of Rs. 10. His appeal having been dismissed, he moved the learned Sessions Judge who has reported the case under S. 438 of the Criminal Procedure Code recommending that the proceedings be quashed and the conviction and sentence set aside on the ground that the warrant issued by the Superintendent of Police, on which the search was made, was bad in law. The learned Sessions Judge has relied on *Sandhi and Kanhiya* v. *Crown* (1) and, in his referring order, has said that in the present case

> the warrant was issued on the information supplied by the Sub-Inspector as deposed to by him, therefore, the warrant was illegal.

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(1) [1876] 9 P. R. 1876 Cr.

(2) A. I. R. 1924 All. 128.

Sandhi and Kanhiya v. *The Crown* (1) has been considered in later authorities and has not been followed or approved of. Had this fact been known to the learned Sessions Judge I have no doubt that he would not have made this reference. I would draw his attention to (*a*) *Empress* v. *Mazhar Ali* (3), (*b*) *Kada* v. *Empress* (4), (*c*) *Vir Singh* v. *Queen-Empress* (5), (*d*) *Basanta Mal and Raini* v. *Queen-Empress* (6), as well as (*e*) *Emperor* v. *Abdus Samad* (7).

In this case the Superintendent of Police issued the warrant, and when he signed it certifying that he "had reason to believe," etc., the only interpretation to be placed on the warrant, is to my mind, that the Suprintendent of Police had reason to believe and that, therefore, he acted upon credible information within the meaning of S. 5 of the Gambling Act (III of 1867). The search was undoubtedly made under S. 5 of this Act The presumption arising out of the discovery of articles, i. e., cards, etc., as provided in S. 6 of the Act, therefore, arose and the conviction in this case was clearly correct.

I, therefore, decline to interfere and dismiss the petition.

Revision dismissed.

(3) [1881] 29 P. R. 1881 Cr.
(4) [1882] 7 P. R. 1882 Cr. (F. B.).
(5) [1895] 22 P. R. 1895 Cr.
(6) [1897] 17 P. R. 1897 Cr.
(7) [1906] 28 All. 210=(1905) A. W. N. 257.

A. I. R. 1926 Lahore 460

LE ROSSIGNOL, J.

Gulzari Mal—Plaintiff—Appellant.

v.

Duman and *others*—Defendants—Respondents.

Second Appeal No. 2254 of 1925, Decided on 3rd February 1926, from the decree of the Addl. Dist. J., Ferozepore, D/- 9th July 1925.

Civil P. C., O. 6, R. 17—Partition suit—Objection as to the separation—Amendment to claim specific part should be allowed.

Where in a partition suit the defendant objects that the property alleged to be undivided had ceased to be joint before the date of suit, amendment, to claim possession of a specific part of the property in suit should be allowed.

[P. 460, C. 2]

Fakir Chand—Appellant.
Shahmair Chand—for Respondents.

Judgment.—Akki had three sons, Nadir, Hasal and Kala, and Hasal had a son Lalu. In 1920 Lalu purported to sell one-third share of the house to the plaintiff who brought the action out of which this appeal arises for possession by partition of his one-third share. The suit was decreed by the trial Court which decided against the defendant's contention that they had been holding adversely to Lalu for more than 12 years. On appeal the District Judge held that the house had ceased to be joint property and the suit was not maintainable on this technical ground and he therefore dismissed the suit.

For the appellant it is urged that on the finding that the three sons of Akki had been dealing with their portions of the house as their own respective severalty the District Judge should not have dismissed the suit on a technical ground, but should have permitted the plaintiff to amend his plaint and sue for that portion of the house which was found to have been alloted to or appropriated by Hasal. In my opinion this contention has force. There is no proof of formal partition, and all that the Court finds is that there was a partition in fact and the plaintiff's claim was for possession of that portion of the house which had fallen to Hasal's lot. The lower Court did not find that the plaintiff's claim was barred by time and this question should now be definitely settled.

I accept the appeal, set aside the order of the Court below and direct that the plaintiff be allowed to amend his plaint so as to convert the suit into one for possession of the share which was allotted to Hasal. Stamp on this appeal shall be refunded and costs shall be costs in the cause.

Order set aside.

* A. I. R. 1926 Lahore 461

JAI LAL, J.

Moti Jan—Plaintiff—Appellant.

v.

The Municipal Committee, Delhi—Defendant—Respondent.

Second Appeal No. 1718 of 1925, Decided on 20th February 1926, from a decree of the Dist. J., Delhi, D/- 15th April 1925.

(a) *Civil P. C., S.* 100—*Prostitute.*

Status as public prostitutes is a question of law. [462, C 1]

* (b) *Punjab Municipal Act* (3 *of* 1911), *S.* 152—*If action of Municipality is ultra vires civil Courts can interfere—Mode of action is not, but power to take action is, open to examination by civil Courts—Civil P. C., S.* 9.

It is a well-recognized rule of the law that when it is alleged that action of the Municipal Committee is ultra vires or is not covered by the authority of the Act, the civil Courts have power to interfere. It is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Municipal Act that the jurisdiction of the civil Courts is ousted. Their discretion as to the mode of action is not subject to a scrutiny by the civil Courts but their power to take that action is always open to examination by such Courts. [P 461, C 2, P 462, C 1]

(c) *Punjab Municipal Act* (3 *of* 1911), *S.* 152—*Profession must be continuing at the time of notice.*

It is essential that the person to whom a notice under S. 152 is given should be carrying on her profession of a public prostitute at the time of the issue of the notice. [P 462, C 2]

* (d) *Punjab Municipal Act* (3 *of* 1911), *S.* 152—*Public prostitute—Definition.*

A woman who is a prostitute by profession and whose trade is to let out her body on hire to all or visitors of a specified class, is a public prostitute, but where she is the employee of one man or has been living with different lovers at different occasions but with one man at a time she is not a public prostitute. [P 463, C 1]

Sardha Ram—for Appellant.

Raj Narayan and *Bishan Narain*—for Respondent.

Judgment.—This judgment will dispose of Appeal No. 1869 of 1925 by Mt. Bandi Jan, Appeal No. 1718 by Mt. Moti Jan, Appeal No. 1719 by Mt. Naushaba Jan, Appeal No. 1965 by Mt. Wahidan Jan, Mt. Zeban Jan and Appeal No. 1966 by Mt. Majidan Jan and Mt. Maddo Jan. The respondent in all these is the Municipal Committee of Delhi and they all arise out of the same judgment of the District Judge of Delhi.

Under S. 152 of the Punjab Municipal Act the Municipal Committee of Delhi prohibited the residence of the appellants in the locality specified in the notice on the ground that they were public prostitutes. The appellants thereupon brought the suits out of which these second appeals have arisen for a declaration that they were not public prostitutes within the definition of the term as used in S. 152 of the Punjab Municipal Act and for an injunction against the Municipal Committee restraining it from prohibiting their residence in the area specified in the notice.

It will be convenient at this stage to dispose of two objections raised by Mr. Raj Narayan who appeared before me on behalf of the respondent. The first was that no civil suit lay as the power of the Municipal Committee to issue a notice under S. 152 was absolute and conseqnently not subject to the control by the civil Courts. The District Judge has not discussed this point in the judgment and consequently it is contended by the counsel for the appellants that it was not raised before him. The question, however, is one of law and the objection is one which relates to the jurisdiction of the Courts. I, therefore, allowed it to be argued before me.

No authority was cited on either side, but the learned counsel for the appellants relied on S. 9 of the Civil P. C. and S. 42 of the Specific Relief Act. I hold that the jurisdiction of the civil Courts, on the facts alleged by the plaintiffs, was not ousted by any provision of the law express or implied. It is a well-recognized rule of the law that when it is alleged by the plaintiffs that action of the Municipal Committee is ultra vires, or is not covered by the authority of the Act, the civil Courts have power to interfere. It is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Municipal Act that the jurisdiction of the civil Courts is ousted. The civil Courts are, no doubt, incompetent to try the question whether a Municipal Committee, if it were acting within the limits of statutory powers, was right in its judgment that a certain action should be taken by them. Their discretion as to the mode of action is not subject to a scrutiny by the civil Courts, but their power to take that

action is always open to examination by such Courts. In the case before me the question is whether the plaintiffs are amenable to the law that has been applied to them by the Municipal Committee and I feel no doubt that the civil Courts are competent to decide that point and to issue an injunction to the Municipal Committee if they hold that the latter have issued notices to porsons who were not really governed by the law which has been applied to them.

The second objection raised by the counsel for the respondent was that the finding of the learned District Judge was one of fact and that, therefore, no second appeal lay but appellants do not contest generally the facts found by the learned District Judge. All that they contend is that the facts found by him do not bring them within the expression "public prostitutes," and that is a question of law and not one of fact. I, therefore, overrule this objection also.

I will now deal with a contention that was raised by the counsel for the appellants that the burden of proving that the appellants were public prostitutes should have been laid on the defendant Municipal Committee. In my opinion there is no force in this contention. The plaintiffs came to the Court praying for a relief. It was initially for them to prove their case.

Coming to the cases of the appellants individually. In Appeal No. 1869 Mt. Bandi Jan has been found to have been living with one Chandu Lal as his mistress. This Chandu Lal, it appears, died during the pendency of this suit. The learned Judge holds as follows :

> She appears to have begun life as a dancing-girl, but she early made the acquaintance of Chandu Lal and was paid a salary of Rs. 220 per mensem for many years. Her case is certainly more doubtful than that of the other appellants, but the mere fact that she remained content with one employer for some years does not exclude her from the definition.

A public prostitute has rightly been defined by the learned District Judge to be a woman who is a prostitute by profession and whose trade is to let out her body on hire to all visitors or to all visitors of a specified class. It appears from the last sentence quoted from the judgment of the learned District Judge that Mt. Bandi Jan, remained content with one employer for some years, and also that at the time of the issue of the notice she was in his employ. Under the circumstances I do not think she falls under the definition of the expression "public prostitute." She was not at that time carrying on a trade of letting out her body on hire to all visitors. It is essential that the person to whom a notice under S. 152 is given should be carrying on her profession of a public prostitute at the time of the issue of the notice. This has not been proved in this case. No inference adverse to the appellant can be drawn from the evidence of Bhika (P. W. No. 6) who stated in cross-examination that other people visit the house of the appellant. I have examined the evidence of this witness. His statement does not lead to the inference that the other people visit the appellant's house for any immoral purpose and I do not understand that this is the view of the learned District Judge. This appeal, in my opinion, ought to be accepted.

The next case is of Mt. Moti Jan (Appeal No. 1718). All that is proved against this appellant is that she has been living with different lovers on different occasions. It is also clear that she has been living with one person at a time. That she is a prostitute is clear enough, but it is doubtful whether under the circumstances she can be called a "public prostitute." The facts proved do not establish that she has been letting herself out to all visitors.

In Appeal No. 1719 by Maushaba Jan : at the time of the notice the appellant was the mistress of one Yusaf (P. W. No. 3). The learned District Judge has remarked that she admitted herself to be open to offers for sexual intercourse. I have referred to the record and have not been able to discover any such admission. Mr. Raj Narayan has admitted before me that there is no such admission. It is clear that she was attached to one lover at the time of the notice and was not carrying on the profession of a public prostitute.

Mt. Wahidan Jan, appellant in Appeal No. 1965, has been held to be a public prostitute on the ground that she admitted that she was open to engagements of sexual intercourse at other people's houses. I have not been able to discover any such admission on the record and Mr. Raj Narayan admitted that there was none. Mt. Wahidan Jan states that she only dances and sings and also

admits that she has been living with two or three different persons at different times. This fact alone does not make hor a public prostitute.

No arguments were addressed to me on behalf of Mt. Zaban Jan. Her appeal is dismissed with costs.

Mt. Majidan and Mt. Maddo Jan are appellants in Appeal No. 1966. The learned District Judge has held in respect of them that they have been the mistresses of several persons at different times and that although they say that they are ill, they have not abandoned their trade. There is no proof that their trade at any time or at the time of the notice was that of a public prostitute and no question of abandoning the trade, therefore, arises in this case. On the facts proved they cannot be held to be public prostitutes and the facts found by the learned District Judge do not bring them within the purview of S. 152.

I accept the appeals and decree the plaintiff's suits with costs throughout. The appeal of Mt. Zaban Jan is dismissed with costs.

Appeals accepted.

A. I. R. 1926 Lahore 463

ADDISION J.

Firm Sukh Dayal Gopi Chand and *Lajpat Rai*—Judgment-Debtors—Appellants.

v,

The Firm Jawahar Singh Harnam Das—Decree-Holder—Respondent.

Misc. First Appeal No. 2565 of 1925, Decided on 18th February 1926, from an order of the Senior Sub-J., Sargodha, D/- 14th October 1925.

Civil P. C., O. 41, R. 6 (2)—Execution against person or moveable property can be had even though sale of immovable property is stayed.

Where an order is passed for stay of sale of immovable property, the mere fact that security has been given under O. 41, R. 6 (2), does not prevent the execution of the decree in accordance with law, either against the person or moveable preperty of the judgment-debtor. [P 463 C 2]

K. J. Rustomji and *Sayad Mohsin Shah*—for Appellants.

Ram Chand Manchanda—for Respondent.

Judgment—A first appeal has been pending in this Court for some years, but no order for stay of execution was ever obtained under O. 41, R. 5, Civil P. C. The decree-holder at first took out execution against immovable property and it was attached and ordered to be sold. The judgment-debtor then applied to the executing Court under O. 41, R. 6 (2), Civil P. C., to stay the sale. Accordingly the executing Court did so and took at the same time security from the judgment-debtor. Under the rule in question the executing Court had to do this. Thereupon the decree-holder applied to attach some moveable property belonging to the judgment-debtor.

The lower Court refused to do this by its order dated the 4th December 1924 on the ground that execution could not proceed as the appeal had not yet been decided. This order was appealed to this Court, see Civil Appeal No. 155 of 1925 and the appeal was accepted on the 19th May 1925 on the ground that although the sale of immovable property could not proceed under the provisions of O. 41 R. 6 (2), Civil P. C., yet the decree-holder was not thereby precluded from proceeding against the person or moveable property of the judgment-debtor. The executing Court was, therefore, directed to proceed with the execution application in accordance with law. Thereupon, by its order dated the 14th October 1925, the executing Court ordered that the moveable property of the judgment-debtor should be attached. Against the decision this appeal has been filed.

It is clear, as has already been held by this Court, that the decree-holder has power to proceed against the moveable property of the judgment-debtor. I, therefore, fail to understand why this appeal has been filed. The mere fact that security has been given under O. 41, R. 6 (2), does not prevent the execution of the decree in accordance with law. What the decree-holder wants is money in his hands and he is entitled to get this money in any legal way he can. I, therefore, dismiss this appeal with costs. This order also disposes of the miscellaneous application for stay of the execution proceedings as regards the moveable property pending this appeal.

Appeal dismissed.

* A. I. R. 1926 Lahore 464 (1)

ZAFAR ALI, J.

Haru Ram—Plaintiff—Appellant.

v.

Ghulam Ali Khan—Defendant—Respondent.

Second Appeal No. 2924 of 1925, Decided on 11th March 1926, from the decree of the Dist. J., Dera Ghazi Khan, D/- 13th August 1925.

* *Interest—No express agreement as to—Sahukara rate of six per cent. should be allowed.*

In the absence of an express agreement interest should be allowed at what is called the sahukara rate of 6 per cent. per annum, that is, the rate at which one moneylender charges interest in his dealing with another moneylender. [P. 464, C. 1]

Mukand Lal Puri—for Appellant.
Amar Nath Chona—for Respondent.

Judgment.—The balance of Rs. 1,540 sued on was made up of principal and interest which was calculated at the rate of 1 per cent. per mensem. The previous account which dated from 1909 showed that interest at that rate had always been charged but the Courts below have disallowed interest on the last balance on the ground that no express agreement to pay interest was proved. But as observed by the learned District Judge, the fact that the defendant had been paying interest throughout gave rise to the presumption that interest was payable on the last balance also and there was no evidence to rebut this presumption. In the absence of an express agreement interest should have been allowed at what is called the sahukara rate of 6 per cent. per annum, that is, the rate at which one moneylender charges in his dealings with another moneylender.

I, therefore, accept the appeal and allow the plaintiff interest at that rate. This comes to Rs. 308 which is half the interest claimed by him. The decree of the Courts below will be modified accordingly. The plaintiff will get costs on Rs. 308 in this Court and the lower appellate Court and in proportion to Rs. 1,848 in the first Court.

Appeal accepted.

A. I. R. 1926 Lahore 464 (2)

MARTINEAU, J.

Rajada—Defendant—Appellant.

v.

Baru Mal—Plaintiff—Respondent.

Second Appeal No. 2611 of 1925, Decided on 19th March 1926, from the decree of the Dist. J., Karnal, D/- 28th May 1925.

Civil P. C., S. 35—Plaintiff failing to prove his case—Defendant is entitled to costs without proof that the case is false.

The plaintiff has to prove his case, and when he fails to prove it, the defendant is entitled to his costs without his being required to prove that the case is a false one; and the mere fact that the case is not entirely false is not a good ground for disallowing costs to defendant. [P. 464, C. 2]

Muhammad Monier—for Appellant.
Harish Chandra—for Respondent.

Judgment.—In this case the plaintiff sued for money alleged to be due on book account, and the issue was whether the defendant had struck the balance in the plaintiff's account book. The Courts below concurred in dismissing the suit, finding that the plaintiff had failed to prove that the defendant had struck the balance, but the District Judge directed that the parties should bear their own costs throughout, and the defendant has accordingly filed a second appeal, asking that he may be allowed costs.

The ground given by the learned District Judge for not allowing costs is merely that it cannot be held that the case is entirely false. This is, however, not a good ground. The plaintiff had to prove his case and when he failed to prove it the defendant was entitled to his costs without his being required to prove that the case was a false one. A question of principle being involved a second appeal lies. I accept the appeal and vary the decree of the lower appellate Court so far as to direct that the plaintiff shall pay the defendant's costs in the Court below. He will also pay the defendant's costs in this Court.

Decree varied.

* A. I. R. 1926 Lahore 465

JAI LAL, J.

H. Fielding — Judgment-debtor—Appellant.

v.

Firm Janki Das and Sons—Decree-holders—Bespondents.

Misc. Second Appeal No. 3187 of 1925. Decided on 19th April 1925, from the order of the Dist. J., Lahore. D/- 10th November 1925.

* (a) *Civil P. C., S. 24 (4)—"Suit" includes execution proceedings.*

The term "suit" in S. 24 includes execution proceedings, and therefore a Court to whom execu- proceedings are transferred under S. 24 from a Court of Small Causes is a Court of Small Causes for the purposes of such proceedings. [P 465 C 1]

* (b) *Civil P. C., S. 48—Subsequent order may be by transferee Court.*

The subsequent order referrrd to in S. 48 may be passed by a Court to which the decree has been transferred. *A. I. R.* 1925 *Bom.* 503, *Foll.* [P 466 C 1]

(c) *Evidence Act, S. 115—Judgment-debtor requesting decree to be by instalments and acting upon it cannot subsequently object to it.*

Where an order directing the payment of the decree by instalment was passed at the request of the judgment-debtor who subsequently acted upon it, he is precluded from contending that the order was not binding on him. *A. I. R.* 1923 *Lah.* 381, *Ref.* [P 466 C 1]

Jai Gopal Sethi—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The decrees were passed in 1911 against the appellant in the Court of Small Causes at Lahore. They were transferred under S. 24 of the Civil Procedure Code, for execution to the Court of the Subordinate Judge at Lahore. When the execution proceedings were pending in the Court of the Subordinate Judge, an agreement was arrived at between the decree-holders and the judgment-debtor that the latter would continue paying in Court a fixed sum every month which would be distributed among the decree-holders. He continued to pay this amount monthly for some years. Then he ceased to do so. The decree-holders then applied in the Court of the Subordinate Judge for execution of the decrees. On an objection by the judgment-debtor the Subordinate Judge has held that the decrees were time-barred and therefore dismissed the applications.

On appeal the District Judge held that he had no jurisdiction to entertain an appeal but in spite of this finding he proceeded to decide it on the merits and held that the applications were not time-barred and quashed the orders of the Senior Subordinate Judge.

It is obvious that after having held that he had no jurisdiction to hear an appeal the District Judge should not have proceeded with its decision on the merits. The judgment-debtor is the appellant before me and it is contended on his behalf that the decision of the District Judge on the question of jurisdiction is correct and on the question of limitation is wrong. A number of authorities were cited on behalf of the respondent in support of his contention that that the view of the District Judge that no appeal lay to this Court was wrong, but none of those authorities applies to this case. They all relate to decrees which had been sent for execution to another Court by the Court which passed them and to which therefore S. 42 of the Civil Procedure Code applied. The decree in this case was admittedly transferred under S. 24 of the Civil Procedure Code, and to such a case S. 24 (4) applies. This lays down that the Court trying any suit transferred or withdrawn under S. 24, Civil Procedure Code, from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes. The term "suit" in this S. 24 includes execution proceedings. I therefore hold that the view of the District Judge on the question of jurisdiction was correct. It consequently follows that his order quashing the order of the Subordinate Judge was without jurisdiction and must therefore be set aside.

Counsel for the respondent, however, asked me to decide the question involved in this case in exercise of my revisional jurisdiction. The result of my setting aside the order of the District Judge is that the respondent will have to move this Court in exercise of its revisional jurisdiction. I consider it convenient to accede to the request of the respondent and to decide the case on its merits.

S. 48 (1) of the Civil Procedure Code provides a limit of 12 years for the execution of a decree from the date of such decree or from the date of the default in making the payment where the decree or any subsequent order directs the payment of money at recurring periods. The

decision of the objection of the judgment-debtor depends upon a determination of the question whether the subsequent order referred to in S. 48 should be only by the Court which passed the decree or it may be passed by a Court to which the decree has been transferred. In the former case the judgment-debter's objection must succeed : in the latter it must fail. The learned counsel for the judgment-debtor relied upon *Jiwan Bakhsh* v. *Mubinal Haq* (1), *Jurawan* v. *Mahabir Dube* (2), *Gobardhan Prasad* v. *Bishunath* (3) and *Abdul Rahaman* v. *Dullaram* (4). The first judgment is by a Judge in Chambers of this Court. All these authorities support the contention of the learned counsel. The learned counsel for the decree-holder on the other hand relied upon *Apte* v. *Tirmal Hanmant Savnur* (5) and a judgment of the Division Bench of this Court reported as *Banarsi Das* v. *Ramzan* (6). The identical point which is involved in this case was not discussed in this last-mentioned case. However certain observations made by the learned Judges support the decree-holder. The Bombay case which appears to be the latest pronouncement on the subject is a clear authority in favour of the decree-holder. *Jurawan* v. *Mahabir Dube* (2) was considered in that case and was dissented from. With great respect I venture to subscribe to the view of the learned Judges of the Bombay High Court. Moreover, an order directing the payment of the decree by instalments was passed at the request of the judgment-debtor who subsequently acted upon it. He is therefore precluded from contending that the order was not binding on him. This was held in *Banarsi Das* v. *Ramzan* (6).

I therefore accept the judgment-debtor's appeal and set aside the order of the learned District Judge but in exercise of my revisional jurisdiction I set aside the order dated the 15th June passed by the Senior Subordinate Judge of Lahore holding that the decrees were barred by limitation. I hold that S. 48 (1) (d) of the Civil Procedure Code applies to the decrees in question, and I remand the case to the Senior Subordinate Judge with directions to proceed with the execution of the decrees in accordance with law. Under the circumstances I leave the parties to bear their own costs.

Appeal allowed ; Revision also allowed.

(1) A. I. R. 1923 Lah. 678.
(2) [1918] 40 All. 198=44 I. C. 24=16 A. L. J. 71.
(3) [1920] 2 P. L. T. 80=58 I. C. 393=(1920) P. H. C. C. 229.
[1887] 14 Cal. 348.
(5) A. I. R. 1925 Bom. 503.
(6) A. I. R. 1923 Lah. 381.

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* A. I. R. 1926 Lahore 466

SHADI LAL, C. J., AND COLDSTREAM, J.

Namdar Singh and *another* — Defendants—Appellants.

v.

Ibrahim and *others*—Defendants—Respondents.

Second Appeal No. 2521 of 1922, Decided on 31st May 1926, from the decree of the Dist. J., Ferozepur, D/- 12th June 1922.

* *Pre-emption — Sale consideration used to pay off antecedent debt — Suit to avoid sale by minor—Vendee not the antecedent creditor whose debts paid off — Pre-emptor need not prove more than existence of the debt although he himself is the antecedent creditor.*

Where the vendee is himself the creditor, the repayment of whose loans is consideration for the alienation, it is not sufficient for him merely to prove that the debts existed. If the sale in such a case is pre-empted, and the pre-emptor has to defend a suit brought to avoid the alienation on the ground that it was unnecessary, the pre-emptor will have to prove more than the mere existence of the debt, just as the vendee would have to do. But where the vendees are not the creditors whose debts were the consideration for the sale, the pre-emptors, who stand in their shoes, are not bound to prove more than the vendees need have proved, namely, that there were debts due which were discharged by the sale. The fact that the pre-emptors happen to be the creditors will not put them in a position less favourable than that of the vendees : 54 *P. R.* 1918, *Expl.* [P 467 C 1, 2]

Tek Chand and *Har Gopal* — for Appellants.

Judgment.—On the 19th November 1918, one Farida, along with his son Abdul Aziz, sold by a registered deed some 230 kanals of land to Wasawa Singh, Nihal Singh and Pritam Singh. Namdar Singh and Zaildar Singh sued for pre-emption and obtained a decree on the 10th March 1919, the price fixed being the same as the consideration for the sale namely, Rs. 5,750. In June 1919 Ibrahim, the minor son of Farida, instituted through his mother Mt. Fatima the

suit from which the present appeal arises contesting the sale on the usual grounds of want of consideration and necessity. The trial Court holding that necessity had been proved only to the extent of Rs. 626 gave a decree to the effect that the sale would affect Ibrahim's reversionary rights to the extent of Rs. 313 only.

The pre-emptors Namdar Singh and Zaildar Singh appealed and the learned District Judge, holding that necessity had been proved to the extent of Rs. 1,523, modified the trial Court's decree accordingly. The pre-emptors have filed this second appeal through Mr. Tek Chand. No appearance has been made on behalf of the respondent. We find that Mt. Fatima has been duly served with notice and we have heard the appeal ex parte. Mr. Tek Chand's main contention is that the learned District Judge has wrongly applied the principle laid down in *Lal* v. *Milkhi* (1). That judgment laid down that in a case where pre-emptors have to defend a sale contested on the ground of want of necessity and consideration they stand in exactly the same position as the vendees whose rights they have pre-empted. The learned District Judge has understood this to mean that in every case of this kind, if the pre-emptor is himself an antecedent creditor whose debts are alleged to have been paid out of the consideration money the pre-emptor is bound to prove not only that the debts existed, but also that they were raised for a necessary purpose. This is not, however, the real meaning of this judgment. No doubt, where the vendee is himself the creditor, the repayment of whose loans is consideration for the alienation, it is not sufficient for him merely to prove that the debts existed. If the sale in such a case is pre-empted, and the pre-emptor has to defend a suit brought to avoid the alienation on the ground that it was unnecessary, the pre-emptor will, in accordance with the ruling referred to, have to prove more than the mere existence of the debt, just as the vendee would have to do. But in the present case the vendees were not the creditors whose debts were the consideration for the sale and the pre-emptors, who stand in their shoes, are not bound to prove more than the vendees need have proved, namely, that there were debts due which were discharged by the sale.

The fact that the pre-emptors happen to be the creditors will not put them in a position less favourable than that of the vendees. It has been admitted from the beginning that the debts in this case were not immoral or due to reckless extravagance or wanton waste on the part of the vendor. We have examined carefully the various debts of which consideration is stated to consist and we need say no more here than that it is proved either by oral evidence or by the production of documents made by registering officers that they were real antecedent debts which were paid off by the sale. The pre-emptors have therefore discharged the obligation laid upon them and the plaintiff is not entitled to any declaration. In view of this decision it is unnecessary to discuss Mr. Tek Chand's argument based upon *Dad* v. *Lal* (2) that in the circumstances no decree ought to be granted even if the necessity and consideration are not proved. Suffice it to say that this suit does appear to us to be a collusive one instituted by the vendors to undo their own act.

We accept the appeal and dismiss the suit with costs throughout.

Appeal accepted

(1) [1918] 54 P.R. 1918=56 I.C. 454=122 P. W.R. 1918.

(2) A.I.R. 1925 Lah. 24=5 Lah. 389.

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* A. I. R. 1926 Lahore 467

SHADI LAL, C.J., AND COLDSTREAM, J.

Raja and *others*—Plaintiffs—Appellants.

v.

Muttali and *others*—Defendants—Respondents.

Second Appeal No. 2185 of 1922, Decided on 27th May 1926, from the decree of the Dist. J., Jhelum, D/- 2nd August 1922.

* *Court-fees Act, S. 17—Alternative reliefs claimed on same cause of action—Fee is payable only on the bigger relief—S. 17 does not apply.*

Where a plaint prays for one of two reliefs in the alternativs based on one cause of action, the larger of the two reliefs determines the value of the claim and S. 17 of the Court-Fees Act does not apply. [P 468 C 1]

N. C. Mehra—for Appellants.

Bihari Lal—for Respondents.

Judgment.—The plaintiffs, on 7th July 1920, sued the defendants for a declaration that an alienation of land by one of the latter in favour of the others, made on 3rd February 1920, would not affect the plaintiffs' reversionary rights, alleging that the land alienated was ancestral and that that alienation was made without necessity and consideration. In the alternative the plaintiffs prayed for a pre-emption decree in respect of the land. The Subordinate Judge refused to grant the declaration, but on 10th June 1922 gave a decree for pre-emption on payment of Rs. 2,000. The plaint had been stamped with a stamp for Rs. 20 and the Subordinate Judge, presumably on the ground that the plaint required a stamp covering the total value of the two reliefs prayed for, ordered that the decree was not to be executed until the plaintiffs had paid an additional Court-fee. The defendants appealed and the learned District Judge dismissed the plaintiffs' suit on the ground that as full Court-fee had not been paid within the period of limitation prescribed for a pre-emption suit the plaint must be held to have been barred by time.

The plaintiffs have appealed, and it is urged on their behalf by Mr. N. C. Mehra that the stamp for Rs. 20 was sufficient to cover the suit for the alternative reliefs asked for and that consequently the Subordinate Judge's order that further Court-fee was to be paid was improper. This being so, there was no ground for the order passed on appeal by the learned District Judge.

After hearing Mr. Bihari Lal for the respondents we are of opinion that the appeal must succeed. There is good authority for the view that where a plaint prays for one of two reliefs in the alternative, based on one cause of action, the larger of the two reliefs determines the value of the claim and S. 17 of the of the Court-fees Act does not apply. In the present case the proper Court-fee on the prayer for declaration was Rs. 10 and that on the prayer for pre-emption Rs. 15-2. The fee paid was greater than was required for the larger of the reliefs claimed and was therefore sufficient, and no further fee need have been demanded.

We accept the appeal and remand the case to the District Judge for re-decision according to law. The Court-fee on the appeal before us will be refunded. Costs will be costs in the cause.

Appeal accepted.

A. I. R. 1926 Lahore 468

ZAFAR ALI AND ADDISON, JJ.

Karam Chand and *others*—Appellants.

v.

Ram Labhaya Mal and *others*—Respondents.

Second Appeal No. 1251 of 1922, Decided on 4th May 1926, from the decree of the Dist. J., Attock, D/- 20th April 1922.

(a) Hindu Law — Alienation by father—Sale resulting in benefit to family should be upheld.

Where the father was neither a spend thrift nor a profligate but a well-behaved person possessing considerable experience of the world, and he was in his youth a patwari, was next employed as manager of the estate of his brother-in-law and then a pleader's Munshi, and where it was found that the land sold was quite unproductive yielding no income but the vendees paid a large amount for it because it adjoined their house which they wanted to extend:

Held: that the sale was for benefit of the family and was not assailable by his sons.

[P. 466, C. 1]

(b) Hindu Law—Alienation by father for necessity—Consent of co-parceners is not necessary.

The consent of the other co-parceners is not essential where the managing co-parcener makes an alienation either for a valid necessity or for the benefit of the family. *A. I. R.* 1925 *All.* 618, *Foll.*

[P. 469, C. 2]

Tek Chand and *Nand Lal*—for Appellants.

Badri Das and *Shamair Chand*—for Respondents.

Zafar, Ali, J.—The second appeal involves a question of the Mitakshara Law relating to the powers of the father of a joint family governed by that law to sell ancestral property. The plaintiffs are two adult sons and three minor grandsons of the vendor named Mangladha, and the property sold by him is a building site about seven marlas in area situate in the town of Pindigheb. The site was ancestral property inasmuch as Mangladha had, as found by the Court below, purchased it out of income derived from the ancestral estate. The plaintiffs sued for possession of the site stating that the sale was without necessity and

devoid of consideration. On behalf of the defendants vendees it was urged that the sale was an act of good management and was effected for the benefit of the family. The trial Court dismissed the suit, but on appeal it has been decreed by the District Judge. The facts are briefly as below: Mangaladha purchased the site in 1902 for Rs. 380 but he paid to his vendors Rs. 200 only, undertaking to redeem with the balance the mortgage to which the property was subject. He, however, never did so, and in December, he sold it for Rs. 2000 representing to the vendees that it was free of encumbrance. The mortgagee, however, succeeded in recovering Rs. 215 from the vendees. It is not contested now that Mangladha received the purchase money and that he is neither a spendthrift nor a profligate, but a well behaved person possessing considerable experience of the world. He was in his youth a patwari was next employed as manager of the estate of his brother-in-law, and is now a pleader's munshi. He has a large family to support and according to all indications he never did anything which was detrimental to the interests of that family. The land was quite unproductive yielding no income, but the defendants vendees paid a large amount for it because it adjoined their house which they wanted to extend. It was therefore a highly profitable bargain that Mangaladha managed to make, and from his character and antecedents it may safely be inferred that he made it for the benefit of his family, and that the purchase money became an accretion to the family funds. The defendant's contention that the suit was collusive appears to be correct because Mangladha, though impleaded as a defendant, kept strictly aloof and did not, like an honest man, lend any support to his vendees from whom he had received so large a sum. Having regard to all these facts and circumstances we come to the conclusion that the sale was for benefit of the family and that the suit was collusive.

The next question is whether Mangladha possessed authority to sell without consulting and obtaining the consent of his adult sons. Gour, in his Hindu Code, points out that the Privy Council as well as the Indian Courts, were originally uncertain as to what the correct rule was on this point, but that the later authorities lay down the principle that the consent of the other co-parceners is not essential where the managing co-parcener makes an alienation either for a valid necessity or for the benefit of the family, see Gour's Hindu Code, second edition, paragraphs 1247-1250. The same view was taken in *Jagmohan Agrahri* v. *Prag Ahir* (1), where the facts were somewhat similar to those of the present case.

We are therefore of opinion that the sale was not voidable at the instance of the plaintiffs. This being so, we accept the appeal and, reversing the decree of the lower appellate Court we restore that of the trial Court, and order the plaintiffs to pay appellants' costs in this Court as well as in the lower appellate Court.

Appeal accepted.

(1) A. I. R. 1925 All. 618.

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* A. I. R. 1926 Lahore 469

DALIP SINGH, J.

Budhu Ram—Accused—Petitioner.

v.

Khem Devi—Complainant — Respondent.

Criminal Revision No. 330 of 1926, Decided on 1st May 1926, reported by the S. J., Multan, on 18th February 1926.

* *Criminal P. C., S. 488—Compromise effected to pay maintenance—Section does not apply.*

Once a compromise is entered into to pay maintenance there is no refusal to maintain on the part of the husband and therefore S. 488, has no longer any application. An order passed regarding such a compromise is without jurisdiction. The proper remedy is by way of civil Courts to enforce the compromise: 42 *P. R.* 1888 *Cr.*; 39 *P. R.* 1905 *Cr., Foll.* [P. ,470, C. 1]

Bishen Nath—for Respondent.

Order.—The present case has been referred by the learned Sessions Judge, Multan, for revision of the order of the Additional District Magistrate, Multan. It appears that Mt. Khem Devi sued her husband, the petitioner, for maintenance under S. 488, Criminal Procedure Code. A compromise was entered into by which the husband agreed to pay Rs. 12 per mensem to Mt. Khem Devi. This was recorded by the order of the Magistrate, dated 21st July 1925. Mt. Khem Devi applied to recover the arrears alleged to be under this order and the Additional District Magistrate ordered warrants of

attachment to issue for the arrears of maintenance.

The petitioner applied for revision basing his contention on two rulings of the Chief Court, namely, *Rahiman Ali* v. *Fateh Bibi* (1), which follows *Rahim Bibi* v. *Khair Din* (2), under which ruling is noted another Division Bench ruling which appears to be on all fours with the present case.

It is clear that once a compromise is entered into to pay maintenance, there is no refusal to maintain on the part of the husband and, therefore, S. 488, Criminal Procedure Code, has no longer any application. Any order regarding such a compromise is, therefore, passed without jurisdiction under that section. Mt. Khem Devi has her remedy by way of the civil Courts to enforce the compromise entered into if any.

Following these rulings, therefore, I accept the revision and set aside the order of the Additional District Magistrate for realization of the arrears of maintenance.

Revision accepted.

(1) [1905] 39 P. R. 1905, Cr.
(2) [1888] 42 P. R. 1888, Cr.

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* A. I. R. 1926 Lahore 470

SHADI LAL, C. J.

Mt. Lachmi—Petitioner.

v.

The Crown—Respondent.

Misc. Criminal Case No. 54 of 1926, Decided on 22nd May 1926, against the order of the Mag. 1st Cl., Amritsar.

* *Criminal P. C., S. 526—Grave unfounded allegations against trying Magistrate contained in the transfer application cannot be a ground.*

It is not desirable that a litigant should be able to get a transfer at his will and pleasure by making an application containing unfounded allegations against a judicial officer, and then representing that after making those allegations he could not expect to get justice from him. If this principle is accepted every application for transfer is bound to succeed. [P 470 C 2]

Nand Lal—for Petitioner.

Des Raj Sawney—for Respondent.

Judgment.—I have already dismissed an application preferred by Mt. Lachhmi for the transfer of a criminal case pending against her in the Court of S. Gokal Singh, a Magistrate of the First Class at Amritsar and this is the second application made for the same purpose. The allegation, upon which this application is founded is a very serious one, and there can be no doubt that if the Magistrate has been guilty of the grave misconduct attributed to him, he is not only unfit to try the case but should no longer be retained in the Provincial Civil Service.

I have bestowed my anxious and earnest consideration upon the matter and questioned the learned counsel for the applicant as to the character of the evidence which she would produce in the event of my acceding to her request for an enquiry to be made into the charge brought against the Magistrate. The case reveals an unfortunate state of affairs, and as I observed in my previous judgment it is to be regretted that the applicant has instead of sending her daughter back to her husband helped her in rendering nugatory the decree for the restitution of conjugal rights obtained by the husband. In the interest of all the persons concerned in the affair I consider that it is not desirable that I should set out the grave allegations made against the character of the Magistrate or enter upon a discussion of the reasons for the conclusion reached by me; it is sufficient for me to say that after giving very careful consideration to what has been urged on both sides, I am of opinion that it is improbable that the Magistrate could have misbehaved in the manner suggested by the applicant.

It is true that after casting grave aspersions upon the character of the trial Magistrate, the applicant apprehends that she will not have a fair and impartial trial in his Court; but I cannot subscribe to the doctrine that a litigant should be able to get a transfer at his will and pleasure by making an application containing unfounded allegations against a judicial officer, and then representing that after making those allegations he could not expect to get justice from him. If this principle is accepted every application for transfer is bound to succeed.

I decline to grant the request for a transfer and dismiss the application.

Application dismissed.

* A. I. R. 1926 Lahore 471

JAI LAL, J.

Shiwala Mahadeo Dandishwar Maharaj—Defendant—Appellant.

v.

Lachhman and *another*—Plaintiff & Defendants—Respondents.

Second Appeal No. 289 of 1926, Decided on 6th May 1926, against the decree of the Dist. J., Karnal, D/- 29th October 1925.

* *Evidence Act, S. 115—Recitals in deed—Executant is not necessarily estopped from denying.*

The executant of a document is not necessarily estopped from denying the facts stated therein but the burden of proving the non-existence of such facts is on him : 1 *Lah.* 137, *Expl.* ; 40 *All.* 593 (*P. C.*), *Dist.* [P 471, C 2]

Nand Lal—for Appellant.

Shamair Chand—for Respondents.

Order.—One Dewa executed a deed of adoption in favour of Lachhman on the 23rd November 1923. On the 28th March 1924 he gifted 38 bighas of land in favour of the appellant, Shiwala Mahadeo Dandishwar Maharaj. Lachhman, who is a minor, thereupon instituted a suit to set aside the gift. Dewa was also impleaded as a defendant. The plea of the defendants was that the plaintiff had not been adopted and that the deed of adoption was merely a paper transaction. The performance of any ceremonies of adoption was denied. The learned District Judge has held as follows :

So far as the evidence in the case is concerned I think it leaves the question whether the boy was really given or taken or not in doubt. Three of the attesting witnesses of the deed of adoption say that there was no such ceremony, but defendant Deva seems to be estopped from denying this by reason of the admission in the deed of adoption.

Reliance is placed on *Vir Singh* v. *Harnam Singh* (1) and *Risal Singh* v. *Balwant Singh* (2) in support of this last conclusion. In the former ruling it was held that a party must be deemed to admit the correctness of recitals made in the deed executed by him and therefore a presumption of the truth of such recitals must be raised against that party, and that consequently the burden of disproving them must be laid on such person. This judgment does not lay down the proposition that the executant of the document is necessarily estopped from denying the facts stated therein.

Risal Singh v. *Balwant Singh* (2) is a judgment of their Lordships of the Privy Council. The facts were that a widow adopted a son, professing to do so under an authority given by her deceased husband. In the litigation which followed, a question arose as to the factum and validity of the adoption. The widow and the adopted son both pleaded that the latter had been validly adopted by the former under the authority of her husband. This plea was held to be proved by the Courts. It appears that later the widow and the adopted son quarrelled with each other, and consequently the lady filed a suit for a declaration that the latter had not been validly adopted by her. She alleged that she had no authority to adopt from her husband and that she did not as a fact make the adoption. Their Lordships held that under such circumstances the widow was estopped from denying that she had the authority of her husband to adopt or that the adoptee was validly adopted by her. The facts of that case are clearly distinguishable from the one before me. It has not been shown that the adoptee has done anything to his prejudice, believing the representation of the adopter as to the validity of the adoption. On the other hand if the assertion of the defendant is correct that the plaintiff was not adopted at all then the falsity of the allegations made in the deed of adoption being known to the adoptee it cannot be stated that he has in any way been misled by the representation made by the plaintiff. In the reported case the widow represented that she had an authority from her husband, and relying on this authority those interested in the adopted son allowed him to be adopted.

I hold, therefore, that the view of the District Judge that defendant was estopped from denying the validity of the adoption is erroneous. The burden, however, is on the defendant to prove that no adoption such as is mentioned in the deed of adoption really took place. The learned District Judge does not appear to have approached the case from this point of view, but has held that an adoption took place merely because one is mentioned in the deed. I think it was

(1) [1920] 1 Lah. 137=56 I. C. 191.
(2) [1918] 40 All. 593=48 I. C. 553=45 I. A. 168 (P. C.).

necessary for the District Judge to decide on the evidence on the record whether the ceremonies mentioned in the deed of adoption did not take place, and if so which ; and whether in the absence of all or any of the ceremonies the adoption was invalid.

In this connexion it may be mentioned that the plaintiff's case stands or falls by the proof or disproof of an adoption under the dattaka form. Counsel for the appellant has frankly admitted before me that he does not rely upon an adoption in the kritrima form. If it be held that no adoption in the dattaka form took place then this suit must be dismissed.

I must, therefore, remand this case under O. 41, R. 25, to the learned District Judge to give a finding on the question whether or not an adoption under the dattaka form took place in this case. In deciding this question he will have to start with a presumption that the facts mentioned in the deed are correct. Return within two months. Ten days for objection.

Case remanded.

A. I. R. 1926 Lahore 472 (1)

LE ROSSIGNOL, J.

Jalla Ram—Plaintiff—Petitioner.

v.

Labhu—Defendant—Respondent.

Civil Revision Petition No. 658 of 1925, Decided on 8th April 1926, from the decree of the Senior Sub-J., Sheikhupura, D/- 17th June 1925.

(a) *Limitation Act, S. 19—Acknowledgment, if can be basis of suit, is doubtful.*

It is doubtful if a suit can be maintained on a mere acknowledgment of debt, but an acknowledgment of debt at least implies a promise to pay. [P 472 C 1, 2]

(b) *Civil P. C., O. 6, R. 17—Plaint slightly defective—Amendment should be allowed.*

Where the only thing to be done is a slight amendment of plaint, the proper course is to allow the amendment and not to dismiss the suit. [P 472 C 2]

Beni Parshad Khosla—for Petitioner.

Judgment.—The suit has been dismissed on the highly technical ground that the suit cannot be maintained on a mere acknowledgment of debt. This view of the law is of doubtful correctness, for an acknowledgment of debt at least implies a promise to pay.

Moreover the plaint does recite the antecedent transactions and a copy of the earlier account was filed with the plaint.

At the most, all that was required was a slight amendment of the plaint, so as to implead specifically the antecedent transactions.

I accept the petition, set aside the lower Court's decree and remand for trial on the merits after amendment as indicated above.

Case remanded.

A. I. R. 1926 Lahore 472 (2)

LE ROSSIGNOL, J.

Hira Lal—Defendant—Petitioner.

v.

Darbari Lal—Plaintiff—Respondent.

Civil Revision Petition No. 382 of 1925, Decided on 1st February 1926, from a decree of the Small Cause Court J., Delhi, D/- 14th March 1925.

Civil P. C. (amended by Act 9 of 1922), S. 35A—Compensation.

Compensation under the section can be awarded only after objection by the opposite party. [P 472 C 2]

Brij Lal—for Petitioner.

Bishen Narain for *Sardha Ram*—for Respondent.

Judgment.—The learned Judge of the Court below has awarded costs of Rs. 50 by way of compensation for a false defence, but his order is illegal as no objection was taken by the other side. He should study Act 9 of 1922 carefully.

I accept the petition and modify the lower Court's decree, by striking out the award of Rs. 50 compensation and the direction that petitioner shall be prosecuted. No costs for this hearing.

Decree modified.

A. I. R. 1926 Lahore 473

ADDISON, J.

Shiv Dyal and *another*—Defendants—Appellants.

v.

Ram Das—Plaintiff—Respondent.

Second Appeal No. 304 of 1926, Decided on 19th May 1926, from the decree of the Dist. J., Attock, at Campbellpur, D/- 29th October 1925.

(a) *Easements Act—Act does not apply to Punjab—Principles of English Law apply.*

Easements Act does not apply in the Punjab. The English Law, which is usually taken to embody the principles of equity and good conscience, should be applied. [P. 474, C. 1]

(b) *Easements Act, S. 13 (b)—Grantor does not get quasi easement unless expressly reserved.*

When a quasi-servient tenement is conveyed to the grantee, and the quasi-dominant tenement is retained by the grantor, quasi-easement cannot arise in favour of the grantor unless expressly reserved in his grant, inasmuch as the grantor by a grant for valuable consideration is, in the absence of such express reservation, taken to have relinquished all rights over the tenement granted, and to be thereby afterwards precluded from doing anything which derogates from his grant: *Wheeldon* v. *Burrows*, (1879) 12 *Ch. D.* 31, *Foll*; *Pyer* v. *Carter*, (1857) 1 *H.* and *N.* 916, *not Foll.* [P. 473, C. 2]

(c) *Maxims—Justice, equity and good conscience.*

When a case has to be decided according to justice, equity and good conscience what should be followed is the Common Law of England: 48 *Cal.* 338, *Foll.* [P. 474, C. 1]

M. S. Bhagat and *R. C. Soni*—for Appellants.

Shamair Chand—for Respondent.

Judgment.—The plaintiff bought from the defendants a vacant site next to their houses. He commenced to build a house on this land but was obstructed by the defendants. He, therefore, sued for an injunction to restrain them from obstructing him. The Courts below have found that the defendants had three apertures C, D and E in their houses prior to sale to the plaintiff. These apertures would be closed by the construction of the plaintiff's house. The Courts below, however, have decreed the plaintiff's suit on the ground that the Indian Easements Act does not apply in the Punjab and that the English Law, which is usually taken to embody the principles of equity and good conscience, is in favour of the plaintiff. Against this decision this second appeal has been filed.

It is undoubted that the general rule in England in such cases is as laid down by the Courts below, namely, that when a quasi-servient tenement is conveyed to the grantee, and the quasi-dominant tenement is retained by the grantor, quasi-easements cannot arise in favour of the grantor unless expressly reserved in his grant, inasmuch as the grantor by a grant for valuable consideration is, in the absence of such express reservation, taken to have relinquished all rights over the tenement granted, and to be hereby afterwards precluded from doing anything which derogates from his grant. The principal case on the subject is *Wheeldon* v. *Burrows* (1). It is definitely decided by it that the grantor could not be held impliedly to have reserved to himself the right to any quasi-easements as regards the quasi-dominant tenement retained by him. This enunciation of the law has been repeatedly affirmed, and the only case which seems to have been decided in the contrary sense is *Pyer* v. *Carter* (2). This was a case decided by the Court of Exchequer. Though this decision has never been expressly overruled, the principles laid down in it were definitely rejected by the same Court in *White* v. *Bass* (3). In the next case, namely, *Suffield* v. *Brown* (4), the Lord Chancellor emphatically dissented from the doctrine of *Pyer* v. *Carter* (2). There were other cases which did not follow *Pyer* v. *Carter* (2). Then followed *Wheeldon* v. *Burrows* (1) which decisively settled the law in England on this subject. In *Allen* v. *Taylor* (5) the Master of the Rolls stated:

> I take it also that it is equally settled law, that if a man who has a house and land grants the land first reserving the house, the purchaser of the land can block up the windows of the house.

This subject is well discussed in Peacocks' Law relating to Easements in British India at page 366 et seq. The same view is taken in Gale on Easements, where it is said, at page 168, that *Wheeldon* v. *Burrows* (1) has been often followed and is now regarded as settled law. At

(1) [1879] 12 Ch. D. 31=48 L. J. Ch. 353=41 L. T. 327=28 W. R. 196.
(2) [1857] 1 H. and N. 916=26 L.J. Ex. 258=5 W. R. 371.
(3) [1867] 7 H. and N. 722=31 L. J. Ex. 283=8 Jur. (N. S.) 312=5 L. T. 843.
(4) [1862] 4 De. G. J. and S. 185=3 N. R. 340=9 L. T. 829=33 L. J. Ch. 249=12 W. R. 356=10 Jur. N. S. 111.
(5) [1880] 16 Ch. D. 358.

the bottom of that page note (h) gives many rulings following *Wheeldon* v. *Burrows* (1).

It has often been laid down that when a case has to be decided according to justice, equity and good conscience what should be followed is the Common Law of England: vide *Satischandra* v. *Ram Dayal* (6). The difficulty here is that S. 13 (d) of the Indian Easements Act followed *Pyer* v. *Carter* (2) though Mr. W. Stokes, who drafted the Act, intended to follow the principles of English Law. At the time, however, the Act was drafted *Wheeldon* v. *Burrows* (1) had not been decided, while *Pyer* v. *Carter* (2) had. The reason why *Pyer* v. *Carter* (2) was followed was because of the judgment of Mr. Justice Field in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (7). Mr. Whitely Stokes acknowledged the assistance given to him by that learned Judge in drafting the Bill which became the Easements Act. *Charu Surnokar* v. *Dokouri Chunder* (7) was, however, not approved by the learned Judges who decided *Watzler* v. *Sharpe* (8). They said at page 298 as follows:

In our opinion an examination of the authorities does not support the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (7), that a way under the circumstances of that case might pass by implication on a severance as an apparent and contiuuous easement.

Similarly the learned Judge who decided *Chuni Lal-Mancharam* v. *Manishankar-Atmaram* (9) followed the English rule instead of S. 13 (d) of the Easements Act which had been passed by the time that case was decided. Peacock has remarked at page 388 that:

it may be seriously questioned whether *Charu Surnokar* v. *Dokouri Chunder Thakoor* (7), will, in future, be followed in Bengal and the other parts of India in which the Indian Easements Act is not in force.

In my opinion the equitable rule is that followed in English Law. In the present case the strip of land sold is only something like ten feet wide, and if the plaintiff is prevented from building it will be useless to him. It must be presumed that the grantors did not impliedly reserve to themselves any right as regards the three apertures. On the other hand, having parted with the land for valuable consideration, in the absence of any express reservation, they must be held thereby afterwards precluded from doing anything which derogates from their grant.

The case was properly decided and I dismiss this appeal with costs.

Appeal dismissed.

(6) [1921] 48 Cal. 388=32 C. L. J. 94=59 I. C. 143=24 C. W. N. 982 (S. B.).
(7) [1882] 8 Cal. 956=10 C. L. R. 577.
(8) [1893] 15 All. 270=(1893) A .W. N. 151.
(9) [1894] 18 Bom. 616.

A. I. R. 1926 Lohore 474

MARTINEAU AND DALIP SINGH, JJ.

Ata-ur Rahman and *others*—Appellants.

v.

Mashkur-un-Nisa and *others*—Respondents.

First Appeal No. 1239 of 1918, Decided on 25th February 1926, from the decree of the Sub-J., 1st Cl. Delhi, D/- 8th March 1918.

(a) *Civil P. C., O. 22, Rr. 4 and 9—Application under R. 4 may in particular cases be treated as one under R. 9.*

An application which purports to be under O. 22, R. 4, may in particular cases be treated as one in substance under O. 22, R. 9: *A. I. R.* 1922 *Lah.* 61; *A. I. R.* 1923 *Lah.* 546; & *A. I. R* 1924 *Lah.* 424: *Ref.* [P. 475, C. 2]

But where not only there was no assertion that there had been a delay due to reasonable causes, but there could not in fact be any reason for the applicant to ask for an excuse of the delay because the applicant thought there had been no delay when the application was made.

Held: it was not possible to treat the application as being one under O. 22, R. 9.

[P. 475, C. 2]

(b) *Civil P. C., O. 22, R. 4—Joint decree—Appeal—Some of the plaintiffs dying and their legal representatives not impleaded - Appeal abates in toto.*

Where a joint decree is passed, so that any one of the plaintiffs might execute it for the benefit of all, the plaintiffs are necessary parties to the appeal and it would be wholly infructuous to allow the appeal to proceed against some only of the plaintiffs as it would lead to incosistent decrees and therefore if legal representatives of any of the plaintiffs who have died are not impleaded the appeal abates in toto.

[P. 476, C. 1, 2]

B. Tek Chand and *Ghulam Mohy-ud-Din*—for Appellants.

Moti Sagar, *Sardha Ram* and *Mehr Chand Mahajan*—for Respondents.

Judgment.—These three appeals, namely, 1239 of 1918, 844 of 1923 and 846 of 1923, together with Appeals Nos. 845 of 1923 and 847 of 1913 are all more or less connected with each other.

A preliminary objection has been raised as regards Appeals Nos. 1239 of 1918

and 844 of 1923 and 846 of 1923 that these appeals have abated because one Siraj-ud-Din, who was a party to the first two of these appeals, is dead and his legal representatives have not been brought on to the record within the period of limitation, and one Baij Nath who was also a respondent in Appeal No. 1239/1918 and in Appeal No. 846 of 1923, has died and his representatives have similarly not been brought on the record. As the point raised in both these instances is the same they will be disposed of by one decision.

It seems that Siraj-ud-Din died on the 31st January 1925 and an application to bring his representatives on the record was made on the 4th June 1925. The application was returned for the purpose of giving the date of the death, and on the 15th June 1925 the date of death was noted on the application as being the 31st January 1925. On the 23rd of July 1925 a Judge of this Court admitted the application subject to just exceptions. Now, it is clear that at that time the appeal had abated because more than three months had elasped from the date of death of Siraj-ud-Din. It is also clear from the date of the attestation of the affidavit that the death was known to the appellants on the 4th of May 1925.

The learned counsel for the appellants has contended that the application should be treated as one under O. 22, R. 9 and has cited various rulings of this Court in support of his contention. These rulings are *Arur Sing* v. *Todar Mal* (1); *Chuni Lal* v. *Kala Khan*, (2); *Tirath Ram* v. *Abdul Rahim* (3); *Allah Yar* v. *Thakurdas* (4) and *Badlu* v. *Naraini* (5). The reason given now for not putting in the application in time is that the appellants were misled by the advice of their legal advisers at Delhi and thought that the time for making such an application was six months.

As regards Baij Nath the facts are that he died on the 5th of August 1923 and an application was made to bring his representatives on the record on the 12th of November 1923. That application was by Sana-ul-Haq, assignee of the lessees, the present appellants. The affidavit had been attested on the 5th October 1923, and the order of the learned Judge admitting the application subject to just exceptions was passed on the 20th of December 1923. The same reason for the delay is given in an affidavit by Abdul Gafur, Mukhtar of Obed-ul-Rahman, one of the appellants.

Now as regards the contention that the applications under O. 22, R. 9, the rulings of this Court merely held that an application which purports to be under O. 22, R. 4, may in particular cases be treated as one in substance under O. 22. R. 9, in all those cases, except in *Badlu* v. *Naraini* (5), a ruling by a single Judge. It is conceded by counsel for the appellants that there was reasonable cause for delay in making the application. In these circumstances it was open to the Court to hold that such an application was in substance under O. 22, R. 9.

In the case before us not only was there no assertion that there had been a delay due to reasonable causes, but from the very nature of the ground now urged in the affidavit as a cause for excusing the delay there could not be any reason for the applicant to ask for an excuse of the delay because, according to the applications, he thought there had been no delay when the applications were made. We therefore, consider that it is not possible for us to treat these applications as being applications under O. 22, R. 9, and we can only consider the oral application made before us on the 15th February 1926 as being the first application under O. 22, R. 9, to set aside the abatement that has admittedly taken place.

Now, without deciding the question as to how far delay due to a mistake of the legal advisers of a party may be just cause or not, it is quite clear that, in the circumstances of this case, this delay cannot be excused. The Limitation Act of 1908 undoubtedly gave a period of six months for such an application, but by Act 26 of 1920, which came into force on the 1st January 1921, the period in the case of the sister Article 176 was reduced to 90 days, For some time our Court held that the period under Article 177 had also been reduced to 90 days. On the 3rd July 1922 it was held by Mr. Justice

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(1) [1919] 22 P. W. R. 1919=49 I. C. 501.
(2) A. I. R. 1922 Lah. 61.
(3) A. I. R. 1923 Lah. 546.
(4) [1908] 46 P. W. R. 1918=44 I. C. 9=24 P. L. R. 1918.
(5) A. I. R. 1924 Lah. 424.

Harrison in a case reported in *Rupkishore* v. *Govind Das* (6) that the period under Article 177 had not been reduced. This decision was upheld in Letters Patent Appeal reported as *Gobind Das* v. *Rupkishore* (7) on the 1st of May 1923. Before this decision, however, the repealing and amending Act XI of 1923 had been passed and had come into force some time in March 1923. By that amending Act the doubt on the question was removed and the period under Article 177 was reduced to 30 days. The question that we have to consider is whether any party whether under the advice of his counsel or not, can plead that the delay in applying under O. 22, R. 9, can be excused when that delay extends from March 1923, when the amending Act came into force, to February 1926 when, as we have already held, the first application was made to set aside the abatement. We are not aware of any case where such a lengthy period has been allowed to any party on the ground of ignorance of a statutory provision of law. There is a clear distinction betweeen a mistake of law and ignorance of law and, without deciding whether ignorance of law can ever be an excuse for delay or not, it seems clear to us, that a delay of nearly three years, cannnot, in the circumstances of this case, be excused. We therefore hold that these appeals abated so far as Siraj-ud-Din and Baij Nath are concerned and that no sufficient reason has been shown for setting aside the abatement.

The next question for decision is whether the appeals have abated in toto or not. Now, the rulings on this point are, so far as our own Court is concerned, admittedly conflicting to some extent and do not seem to lay down any clear principle of decision. The same difficulty seems also to appear in the rulings of the other High Courts. It is, therefore, necessary to examine each case with reference to its facts.

Now, in appeal No. 1239 of 1918, the plaintiffs, of whom Siraj-ud-Din was one, sued for recovery of Rs. 12,324-3-6 on account of rent from various defendants. In paragraph 4 of the plaint the shares of the plaintiffs were specified, but no specification of shares was made in the amount claimed for rent. The decree directed Defendants Nos. 1 to 4 to pay to the plaintiffs the sum of Rs. 6,568-3-6. No specification was made in the decree as to the shares of the plaintiffs. The decree was therefore, in our opinion. a joint decree and any one of the plaintiffs might have executed it for the benefit of all. Now, in such a case it seems to us clear that Siraj-ud-Din and Baij Nath were both necessary parties to the appeal and it would be wholly infructuous to allow the appeal to proceed as it would lead to inconsistent decrees if the appeal of the lessees against the other lessors were to succeed. We hold, therefore, that in this case if legal reprentatives of any of the plaintifis who has died are not impleaded the appeal abate in toto and must be dismissed with costs.

In Civil Appeal No. 844 of 1923 the suit by the lessees against the three contesting defendants, of whom Siraj-ud-Din was one, was a suit for possession of certain shops. No shares of Siraj-ud-Din and others were specified. No separate relief was asked against any of them. A joint relief was claimed against them all and that suit was dismissed. It has been contended by counsel for the appellants that the case falls within the rulings in *Raghbir Saran* v. *Sohan Devi* (8); *Zainab Bibi* v. *Rohila* (9), and *Nandoo Singh* v. *Baljit Singh* (10).

The question, however, was not whether the appeal had abated, but whether the suit against certain covendees whose shares were specified in the sale deed had or had not abated. The question, therefore, of the effect of a joint decree was not discussed in that case. No doubt that ruling relies on *Zainab Bibi* v. *Rohila* (9) as authority for the proposition there laid down, and that was a case where the question was of the abatement of an appeal, but the specific point seems not to have been urged before their Lordships in *Raghbir Saran* v. *Sohan Devi* (8); *Zainab Bibi* v. *Rohila* (9) and *Nandoo Singh* v. *Baljit Singh* (10) which were suits against collaterals and, as the rights of collaterals are admittedly separate rights, it was held that the appeal only abated qua the particular collaterals whose representatives had not been brought on the record. The point is not free from doubt. The main question

A. I. R. 1922 Lah. 211.
A. I. R. 1924 Lah. 65.

(8) A. I. R. 1925 Lah 381.
(9) (1917) 23 P. R. 1917=39 I. C. 277.
(10) A. I. R. 1924 Lah. 93.

really ssems to be whether in considering the question one should look at the nature of the decree or at the nature of the right of the deceased party. Without deciding this question it seems to us that in the circumstance of this case whether we look at the nature of the decree or at the nature of the right of the deceased partv. it is clear that there is nothing to show that the right was separate. All the indications on the record are to the contrary. In the circumstances we must be guided: therefore, by the form of the decree which we hold was a joint decree, and therefore it follows that we must hold that the appeal has abated in toto.

In Civil Appeal No. 846 of 1923 the suit was brought by Baij Nath and others for a declaration that a certain lease had expired and that the plaintiffs were entitled to retain proprietary possession of certain shops, and for injunction to the defendants not to take steps to obtain possession of those shops or to interfere with the plaintiff's ownership and possession. The suit was decreed in full and here again it is clear that the decree was a joint decree and the injunction against the defendants might be enforced by any one of the plaintiffs. As, therefore, Baij Nath was a necessary party to the appeal that appeal must also be held to abate in toto.

These three appeals are, therefore, dismissed with costs,

Appeals dismissed.

A. I. R. 1926 Lahore 477

FFORDE AND CAMPBELL, JJ.

Kalwa—Plaintiff—Appellant.

v.

Hira Lal—Defendant—Respondent.

Second Appeal No. 2070 of 1922, Decided on 20th May 1926, from a decree of the Dist. J., Delhi, D/- 26th May 1922.

Appeal—Prayer for possession not properly stamped—Prayer for possession given up—Appeal should not be dismissed but prayer for possession should be struck out.

Where the memo. of appeal asks for possession but is not properly stamped for such a prayer and the appellant gives up the claim for possession and merely seeks a declaration, the appeal should not be dismissed but the proper order to pass is that any prayer in the memorandum of appeal relating to possession must be struck out and the appeal be heard upon the remaining prayers. [P 477, C 2, P 478, C 1]

Nanwin Mal—for Appellant.

Sardha Ram Kapur—for Respondent.

Order.—Mt. Mukhi, widow of Jhabbra, sold a certain house to her daughter's son Hira Lal, whereupon Jhabbra's brother's son Kalwa sued for possession and for cancellation of the sale-deed on the ground that the sale by the widow was for no valid necessity. The trial Court framed the following issues:

1. Whether a suit for possession s maintainable? 2. Whether the property in question is ancestral? 3. Whether the sale in favour of Hira Lal was for valid necessity? 4. Whether S. 11, Civil P. C. bars the suit? 5. Whether the plaintiff is estopped from questioning the alienation on account of Defendant No. 1 being the administratix? 6. To what relief is the plaintiff entitled?

On the first issue it was held that the plaintiff certainly could not obtain possession during the lifetime of Mt. Mukhi, and that even if a prayer for a declaration be held to be included in the prayer for cancellation of the document, or in the general prayer at the end of the plaint, the plaintiff had failed to make out a case for the grant of a declaration. On the second issue it was held to be immaterial whether the property was ancestral or not. On the third, the finding was that the sale was for valid necessity. On the fourth, that S. 11 did not bar the suit. It was admitted before the trial that there was no estoppel on the ground mentioned in Issue No. 5, and with this we are not concerned and on Issue No. 6 it was held that the plaintiff was entitled to no relief and his suit was dismissed.

He appealed to the District Judge who first of all held that the appeal was liable to dismissal because it was not properly stamped. It is manifest that the decision was incorrect. The plaintiff-appellant appealed on a stamp of Rs. 10 and his counsel submitted that he had given up the claim for possession and appealed merely for the purpose of seeking a declaration. The learned District Judge observed that the memorandum of appeal expressly asked for possession and that not being stamped on such a prayer, it must be dismissed. Obviously the proper order to pass was that any prayer in the memorandum of appeal relating to

possession must be struck out and the appeal be heard upon the remaining prayers. The learned counsel for the respondents before us does not attempt to uphold this part of the learned District Judge's decision.

The learned District Judge proceeded to record findings upon the merits of the appeal. He did not either affirm or reverse the decision of the trial Court that the sale was for necessity, but he held that in view of the plaintiff's conduct in respect of certain proceedings before the Court in which Mt. Mukhi had taken out Letters of Administration for the estate of her deceased husband Jhabbra, the plaintiff was not entitled to the relief of declaration sought by him. We find ourselves unable, however, to pass a satisfactory order which will terminate this long pending litigation without clear findings by the lower appellate Court on the third and fourth issues. The key to the case appears to us to lie in the third issue, and the learned vakil for the respondents asserts before us that he is prepared to support the dismissal of the suit on the ground of res judicata although this was found against him in the trial Court.

We accordingly return the case to the learned District Judge under O. 41, R. 25, with a direction that he should decide these two points and return his findings to this Court with the least possible delay. In dealing with Issue No. 3 he should disregard the somewhat vague observations by his predecessor in the paragraph of the judgment before us commencing: "Now I am not myself satisfied of the genuine nature of all the alleged debts," and the present District Judge will make his own enquiry and come to his own independent decision upon the character of the alleged debts and the nature of the rest of the alleged consideration.

Case remanded

A. I. R. 1926 Lahore 478

MARTINEAU, J.

Chandan Lal and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 1379 of 1925, Decided on 23rd April 1926, reported by the S. J., Karnal Dn., on 14th August 1925.

Penal Code, S. 406—Immovable property.

Criminal breach of trust cannot be committed in respect of immovable property: 23 *Cal.* 372, *Foll.* [P. 479, C. 1]

Shamair Chand—for Petitioners.

Report.—Chandgi filed a complaint against Chandan Lal and Devi Ditta to the effect that he had made over the house of his deceased brother Hira to the accused together with some moveable property which was in the house and that on complainant's demanding back the same the accused have declined to deliver the same and that they have misappropriated the moveable property inside the house. The Magistrate, Mirza Izaz-ud-Din Ahmad Khan, First Class, has framed a charge under S. 406, Indian Penal Code, against both the accused, and the accused have applied to this Court for revision.

Opinion.—The complainant had made a statement before the Naib Tahsildar in connexion with a previous case under S. 448 in respect of the same house filed by one Amrat Jat against the same accused. This is marked Ex. P. B. In that statement Chandgi made no mention of Chandan and stated that he had given the house to Devi Ditta alone for living purposes, that he had taken away the utensils in it and left only a charpai with Devi Ditta. Again in this case Chandgi made a statement before the Tahsildar on the 7th of January 1925 in which he stated that he had given the house to both the accused Devi Datta and Chandan and he mentioned a large number of moveable articles and stated that he had sent all those things to the house of the two accused and the house in dispute was empty and was locked and the key was given to Devi Ditta. Again, on the 8th of April 1925, he made a third statement before Mirza Izaz-ud-Din Ahmad Khan in which he stated that he had left the articles above mentioned in the house in dispute. His previous

two statements are not denied by the complainant and his attention was drawn to them in cross-examination. A comparison of these three statements alone is sufficient to show that the case is entirely frivolous and false. So far as Chandan is concerned complainant made no mention of him in the statement before the Naib Tahsildar. *Jugdown Singh* v. *Queen-Empress* (1) shows that criminal breach of trust cannot be committed in respect of immovable properperty. As regards moveable property the own statement of the complainant shows that the case is not true. This is a case in which the Magistrate should not have framed a charge against the applicants and the case is one quite fit for revision. The Public Prosecutor who appeared for the Crown also agrees with this view and cannot support the charge. The case is, therefore, submitted to the High Court with a recommendation that the charge against the two applicants may be quashed and the case ordered to be consigned to the record room.

Order.—For the reasons given by the learned Sessions Judge I quash the charge framed by the Magistrate against the accused.

Charge quashed.

(1) [1896] 23 Cal. 372.

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* A. I. R. 1926 Lahore 479

ADDISON, J.

Jagat Singh and *others* —Petitioners.

v.

Sunder Singh—Respondent.

Criminal Revision No. 349 of 1926, Decided on 10th May 1926, from an order of the Addl. Dist. Mag., Lahore, D/- 7th January 1926.

* *Criminal P. C., S. 145—Court should not disturb previous order under same section unless change of possession is found in the meantime.*

A Magistrate in deciding the question of possession under S. 145 of the Code is concluded by a previous order of a criminal Court relating to the subject of the dispute, unless he finds that there has been a change of possession since the previous order of the criminal Court was passed; 33 *Cal.* 33 and *A. I. R.* 1922 *Cal.* 364=49 *Cal.* 174, *Dist.* [P. 430, C. 1]

L. Saunders and *Ghulam Muhammad* —for Petitioners.

Daulat Ram—for Respondent.

Judgment.—There has been a dispute for a long time between Party I and Party II as to the ownership of certain land in village Kulloke, District Lahore. Party I applied against Party II under S. 145, Criminal P. C., at the end of 1920. Mr. Lincoln, Magistrate, First Class, heard the case and decided that Party II were in possession of the land and he ordered that they should remain in possession without being disturbed until such time as a competent Court directed otherwise. This order was dated the 3rd January 1921.

In spite of this order Party I does not appear ever to have gone to the civil Courts, but the two parties continued to dispute among themselves. There have been several criminal cases and one member of Party I was killed. Accordingly in 1924 the police took action under S. 145, Criminal P.C., again as regards the same land and sent up the proceedings under that section for determination by a Magistrate, First Class. Mr. Ram Lal, Magistrate First Class, heard these proceedings and his finding is that he was unable to satisfy himself as to which of the two parties was in possession of the land in dispute. Under S. 146, Criminal P. C., he, therefore, ordered that the land should remain under attachment until a competent Court had determined which party was entitled to possession thereof.

Party I applied to the Sessions Judge on the revision side requesting him to report the matter to the High Court to modify that order. The Sessions Judge dismissed their application on the 21st April 1925. Party II came to the High Court in revision on the 9th March 1925, but they were directed first to apply either to the Sessions Judge or the District Magistrate. They re-filed their application before the Additional District Magistrate who, without going into the merits, held that he had no power to interfere. It was, however, his duty to report the matter to the High Court if he considered the order to be wrong one. Party II had again filed a revision in the High Court and this they were entitled to do after having moved the Additional District Magistrate. Their application was admitted to a hearing.

The petitioners' contention was that as the Magistrate could not satisfy himself as to who was in possession, he should have made no order in view of the fact

that it had already been held by a First Class Magistrate in 1921 that they were in possession and that their possession should not be disturbed until the order of a competent Court was obtained. On behalf of Party I I was referred to *Kulada Kinkar Roy* v. *Danesh Mir* (1), where it was held that there was no inflexible rule of law that a Magistrate in deciding the question of possession under S. 145 of the Code was concluded by every previous order of a civil or criminal Court relating to the subject of the dispute and that the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case. In the above ruling, however, the order to the criminal and civil Courts had been passed some twenty years before and, therefore, the land had been completely washed away and recently re-formed. In *Sahabaj Mandal* v. *Bhajahari Nath* (2) the order of the civil Court had been passed not very long before proceedings were taken under S. 145, but there was a clear finding by the Magistrate that notwithstanding the possession given by the civil Court to the auction-purchasers, the first party continued in actual possession of the property in dispute. In the case before me these rulings cannot be applied as the Magistrate has not been able to hold that there has been a change of possession since the order of the first Magistrate dated the 3rd January 1921. That being the case, he should have refused to pass any order, leaving the previous order to stand.

I, therefore, accept this revision and set aside the order of the Magistrate, First Class, dated the 15th January 1925 on the ground that this Magistrate should not have taken any action contrary to order, dated the 3rd January 1921, when he was unable to hold that there had been a change of possession since then. It is competent for the police to take action under S. 107 of the Criminal P. C.

Order set aside.

(1) [1906] 33 Cal. 33=10 C. W. N. 257=2 C. L. J. 271.
(2) A. I. R. 1922 Cal. 364=49 Cal. 174.

A. I. R. 1926 Lahore 480

HARRISON, J.

Natha Singh—Accused—Petitioner.

v.

Mt. Harnam Kaur—Complainant—Respondent.

Criminal Revision No. 1966 of 1925, Decided on 12th March 1926, reported by the S. J., Hissar, D/- 30th November 1925.

Criminal P. C., S. 488—*Conditional order for maintenance is illegal.*

Where the husband is ordered to take the wife away and maintain her, but if he fails to do so, and turns her out he will be liable to pay a fixed sum per month to her for maintenance, the order is illegal : 14 *P. R.* 1917 (*Cr.*), *Foll.* [P. 480, C. 2]

Harish Chandra—for Petitioner.

L. C. Mehra—for Respondent.

Facts.—Musammat Harnam Kaur, wife of Natha Singh, accused, brought a Complaint under S. 488, Criminal P. C., for maintenance. The trying Magistrate disposed of the case with the following order :

The husband is willing to take his wife and support her. The wife agrees to doing so. At present the husband is ordered to take the wife away and maintain her ; but if he fails to do so, and turns her out, he will be liable to pay Rs. 15 per month to her for maintenance.

Grounds.—The application for revision from this order is made by the husband on the ground that the order of maintenanee being conditional is ultra vires. In support of this contention reliance is placed on behalf of the petitioner on *Phula Khan* v. *Emperor* (1) ; *Emperor* v. *Jamiet Singh* (2) ; and *In re Kuppa Mudali* (3) : Sohoni's Criminal Procedure Code, page 1022, para. 2. The authorities relied upon by the petitioner are in point and I am of opinion that the order of the trying Magistrate is illegal, and should be quashed.

Order.—For the reasons given by the learned Sessions Judge I set aside so much of the order of the Magistrate as embodies the condition regarding maintenance.

Order set aside.

(1) [1915] 213 P. L. R. 1915=26 I. C. 998=46 P. W. R. Cr. 1914.
(2) [1917] 14 P. R. Cr. 1917=39 I. C. 496=18 Cr. L. J. 528.
(3) 2 Weir 630.

A. I. R. 1926 Lahore 481

BROADWAY AND FFORDE, JJ.

Fateh Shah—Plaintiff—Appellant.

v.

Mt. Nuran and *others*—Defendants—Respondents.

First Appeal No. 2666 of 1920, Decided on 27th April 1926, from a decree of the Senior Sub-J., Montgomery, D/- 30th August 1920.

Custom (Punjab)—Gift—Sayyads of Basti Kesa in Montgomery District can make valid gift to daughter's son provided it is in writing and with possession.

Sayyads of Basti Kesa in the Okara Tahsil of the Montgomery District are governed by custom by which gifts of a portion of the ancestral property can be validly made, to a daughter's son provided the gift is made in writing and is followed by possession. [P. 481, C. 1, 2]

Mahesh Das—for Appellant.

Muhammad Tufail—for Respondents.

Judgment.—This appeal has arisen out of a suit brought by one Fateh Shah challenging a gift of ancestral land made by his father Bahab Shah in favour of Mt. Sahib Bibi, Mt. Saidan Bibi and Mt. Badshah Bibi—Bahab Shah's daughters by his wife Mt. Nuran. A declaration was asked for to the effect that the said gift would not affect the plaintiff's reversionary rights. When the suit was instituted Badshah Bibi had died leaving a son named Madad Ali who was made a party under the guardianship of the Assistant Clerk of the Court. Mt. Sahib Bibi died without issue during the pendency of the suit which was dismissed, it being held that the parties who are Sayyads of Basti Kesa in Okara Tahsil of the Montgomery District were governed by custom by which gift of a portion of the ancestral property could be validly made to daughters in the presence of a son of the donor. Against this order of dismissal Fateh Shah preferred this appeal in November 1920 and while it has been pending in this Court Bahab Shah and Mt. Saidan Bibi have both died, the latter leaving no issue.

Fateh Shah himself has been brought on to the record as the legal representative of the father Bahab Shah and Mt. Nuran as that of Mt. Saidan Bibi and Mt. Sahib Bibi. She alone has contested the appeal through Mr. Muhammad Tufail. The case was remanded under O. 41, R. 25, Civil P. C., by order of a Division Bench of this Court dated the 4th April 1925 and has now come up for disposal. Although other matters were raised in the ground of appeal the point argued before us was whether the decision of the trial Court on the question of custom was correct. Mr. Mahesh Das for the appellant urged that the evidence on the record did not justify the finding arrived at, while Mr. Muhammad Tufail contended that the finding was correct.

Fateh Shah is now in possession of the property which was the subject-matter of the gift and as pointed out by Mr. Mahesh Das, as Mr. Muhammad Tufail's clients have died without issue, the said property must revert to the heirs of the donor. A reference to the wajib-ul-arz of Basti Kesa prepared at the Settlement of 1857 shows that the power to make a gift of ancestral property to a daughter's son was recognized provided the gift was made in writing and was followed by possession. Again the riwaj-im-am of this Tahsil prepared in 1872 shows that gifts of lands to daughters were recognized and these entries are supported by two instances. A presumption of correctness attached to the entries in such revenue records.

In order to rebut the presumption the plaintiff produced certain witnesses. P. W. No. 1 Chogatta, is a Churera of a neighbouring village and says that Sayyads "cannot gift ancestral land to daughters." P. W. No. 2 Natu and P. W. No. 3 Bahadur are Bhattis and afford no assistance as they do not claim to know what the custom among Sayyads is. P. W. No. 4 Shamas Din is a Sayyad and the uncle of Bahab Shah. He says Sayyads cannot make gifts of this nature but had to admit that Taboo Shah, Bahab Shah's brother, had made such a gift. P. W. No. 5 Waryam, a Kharl, supports the plaintiff but gives his evidence in general terms. The evidence of P. W. No. 6 Imam Shah is similar to that of Waryam. P. W. No. 7, Taboo Shah, while admitting that he made a gift to his daughter says that it was revoked later. At the same time he admits that the custom they follow are entered in the Settlement Records and have not altered since 1872. In this he is suported by P. W. No. 9 Mehr Shah. P. W. No. 8 Mulak Shah a Sayyad who says generally that such gifts cannot be made but in cross-

examination admitted that his uncle had made a gift to his daughters that had not been challenged. P. W. No. 11 Muhammad Amir, a Lashari Biloch, says that Sayyads follow the general agricultural custom which prohibits such gifts.

On the other hand for the defendants Sadar Ali and Hassan Shah both Sayyads assert that gifts to daughters are recognized by custom and give instances. After a consideration of this evidence I am of opinion that the plaintiff's evidence does not rebut presumption of correctness that attaches to the entries in revenue records which in the present case are further supported by the instances referred to by the defendants' witnesses. I would, therefore, dismiss the appeal but in the circumstances allow the parties to pay their own costs.

Appeal dismissed.

A. I. R. 1926 Lahore 482

ADDISON, J.

Hakim Ali and *others* — Defendants—Appellants.

v.

Kartar Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1455 of 1925, Decided on 17th December 1925.

Civil P. C., S. 100—*Question of law — Adverse possession.*

Whether adverse possession has been established or not, is a question of law. [P. 482, C. 2]

Shamair Chand—for Appellants.

Abdul Aziz—for Respondents.

Judgment.—One Nabia was an occupancy tenant under the plaintiffs and the defendants. He also had a house in the village. He died some time between 1886 and 1892. Before doing so he executed a registered sale-deed, dated the 17th February 1886 in favour of the defendants' ancestors as regards a portion of the site he had in the village. After his death he was succeeded by his widow Mt. Begum both as regards the occupancy land and as regards the house in the village. She then sold the rest of the site in the village to the defendants by an unregistered sale-deed, dated the 28th May 1892. When she died in 1893 the occupancy land was partitioned between the plaintiffs and defendants who were the landlords. The plaintiffs have now come into Court for possession by partition of their share of the site occupied by Nabia and Mt. Begum in the village.

The trial Court held that the two sale-deeds in question had been proved ; that there was only one entrance into the defendants' house and the site in question ; that the defendants had been in possession of the site under the sale-deeds since 1886 and 1892 and had erected a shed with a thatched roof in which food used to be cooked ; that they tied their cattle and had their mangers there, etc. For these reasons it held that adverse possession had been established and it also found that the plaintiffs kept silent until the defendants erected two kothas on the site in dispute. It accordingly dismissed the suit. On appeal the Senior Subordinate Judge held that adverse possession had not been established as the site must be treated as a vacant one and no overt act showing adverse possession had been proved. He accordingly accepted the appeal and decreed the claim.

The sole question in this second appeal is as to whether adverse possession has been established. It is admitted that this is a question of law. It is clear that the plaintiffs made no attempt to get any portion of the site in the abadi when the occupancy lands were partitioned. It has also been established that the plaintiffs could not have been in possession of this site as it could only be entered by going through the main gate of the defendants' house. It has further been established that a shed for cooking food was erected there by the defendants who also kept their cattle and had mangers there until they created the house now standing upon it. Further, the defendants were obviously in possession under the sale-deed and not as co-sharers. One of these was registered and its existence must have been known to the plaintiffs. Particularly in view of the fact that the site falls exclusively within the defendants' main gate, and the fact that the defendants purported to buy the land from Nabia and his widow it seems to me that the only conclusion that can be drawn is that their possession over the site was adverse to the plaintiffs even although the plaintiffs were originally co-sharers in the site in question.

I therefore accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 483

BROADWAY AND FFORDE, JJ.

Jaggi Mal--Plaintiff--Appellant.

v.

Arya Ram and *others* — Defendants -- Respondents.

Second Appeal No. 900 of 1922, Decided on 1st April 1926, from the decree of the Dist. J., Hissar, D/- 31st January 1922.

(a) *Bengal Regulation* (17 *of* 1806), *S.* 8—*Notice—Omission to mention S. 7 in notice is not fatal.*

The omission in the notice to mention S. 7 is not fatal provided the purport of the section is given in the notice. [P. 483, C. 2]

(b) *Bengal Regulation* (17 *of* 1806), *S.* 8—*Larger sum demanded—Notice is not bad.*

Demand for a larger sum than was actually payable at the time of issuing notice cannot be regarded as a fatal defect in the notice: 91 *P. R.* 1913, *Foll.* [P. 484, C. 1]

Nawal Kishore—for Appellant.

Shamair Chand--for Respondents.

Judgment.—On the 29th July 1889 Hukam Chand and others, since deceased, mortgaged a certain nauhra or stable to Bhola Singh for Rs. 1,000. The mortgage was by way of conditional sale for a term of seven years, the condition being that if the principal, interest and costs of repairs were not paid by the end of the said seven years the transaction would be considered to be one of sale. The mortgage was with possession, and possession was given to the mortgagee. Nothing was paid, and on the 29th May 1919 the heirs of Bhola Singh who had died, applied to the District Judge of Hissar for the issue to the surviving mortgagor, Hukam Chand, of a notice of foreclosure under S. 8 of Regulation XVII of 1806. Notice was issued on the 4th June 1919 and served on Hukam Chand on the 10th of that month.

Before the expiry of the year of grace on the 27th May 1920 Hukam Chand sold the equity of redemption to Jaggi Mal who, on the 7th June 1920, instituted a suit for redemption on payment of Rs. 1,360. It was claimed that the notice issued on the 4th of June 1919 was null and void and that the mortgage was a subsisting one. It was also averred in the plaint that the sum of Rs. 1,360 had been tendered to the mortgagees who had refused to receive it.

The defendants contested the suit and pleaded the validity of the notice and in the alternative claimed a sum of Rs. 3,400 as due on account of principal and interest and the costs of repairs. They also asked for interest till the date of payment.

The trial Court held that the notice was defective: (1) because it omitted to state that the redemption was to be effected in the manner provided for by S. 7 of Regulation XVII of 1806; (2) because S. 7 of Regulation XVII of 1806 was not mentioned in the notice; and (3) because S. 7 had not been correctly copied out in the notice.

The plaintiff was, therefore, granted a decree on payment of a sum of Rs. 2,180.

The plaintiff appealed against that decree objecting to the amount allowed and the defendants filed cross-objections attacking the finding as to the invalidity of the notice. The learned District Judge held that the notice was perfectly valid and dismissed the plaintiff's suit with costs throughout.

The plaintiff Jaggi Mal has now come up to this Court in second appeal through Mr. Nawal Kishore, and Mr. Shamair Chand has represented the respondents.

The first point for determination is whether the notice was valid. It appears that the notice issued was in the form prescribed as No. 165. It is true that S. 7 of the Regulation was not specifically referred to in it and authorities have been cited at the Bar in which this omission has been considered a fatal defect. More recent authorities, however, have laid down that the omission to mention this section is not fatal provided the purport of the section is given in the notice. An examination of the notice shows that the purport of S. 7 is contained therein.

Again it is urged that S. 2 of Regulation 1 of 1798 should have been specifically referred to. In my opinion, so long as the purport of that section is given in the notice, specific reference to it is not imperatively necessary. Regulation 1 of 1798 lays down the procedure to be adopted by a borrower or mortgagor to preserve his right of redemption under deeds of bai bilwafa or conditional sales of land. It lays down that when money is lent on bai bilwafa or on the conditional sale of land the borrower, if he desires to redeem the land by payment of the money lent upon it, may, if the lender is not in the possession of the land, tender

or make payment of or deposit in Court the principal sum borrowed, and that on such deposit the Court shall issue notice to the lender as prescribed in S. 2. A proviso to that section lays down that the borrower may deposit a sum less than the sum above referred to alleging that the sum so deposited is the total amount due to vendor and that on such a deposit being made the Court shall receive it and issue notice as prescribed in that section. In the present case the notice issued to Hukum Chand informed him that he should pay a certain sum to the mortgagees and goes on to say, "or the balance of the sum remaining undischarged." So that it is clear that Hukam Chand was notified that he could pay into Court a lesser sum than that mentioned in the notice if he thought fit, the payment of the lesser sum being, of course, at his risk.

After a careful consideration of the Regulations in question and the notice issued, I am of opinion that there is no fatal defect in the said notice and that the only error of any importance in the notice is that instead of calling upon Hukam Chand to pay a sum of Rs. 1,000, that is to say, the actual sum lent under the conditional sale, he was called upon to pay a sum of Rs. 3,400 as well as to pay interest. The details of this sum of Rs. 3,400 were given in the notice. The principal amount was shown as Rs. 1,000, interest was shown as Rs. 1,650; and the costs of repairs at Rs. 750. I am in agreement with Mr. Nawal Kishore that in this case only the item of Rs. 1,000 should have been shown as payable. The words of the notice between asterisks commencing with "together" and concluding with "thereon" should have been scored through; and the attention of the Court is drawn to the necessity of a strict compliance with the rules for filling in the prescribed forms.

The demand for a larger sum than was actually payable at that stage cannot, however, be regarded as a fatal defect in the notice as was held in *Barkat Rai* v. *Ali* (1) by Rattigan and Scott-Smith, JJ. Mr. Nawal Kishore sought to distinguish this case by pointing out that it dealt with a mortgage without possession, but it seems to me that the principle enunciated in that authority applies equally to cases of mortgages with possession. The object of the Regulation of 1806 is to give a warning to the mortgagor so as to enable him by taking action under the Regulation to preserve his right to redeem. He was specifically told in this notice that the principal sum payable was Rs. 1,000 and had he deposited that sum in Court his right to redeem would have been preserved, any dispute in regard to other amounts claimed being settled at a later stage. In my opinion, therefore, the view taken by the learned District Judge is correct and this case was valid.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) [1913] 91 P. R. 1913=341 P. L. R. 1913=21 I. C. 643=223 P. W. R. 1913.

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* A. I. R. 1926 Lahore 484

JAI LAL, J.

Thakar Das—Decree-holder—Appellant.

v.

Ghulam Mahommad—Judgment-debtor—Respondent.

Miscellaneous Appeal No. 1960 of 1925, Decided on 27th January 1926, from an order of the Dist. J., Multan, D/- 30th April 1925.

* *Evidence Act, Ss.* 102 *and* 103—*Burden of proving a person to be agriculturist is on him—Principle of giving benefit of doubt is not applicable.*

Law does not recognize the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. Burden of proving that a person is of an agriculturist tribe is on him, especially when entries in Settlement record are against him. [P. 485, C. 1]

Har Gopal—for Appellant.

Iftikar Ali—for Respondent.

Judgment.—The only question involved is whether the respondent judgment-debtor is a Kharal, an agricultural tribe under the Alienation of Land Act, or whether he is a Pawli. In the latter case his land would be liable to attachment and sale in execution of the decree passed against him in favour of the appellant. The learned District Judge has not dealt with this case properly. He has held that the appellant was entitled to the benefit of any doubt that may exist with regard to his caste," and that he was a member of an agricultural tribe until the contrary was proved.

Now this was not the proper way to approach this case. The caste of the respondent is entered as Pawli in the current Settlement .records. The burden of proving that he is a Kharal would, under ordinary circumstances, lie upon the judgment-debtor. In this case there is a further presumption in favour of the appellant by virtue of the entries in the Settlement record. The learned District Judge should have come to a definite finding. In a case like this the law does not recognize the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. I must, therefore, set aside the order of the District Judge and remand the case to him for re-decision on the merits. It will be open to the learned Judge to record further evidence of the parties, if he considers that the evidence on the record is not sufficient to enable him to give a definite finding. Costs will abide the result. Court-fee on the memorandum of appeal will be refunded.

Case remanded.

A. I. R. 1926 Lahore 485

HARRISON AND FFORDE, JJ.

Dini—Accused—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 990 of 1925, Decided on 29th January 1926, from an order of the S. J., Ferozepore, D/- 7th September 1925.

(a) *Criminal P. C., S. 172—To disbelieve defence story only because it is nowhere mentioned in Police Zimnis is against provisions of Criminal P. C.*

To disbelieve the story of the defence only because it is nowhere mentioned in the Zimnis, amounts to making use of the Zimnis in such a way as to strengthen the case for the prosecution and to show that the rival story told by the defence is untrue,—a course forbidden by the provisions of the Criminal P. C. [P 485 C 1]

(b) *Penal Code, S. 300, Excep. 1—Sudden provocation.*

If a man comes home and finds a person actually misbehaving with his relation, his blood can hardly be expected to have cooled in the course of 15 or 20 seconds, and it is grave and sudden provocation within Exception 1 to S. 300. [P 486 C.1]

Ram Lal—for Respondent.

Harrison, J.—Dini sweeper has been found guilty in this case under S. 302, Indian Penal Code, of murdering Jowala Singh, Jat, by striking him on the head with a gandhali. The facts as found by the Sessions Judge are that this sweeper returned unexpectedly to the house, where he and his brother lived, and there found Jowala Singh with Mt. Har Kuar, his brother's wife. Jowala Singh ran away pursued by Dini, but was caught after he had run 50 karams, or about 90 yards, was struck down with a gandhali and then killed by blows on the head. The Sessions Judge has considered the question of provocation and has come to the conclusion that there was no such grave and sudden provocation as would bring the offence within the purview of the first Exception to S. 300.

The defence put forward was that the deceased died in consequence of his falling against a tree while being pursued by Dini, and we agree with the Sessions Judge in finding that this is wholly untrue, more than one blow having been struck on his head. We disagree from the Sessions Judge's finding that the weapon used was a gandhali. It is true that the evidence for the prosecution is to this effect, but it is contradicted by the medical evidence. We accept that medical evidence which is very clear on the subject and find that the death was caused by blows with a blunt weapon and that the introduction of the gandhali is a piece of malicious exaggeration. The witnesses for the prosecution who are all Jat Sikhs, have told a story about a long-standing intrigue between Jowala Singh and this sweeper woman; and as suggesting further enmity the father of the deceased, Thulla Singh, P. W. No. 11, has asked us to believe that on one occasion his son who was apparently in the habit of gambling with Dini was struck by him; on a second he struck Dini, and he, Thulla Singh, went as a peacemaker and tendered Rs. 40 as blood money, which was accepted by the sweeper.

This fable is a good indication of the bitter and unthinking animosity which is entertained by the witnesses for the prosecution. There is no evidence regarding the previous intimacy of Jowala Singh with this woman beyond the very vague assertion made by these interested witnesses. Their story of what happened

on the fatal day is that Jowala Singh was driving his cattle home, that without any excuse or provocation of any sort Dini, advanced to meet him, and that without putting up any sort of fight he ran away was overtaken and killed. This story has not been believed by the learned Sessions Judge. On the other hand the story put forward by the defence has also been disbelieved, namely, that Dini came and found Jowala Singh actually having intercourse with his brother's wife. The reason the Sessions Judge has given for disbelieving the story is that it is nowhere mentioned in the zimnis. This reason amounts to making use of the zimnis in such a way as to strengthen the case for the prosecution and to show that the rival story told by the defence is untrue, a course forbidden by the provisions of the Criminal P. C. A further reason for finding that the Exception does not apply is that the chase is described as long, and presumably the hot blood of Dini should have cooled down during the long chase. The distance was 50 karams, or less than 100 yards, and if a man comes home and finds a person actually misbehaving with his relation, his blood can hardly be expected to have cooled in the course of 15 or 20 seconds.

After taking everything into account we are of opinion that it is sufficiently established that this sweeper Dini was filled with sudden rage brought about by grave and sudden provocation, that he lost his self control and that his act in killing Jowala Singh amounted to culpable homicide not amounting to murder.

We accept the appeal in so far as to alter the conviction to one under S. 304 para 1, and reduce the sentence to seven years' rigorous imprisonment.

Fforde, J.—I agree.

Sentence reduced.

A. I. R. 1926 Lahore 486

ADDISON, J.

Jiwan Mal --Plaintiff—Appellant.

v.

Lachhman Dass—Defendant—Respondent.

Second Appeal No. 1358 of 1925, Decided on 10th February 1926, against the decree of the Dist. J., Gurdaspur, D/- 28th March 1925.

Tort—Defamation—Libel—Privilege—Uncalled for and irrelevant remark by witness is not privileged.

A remark made by a witness wholly irrelevant to the matter of inquiry, uncalled for by any question of Court and introduced by the witness is not privileged : 16 *P. R.* 1879, *Dist.*

[P. 487, C. 1]

Nand Lal—for Appellant.

A. C. Chatterjee—for Respondent.

Judgment.—In 1922 a Gurdaspur Munsif was trying a small suit between Lachhman Das and Girdhari Lal. On the 22nd March 1922, he suggested a compromise and to this Lachman Dass replied as follows :

A compromise cannot be effected as Jiwan Mal (who had got nothing to do with the suit) stands in the way. He has looted the whole of Dinanagar and gets false cases set up.

This Jiwan Mal is a Municipal Commissioner of Dinanagar, and when he came to hear what had been said he prosecuted Lachhman Dass under S. 500, I. P. C., and Lachman Dass was fined Rs. 200. Jiwan Mal has now sued Lachhman Das for damages amounting to Rs. 2.200, and has obtained a decree from the Court of first instance for Rs. 200, together with costs amounting to Rs. 180. Lachhman Dass appealed in the Court of the District Judge, and Jiwan Mal lodged cross-objections claiming an additional sum of Rs. 300. The District Judge accepted the appeal on a plea not clearly taken in the first Court and not put in issue. The District Judge held that the words complained of were uttered by a party during the trial of a suit, and that the law in the Punjab followed the law in England in this respect, and that a civil suit for damages did not lie, though, of course, there is ample authority that so far as a criminal prosecution is concerned, the I. P. C. applies and not the law in England. The ruling followed was *Ali Bhan* v. *Yaran Khan* (1).

The plaintiff has appealed in this Court against the decision of the District Judge, while the defendant has filed cross-objections claiming his costs which were not allowed by the District Judge.

The principal point argued before me was that it could not be held that the alleged statement was made by Lachman Dass in his capacity as a party to the civil suit between himself and Girdhari Lal. It was claimed that it was a gratuitous

(1) [1879] 16 P. R. 1879.

statement and had got nothing to do with the suit and that, therefore, it could not be considered to be a statement made in the course of a suit. It was not recorded by the Munsif and it was made to him when he suggested that such a petty suit might be compromised. It was totally irrelevant, and in my opinion it cannot be held that it was made by Lachman Dass as a party to the suit in question. It has been held in England that a remark made by a witness wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel and introduced by the witness for his own purpose would not be privileged ; see page 1078, Ratan Lal's Law of Crimes, 10th Ed.)

So in the case before me the remark made by Lachman Dass was wholly irrelevant to the matter of inquiry and was uncalled for by the question of the Munsif. I therefore, hold that it was not made by him as a party to the suit. It follows that *Ali Khan* v. *Yaran Khan* (1) cannot be held to apply to this statement and I accordingly accept the appeal ; and setting aside the decision of the District Judge remand the appeal to him for disposal on the merits. The cross-objections are dismissed. Costs in this Court will abide the event. Court-fee paid in this Court will be refunded.

Appeal remanded.

A. I. R. 1926 Lahore 487

CAMPBELL, J.

Saraj Din—Complainant—Petitioner.

v.

Khalil Shah and *another*—Respondents.

Criminal Revision Petition No. 1769 of 1925, Decided on 30th January 1926, from an order of the Addl. S. J., Lahore, D/- 29th September 1925.

Criminal P. C., S. 520—S. 520 does not apply to order not relating to property—Under it order relating to custody of child cannot be passed.

S. 520 does not apply to an order not relating to property and not passed under Ss. 517, 518 or 519. So under S. 520 an order restoring a child to his parents cannot be passed. [P. 487, C. 2]

Parkash Chandra for *D. N. Mehra*—for Petitioner.

Bakhshi Sain Das—for Respondents.

Judgment.—This revision petition concerns a child Mt. Iqbal Begam or Ghulam Fatima. Three persons, Khalil Shah, Mt. Mehr Bibi and Mt. Janat Bibi were prosecuted under S. 363, Indian Penal Code, at the instance of Siraj Din, who alleged that the girl was his daughter and had been kidnapped by the accused persons. The Magistrate who tried the case found, firstly, that Mt. Ghulam Fatima was the daughter of Siraj Din and had been kidnapped some 3 -1/2 years before the case ; secondly, that Khalil Shah and Mt. Mehr Bibi were innocent persons who in good faith had received the child from the third accused Mt. Janat Bibi; and thirdly, that Mt. Janat Bibi was not proved to have kidnapped the child but that she had not been able to account for her possession of the child and that she had not come by her honestly.

On these findings, Khalil Shah and Mt. Mehr Bibi were discharged and Mt. Janat Bibi was acquitted, and an order was passed that the child should be returned to her parents Siraj Din and Mt. Rahim Bibi. Khalil Shah and Mt. Mehr Bibi appealed to the Sessions Judge against the order making over the child to Siraj Din and Mt. Rahim Bibi, and the learned Additional Sessions Judge accepted the appeal and set aside the order as being without jurisdiction. Siraj Din has come to this Court with a petition for revision.

The first objection to the lower appellate Court's order is that it itself was passed without jurisdiction, and this is quite clear. The learned Additional Sessions Judge purported to act under S. 520 but that section, on his own showing, did not apply, since the order was not one relating to property and was not passed under Ss. 517, 518 or 519 of the Criminal P. C. I accept the petition and set aside the order of the Additional Sessions Judge.

The question remains whether I should interfere on revision with the order of the Magistrate, but in the circumstances, I am not prepared to do so. The order was passed on the 31st March 1925 and was carried into effect immediately. The learned Sessions Judge's order for restoration to Khalil Shah has not been executed and there is no allegation made on behalf of Khalil Shah, who is represented before me by counsel that the girl is being ill-treated or suffering in any way from the fact that she is in the

custody of Siraj Din and his wife who claim to be her parents. Khalil Shah must in the circumstances be left to assert any right he may claim by an application to a civil Court for guardianship or by such other proceedings in a civil Court as he may be advised to institute.

Order set aside.

A. I. R. 1926 Lahore 488

LE ROSSIGNOL AND MARTINEAU JJ.

Hanuman Parshad and *another*— Decree-holders—Appellants.

v.

National Bank of India, Limited, Delhi —Judgment-Debtor—Respondent.

Misc. First Appeal No. 1728 of 1924, Decided on 25th January 1926, from an order of the Senior Sub-J., Delhi, D/- 7th April 1924.

(a) *Civil P. C., S. 144—S. 144 applies even when decree is reversed in Privy Council.*

S. 144 is very comprehensive and is not inapplicable to a case in which a decree has been reversed by the Privy Council. 40 *Mad.* 299, *Foll.* [P. 488, C. 2]

(b) *Civil P. C., S. 144—Reversal of decree in Privy Council — Interest should be allowed on money to be paid back on reversal.*

Where there has been a reversal of a decree in the Privy Council, interest should be allowed on money which has to be paid back in consequence of that reversal. *Rodger* v. *Comptoir* (1871) 3 *P. C.* 465, *Foll.* [P. 488, C. 2]

Manohar Lal and *Sardha Ram Kapur* —for Appellants.

Mehr Chand Mahajan and *Raj Narain* —for Respondent.

Judgment.— This appeal and the Cross-Appeal No. 1820 of 1924 arise out of proceedings consequential on a judgment of the Privy Council by which a decree of the Chief Court was reversed and that of the Subordinate Judge restored. The Subordinate Judge had on the 15th December 1915 passed a decree in favour of Seth Kanhaya Lal, now represented by his sons, against the National Bank of India, Limited, for Rs. 83,032-8-3 with interest at 6 per cent. per annum from the date of suit till realization. On the 7th September 1916 the Bank paid to the decree-holder Rs. 152,125-4-9 which included Rs. 83,032-8-3 principal, Rs. 2,453-3-6 on account of costs, and Rs. 66,639-9-0 interest up to the 13th January 1916.

After the reversal of the decree by the Chief Court on the 15th January 1919, Seth Kanhaya Lal paid to the Bank Rs. 1,52,125-4-9 which the Bank had paid in September 1916, interest thereon up to the 14th June 1919 and costs. The decree of the Privy Council reversing that of the Chief Court was passed on the 23rd April 1923. The decree-holders then applied for the re-payment of the Rs. 1,79,546-10-0 as well as for interest thereon and costs incurred in the Privy Council. It is the claim for interest which is in dispute. The Subordinate Judge has allowed the decree-holder's interest at 8 per cent. on Rs. 27,420-12-1, that is, the difference between the sums of Rs. 1,52,125-4-9 and Rs. 179,546-10-0. Both parties have appealed.

It is contended for the Bank that S. 144, Civil P. C., on which the decree-holders rely, does not apply and that the latter are only entitled to execute their decree and to get interest at 6 per cent. per annum on the amount decreed, while the decree-holders claim interest on the sum of Rs. 1,79,546-10. We are of opinion that under S. 144 which is very comprehensive, the decree-holders are entitled to interest on the sum of Rs. 1,79,546-10 paid by them to the Bank in 1919 under the Chief Court decree which was afterwards reversed, and we do not agree with the argument that the section is inapplicable to a case in which a decree has been reversed by the Privy Council. In *Subrayudu* v. *Seshasani* (1) it was held that the section applied, however, the reversal of a decree had been effected; and the judgment of the Privy Council contained in *Rodger* v. *Comptoir D'Escompte DeParis* (2) affirmed the principle that where there had been a reversal of a decree in the Privy Council interest should be allowed on money which had to be paid back in consequence of that reversal.

We, therefore, hold that the decree-holders are entitled to interest on the whole sum of Rs. 179,546-10 which they paid to the Bank in 1919 and we accept their appeal and direct that interest be paid to them on that sum. We also accept

(1) [1916] 30 M. L. J 366=3 L. W. 236=33 I. C. 739=(1916) 1 M. W. N. 155.

(2) [1871] 3 C. P. 465=40 L. J. P. C. 1=24 L. T. 111=19 W. R. 449=7 Moo. P. C. (N. S.) 314.

the Bank's appeal to the extent of reducing the rate of interest payable to six per cent. per annum. This was the rate at which the decree-holders paid interest to the Bank and we do not think they are entitled to interest at a higher rate on the amount refunded to them. The decree-holders will get their costs in this Court in their appeal and the parties will pay their own costs in the appeal on the Bank.

Appeal accepted.

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* A. I. R. 1926 Lahore 489

SHADI LAL, C. J., AND
LE ROSSIGNOL, J.

Khalil-ul-Rahman and *another*—Judgment-debtors—Appellants.

v.

Ram Sarup—Decree-holder—Respondent.

Letters Patent Appeal No. 53 of 1925, Decided on 30th March 1926, from the order of Martineau, J., in Civil Appeal No. 2349 of 1924, D/- 5th February 1925.

* *Provincial Insolvency Act* (1920), *Ss.* 39 *and* 33—*Discharge releases debtor from all provable debts—Composition binds consenting creditors only.*

The main distinction between an order of discharge and an order approving a composition is that an order of discharge releases the insolvent from all debts provable under the Act whether those debts have been entered in the schedule contemplated by S. 33 of the Act or not, but a composition is binding only on creditors who cause their debts to be entered in the schedule contemplated by S. 39. [P. 489, C. 2, P. 490, C. 1]

Sardha Ram—for Appellants.

Shamair Chand—for Respondent.

Judgment.—In August 1921 the respondent instituted a suit for recovery of money against the appellant and obtained a decree in January 1924. In the meantime the appellant applied for the benefits of insolvency and was adjudicated an insolvent in February 1922. During the pendency of the insolvency proceedings the suit against the appellant was not stayed and as above noted resulted in a decree against the appellant. After adjudication in December 1922 certain of the creditors of the appellant accepted a composition proposed by him and on the 15th March 1923 the adjudication of insolvency was annulled.

The present appeal arises out of proceedings initiated by the respondent for the execution of his decree, and the sole question for decision is whether the respondent is bound by the composition and is consequently not entitled to execute his decree. The learned Judge in single Bench has held that the annulment of the adjudication has not the same effect as a discharge and, therefore, the appellant cannot claim exemption from the execution of the respondent's decree in the ordinary course of law.

On behalf of the appellant it is contended that, inasmuch as the respondent was a party to the insolvency proceedings and did not appeal against the insolvency Court's approval of the composition, he is bound by it. In our opinion the appeal deserves to fail. S. 39 of the Provincial Insolveney Act of 1920 lays down the procedure to be followed when a proposal for a composition in satisfaction of his debts is made by a debtor and receives the approval of the Court. The terms of the composition are to be embodied in an order of the Court and then a schedule of all creditors who prove their debts under the composition is to be drawn up and the main result flowing from the drawing up of the schedule is that the composition becomes binding on all the creditors entered therein to the extent of the debts therein specified.

The main distinction between an order of discharge and an order approving a composition is that an order of discharge releases the insolvent from all debts provable under the Act whether those debts have been entered in the schedule contemplated by S. 33 of the Act or not. If a debt provable under the Act has not been entered in the schedule contemplated by S. 33 the creditor loses all his remedies.

When, however, there has been no discharge but on the contrary an annulment of the adjudication, a creditor, who does not choose to take advantage of the composition and to prove his debt for participation in the funds made available under the composition, is not bound to do so. He may take his chance and recover what proportion of his debt he can in due course of law. The binding force of a proposal of composition lies not in the assent to it of the creditors but in

the approval which is stamped upon it by the Court. The binding force of a compromise is due to the law which is embodied in S. 39 and that law must be applied subject to all the restrictions set forth in the section. It cannot be held to be binding except on creditors who cause their debts to be entered in the schedule contemplated by the section.

Admittedly, here the respondent has never attempted to prove his debt in the Insolvency Court and was never a party to the acceptance of the proposal of composition. Consequently the composition is not binding upon him in respect of the decree of which he is now suing out execution.

The appeal is dismissed with costs.

Appeal dismissed.

** A. I. R. 1926 Lahore 490

SHADI LAL, C. J., AND COLDSTREAM, J.

Bansi Dhar and *others*—Appellants.

v.

Muhammad Suleman and *others*—Respondents.

First Appeal No. 1039 of 1921, Decided on 3rd June 1926, from the decree of the Sub. J., 1st Cl. Delhi, D/- 18th April 1921.

** (*a*) *Civil P. C., O.* 34, *R.* 14—*Sale of equity in execution of decree for interest on mortgage money is voidable but not void—It can only be avoided by application under S.* 47 *before sale is confirmed—After confirmation, redemption is barred—That mortgagee is purchaser makes no difference.*

A sale of the equity of redemption in execution of a decree for money due under the mortgage (e. g. accumulated interest) it is not void but voidable at the instance of the mortgagor or any other person interested in the equity of redemption: 32 *Cal.* 296 (*P. C.*); 35 *Cal.* 61 (*F. B.*); 47 *Cal.* 377 (*F. B.*); 45 *Bom.* 174; 30 *Mad.* 362; 37 *All.* 165; and 2 *Pat. L. J.* 587, *Rel. on.* 2 *P. R.* 1907 *Dist. as obiter.* The principle does not exclude a mortgage by conditional sale. Not only is the sale of the equity of redemption binding on the parties until it is set aside, but the principle is firmly established that the procedure to set aside the sale is by way of an application under S. 47, of the Civil P. C., and that the application must be made before the sale is confirmed by the Court. A suit to set aside the sale cannot be maintained. After the confirmation of the sale the mortgagor is not entitled to redeem the mortgage, and it is immaterial whether the equity of redemption has been purchased by the mortgagee himself or by a third person.

[P. 491, C. 2, P. 492, C. 2]

* (*b*) *Civil P. C., O.* 32, *R.* 4—*O.* 32 *does not directly apply to execution—Omission to appoint guardian does not vitiate execution sale.*

The provisions of O. 32 of the Civil P. C. relating to suits by or against minors have no direct application to proceedings in execution after the rights of the parties have merged in a valid decree, and the omission to appoint a guardian ad litem of minor does not vitiate a sale in execution. 35 *C. L. J.* 9, *Ref.*

Where the estate was fully represented in the suit, and all the persons interested in the estate were parties also to the execution proceedings and the minors were represented by their mother who was recognised by all concerned including their uncles to be their guardian, and during the protracted proceedings lasting for two years it was never suggested that a formal order appointing her to be the guardian had not been made.

Held: the mere absence of a formal order does not render the sale invalid; 30 *Cal.* 1021 (*P. C.*) *Ref.* [P 493, C 1, 2]

Sheo Narain, Tek Chand and *Piyare Lal*—for Appellants.

Kishen Dayal, Sardha Ram, Shamair Chand and *Des Raj* for *G. C. Narang*—for Respondents.

Shadi Lal, C. J.—This appeal arises out of a suit for the redemption of certain landed property situate in the Delhi Province. On the 14th January 1888, Karim Bakhsh, the grand father of Plaintiff No. 1 and Defendants Nos. 7 and 8 mortgaged with possession the land in dispute to the ancestor of the Defendants Nos. 1 to 6 for Rs. 20,000. The mortgage was one by way of conditional sale, and the deed contained a covenant to the effect that the mortgagee should receive the rents and profits of the mortgaged property in lieu of interest on Rs. 10,000. On the balance of the loan the mortgagor promised to pay every year to the mortgagee interest at the rate of 7-1/2 per cent per annum. It appears that on the 4th October 1888, the mortgagor took another loan of Rs. 1,500 and created on the estate a further charge on terms similar to those contained in the previous deed.

The debtor did not, however, pay the interest due from him in accordance with the stipulation, with the result that the creditor brought an action for the sum due to him on account of interest and obtained a decree in February 1892. In execution of this decree he brought the equity of redemption to sale, and, after obtaining the permission of the Court, he purchased it himself. The proceedings in connexion with the sale lasted for nearly two years, and it was

not until July 1894, that the Court made an order confirming the sale in favour of the decree-holders.

The mortgagee, who was already in possession of the property, became after the confirmation of sale, full proprietor thereof; and his title was not challenged for 25 years. In June 1919, Rai Bahadur Buta Singh secured a sale deed of a portion of the estate from one of the grandsons of the original mortgagor, and in August he along with that grandson commenced the present action for the redemption of the property. The claim has been decreed by the trial Judge who holds that the sale of the equity of redemption in favour of the mortgagee being in violation of S. 99 of the Transfer of Property Act was a nullity and could not extinguish the right of redemption.

The quondam mortgagees have preferred the present appeal in which they impeach the correctness of the decision of the Subordinate Judge. The main question debated before us is whether the sale of the equity of redemption was a void transaction and could consequently be ignored by the mortgagor. Now, S. 99 of the Transfer of Property Act enacts that where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67. This section has been repealed by the Code of the Civil Procedure 1908, which embodies in O. 34, R. 14, a similar provision with the modification that a mortgagee is not precluded from selling the mortgaged property under a judgment unconnected with the mortgage debt.

In the present case the equity of redemption was sold in satisfaction of a claim arising under the mortgage, and the question for consideration is whether such a sale made in contravention of the rule is void or merely voidable. It was thought at one time that a sale of this character is a void transaction, and that the purchaser does not thereby acquire the right to recover possession of the mortgaged property from the mortgagor, vide *Martand* v. *Dhondoo* (1), and *Muthuraman Chetti* v. *Ettappasami* (2). But this view had now been wholly discarded and there is a consensus of judicial opinion to the effect that a sale of the equity of redemption in execution of a decree for money due under the mortgage is not void but voidable at the instance of the mortgagor or any other person interested in the equity of redemption.

The locus classicus on the subject is the judgment of the Privy Council in *Khiarajmal* v. *Daim* (3), which dealt with a sale of the equity of redemption made in favour of the mortgagees in execution of a decree obtained by them for the debt due on the mortgage. Their Lordships held that the sale did not affect the interests of those mortgagors who were not parties to the decree and to the proceedings taken in execution of the decree, and that such mortgagors could disregard the sale without taking any proceeding to set it aside. But in respect of the share of the mortgagors, who were represented in the suit, the Privy Council made the following pertinent observations:

> The question, therefore, is whether the equity of redemption not only purported to be, but was in fact, sold under the decrees. Their Lordships agree that the sale cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them.

The judgment in *Khiarajmal's* case settles the law on the subject, and the High Courts have now adopted the view that the sale in contravention of the rule contained in O. 34, R. 14, is only voidable and not void, vide, inter alia *Ashutosh Sikdar* v. *Behari Lal Kirtania* (4), *Uttam Chandra Daw* v. *Raj Krishna Dalal* (5), *Bhaichand Kirna Ram* v. *Ranchhoddas Manchharam* (6), *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (7), *Lal Bahadur Singh* v. *Abharam Singh* (8); and *Sheo Narain Ojha* v. *Ram Jatan Ojha* (9).

The Subordinate Judge has, however, relied on the judgment of a Single Judge of the Punjab Chief Court in *Jaggan*

(1) [1898] 22 Bom. 624.
(2) [1899] 22 Mad. 372=9 M. L. J. 113.
(3) [1905] 32 Cal. 296=32 I. A. 23=9 C. W. N. 201=1 C. L. J. 584=8 Sar. 734 (P. C.)
(4) [1908] 35 Cal. 61=11 C. W. N. 1011=6 C. L. J. 320 (F. B.)
(5) [1920] 47 Cal. 377=24 C. W. N. 229=55 I. C. 157=31 C. L. J. 98 (F. B.)
(6) [1921] 45 Bom. 174=58 I. C. 231=22 Bom. L. R. 670.
(7) [1907] 30 Mad. 362=17 M. L. J. 325.
(8) [1915] 37 All. 165=27 I. C. 795=13 A. L. J. 138 (F. B.)
(9) [1917] 2 Pat. L. J. 587=41 I. C. 533=1 Pat. L. W. 729=(1917) P. H. C. C. 373.

Nath v. *Budhwa* (10), in support of the proposition that the sale was a void transaction and could not destroy the equity of redemption of the mortgagor. Now, the learned Judge, who delivered that judgment, was dealing with an application for revision and could not, therefore, interfere with the decision of the Subordinate Court even if it was erroneous in law. Indeed, he himself points out that

> even, however, if the law on the subject had been misapprehended by the lower appellate Court as alleged it could not form a valid ground for revision, the matter having been decided by the lower appellate Court after due consideration.

The observations as to the nature and the effect of the sale were, therefore, mere obiter dicta. The learned Judge followed the view expressed by the Bombay and Madras High Courts in *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (1), and *Muthuraman Chetti* v. *Ettappasami* (2), but that view is no longer accepted even by those Courts who, as pointed out above, have laid down the contrary rule.

There is now complete unanimity of judicial opinion in favour of the proposition that a sale of the mortgaged property in contravention of the rule referred to above is only voidable, and that it is binding upon the parties until it is set aside. Indeed, the learned counsel for the plaintiffs does not dispute the correctness of this proposition, but he argues that a mortgage by way of conditional sale is an exception to this rule and that the equity of redemption in respect of such mortgage can be extinguished only in the manner prescribed for the foreclosure thereof. A sale of the equity of redemption, whether by private treaty or in execution of a decree, is, however, essentially different from its automatic extinction by foreclosure. There is no warrant in principle to justify the distinction which the learned counsel seeks to draw, nor is there any authority in support of his contention except the Single Bench judgment in *Jaggan Nath* v. *Budhwa* (10). Indeed, there are several judicial instances in which the equity of redemption in the case of a mortgage by way of conditional sale has been brought to sale in execution and the sale has been upheld, vide inter alia *Dharanikot Venkayya* v. *Budharazu Surayya Garu* (7), and *Uttam Chandra Daw* v. *Rajkrishna Dalal* (5). Not only is the sale of the equity of redemption binding on the parties until it is set aside, but the principle is firmly established that the procedure to set aside the sale is by way of an application under S. 47 of the Civil P. C. and that the application must be made before the sale is confirmed by the Court. It is further clear that a suit to set aside the sale cannot be maintained. *Khairaj mal* v. *Daim* (3) and *Muhammad Abdul Rashid Khan* v. *Dilsukk Rai* (11). After the confirmation of the sale the mortgagor is not entitled to redeem the mortgage, and it is immaterial whether the equity of redemption has been purchased by the mortgagee himself or by a third person, *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (7) *Lal Bahadur Singh* v. *Abharan Singh* (8) and *Pandit Sheo Narain Ojah* v *Ram Jatan Ojha* (9).

In view of the above exposition of the law, which has received the imprimatur of not only the High Courts in India but also of the Privy Council, it is unnecessary to examine the contention raised on behalf of the appellants that the rule forbidding the sale of the equity of redemption, as enacted by S. 99 of the Transfer of Property Act, could not apply to the Delhi Province, which wes not governed by the provisions of the aforesaid Act, and that O. 34, R. 14 which replaces that section, expressly exempts the territories, to which the statute has not been extended, from the operation of the rule. The sale, with which we are concerned, was duly confirmed by the Court and, as no application under S. 244 of the Civil P. C. of 1882, corresponding to S. 47 of the present Code, was made to set it aside, it is now immune from attack. It is obvious that unless the plaintiffs succeed in getting rid of the sale, which operates as an obstacle to their suit for redemption, they are not entitled to recover the property. In order to get over the obstacle, the learned counsel for the plaintiffs contends that one of the plaintiffs, namely, Muhammad Suleman, who was a minor at the time of the sale, was not properly represented in the execution proceedings which resulted in the sale; and that consequently he is not bound by what took place behind his back.

(10) [1907] 2 P. R. 1907.

(11) [1905] 27 All. 517=2 A. L. J. 210=(1905) A. W. N. 80.

Now, it is patent upon the record that the decree, in execution of which the sale in question was effected, was properly obtained against the estate of the mortgagor Karim Baksh which estate was represented by his four sons who were sui juris. It appears that subsequently one of the sons died, and his minor sons, including the plaintiff Muhammad Suleman, were impleaded as his legal representatives, and their mother Mt. Allah Julai was described as their guardian ad litem. The facts so far do not admit of any dispute, but it is urged that the Court did not pass an order appointing the mother to act as the guardian of her minor sons. Now, it is true that no such order can be traced, but, considering that more than 25 years have expired since the date of the sale it was hardly to be expected that all the papers relating to the execution would be preserved for such a long time. It must be remembered that the proceedings in execution took nearly two years, and that the uncles of the minor who were themselves adversely affected by the sale, did not take any objection to the validity of the execution proceedings on the ground of the alleged defect in the appointment of the guardian ad litem. Indeed, the law authorises the Court to presume that the judicial and official acts have been regularly performed, vide illustration (e) to S. 114 of the Indian Evidence Act.

It will be observed that the provisions of O. 32 of the Civil P. C. relating to suits by or against minors have no direct application to proceedings in execution after the rights of the parties have merged in a valid decree, and it has been held by a Division Bench of the Calcutta High Court in *Fani Bhusan Bhuian* v. *Surendra Nath Das* (12) that even the omission to appoint a guardian ad litem of a minor does not vitiate a sale in execution. Indeed, the judgment of the Privy Council in *Khiarajmal's* case, on which Mr ;. Krishan Dayal places his reliance, contains the following observations :

> The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors."

(12) [1921] 35 C. L. J. 9=34 I. C. 25.

The present case is much stronger than that dealt with by the Privy Council. It is beyond question that in this case, the estate was fully represented in the suit, and that all the persons interested in the estate were parties also to the execution proceedings. Moreover, the minors were represented by their mother who was recognised by all concerned including their uncles to be their guardian, and during the protracted proceedings it was never suggested that a formal order appointing her to be the guardian had not been made,. In these circumstances, the mere absence of a formal order does not render the sale invalid ; *Walian* v. *Banke Behari* (13).

The result is that the plaintiffs have no right to redeem the land which became the property of the contesting defendants as long ago as 1894. The appeal is accordingly accepted and the suit brought by the plaintiffs is dismissed with costs.

Appeal accepted.

(13) [1903] 30 Cal. 1021=30 I. A. 182=7 C. W. N. 774=8 Sar. 512 (P. C.)

A. I. R. 1926 Lahore 493

LE ROSSIGNOL, J.

Sohan Lal—Accused—Petitioner.

v.

Gopal Singh— Complainant— Respondent.

Criminal Miscellaneous Petition No.237 of 1925, Decided on 29th January 1926, for transfer of the case.

Criminal P. C., S. 526—Convenience of accused rather than of complainant is to be seen.

The convenience of the accused has to be considered rather than that of the complainant for transferring a case. [P. 493, C. 2]

Ishar Das—for Petitioner.

Jagan Nath Bhandari— for Respondent.

Order.—The petitioner is the accused in the case and his convenience has to be considered rather than that of the complainant who, however, belongs to petitioner's village.

Montgomery is far away from the petitioner's abode, whilst Pakpattan is near. I transfer the case to the Court of Sub-Divisional Officer, Pakpattan.

Transfer ordered.

✻ A. I. R. 1926 Lahore 494

BROADWAY AND FFORDE, JJ.

Punnu Ram and *another* — Defendants—Appellants.

v.

Ghulam Hussain — Plaintiff — Respondent.

Second Appeal No. 34 of 1922, Decided on 3rd February 1926, from the decree of the Dist. J., Mianwali, D/-28th August 1921.

(a) *Civil P. C., O. 2, R. 2—Defences.*

Rule 2 does not bar pleas in defence. *A. I. R.* 1924 *Lah.* 21=4 *Lah.* 76, *Ref.* [P. 494, C. 2]

(b) *Evidence Act, S. 101—Execution admitted or proved—Deed containing recital as to receipt of consideration — Executant must prove that recital to be false.*

The onus of proving consideration in the first instance lies on the mortgagee, but when execution of the document sued upon has been proved or admitted, if the document contains a recital admitting receipt of the consideration, the onus would then lie on the opposite party to show that that admission was false. 6 *Lah.* 470= *A.I.R.* 1925 *Lah.* 471 (*F. B.*) *Rel. on.* [P. 495, C. 1]

✻ (c) *Civil P. C., O. 41, R. 27—Ruling interpreting question as to onus pronounced after trial of suit — Case cannot be remanded for further evidence.*

Where a ruling interpreting a question as to onus of proof was pronounced after a case was tried in trial Court.

Held: that the pronouncement did not create law but merely stated what the law was and is, and therefore there was no ground made out for a remand to take further evidence. [P. 495, C. 1]

(d) *Transfer of Property Act, S. 60 — Three mortgages — Mortgagee same — Parties agreeing that all will be redeemed together—Mortgagee can refuse redemption piecemeal.*

Where three successive mortgages were specifically charged on the same land and there was an express stipulation between the parties that these mortgages should be redeemed at one and the same time.

Held: that the mortgagee could insist that the mortgagor must redeem all the mortgages together. 3 *L. L. J.* 432 and 31 *All.* 482 *Rel. on.* [P. 495 C 2]

Hargopal—for Appellants.

N. C. Mehra—for Respondent.

Broadway, J.—On the 28th June 1899 one Sardara executed a usufructuary mortgage in favour of Sewa Ram under which Sewa Ram was to get possession of the land mortgaged and hold the same until the mortgagor redeemed the mortgage by payment of a sum of Rs. 300. On the 18th October 1899, Sardara executed a further simple mortgage in favour of Sewa Ram under which the money and grain advanced was secured by a charge on the property which was the subject-matter of the first mortgage. It was specifically agreed that the repayment under this second mortgage was to be made at the same time as the repayment of the sum secured by the first mortgage. Later on, on the 20th February 1901 a further charge was created by Sardara on the same land by the execution of another mortgage in Sewa Ram's favour. In this document there was a similar stipulation as to repayment. Further, in this mortgage it was specifically stated that possession was to be with the mortgagee.

In 1920 Sardara having died, his son Ghulam Hussain sought to redeem the first mortgage, namely, the one dated the 28th June 1899, and to obtain possession of the property mortgaged. The sons of Sewa Ram (who is also dead) objected to the redemption of the first mortgage unless and until the subsequent mortgages were also redeemed. The revenue authorities thereupon refused to allow redemption and referred the son of Sardara to the civil Courts. He then proceeded to bring a suit for a declaration to the effect that he was entitled to redeem the first mortgage without taking any account of the subsequent mortgages. The result of the suit was that the District Judge finally held that redemption of the second mortgage was barred under the provisions of O. 2, R. 2 of the Civil Procedure Code and that the third mortgage could not be set up inasmuch as consideration had not been proved. It was also held that the claim advanced under the third mortgage was barred by limitation. Accordingly the plaintiff was granted a declaration to the effect that he could redeem the land on payment of Rs. 300 only, that is, the amount secured by the first mortgage. Against this decree the mortgagees-defendants have come up to this Court in second appeal through Mr. Hargopal, while Mr. Nihal Chand Mehra has addressed us on behalf of the plaintiff-respondent.

It has been urged that the claim qua the second mortgage was not barred by the provisions of O. 2, R. 2. Having regard to the most recent decision of this Court, viz., *Khota Ram* v. *Nawaz* (1) there can be no doubt that O. 2, R. 2

(1) A. I. R. 1924 Lah. 21=4 Lah. 76.

of the Civil Procedure Code has been wrongly applied by the Court below and this has been admitted by Mr. Mehra.

With regard to the third mortgage our attention has been drawn to *Ram Chand* v. *Chhunnu Mal* (2) in which it was held that the onus of proving consideration in the first instance lies on the plaintiff but that when execution of the document sued upon has been proved or admitted, if the document contains a recital admitting receipt of the consideration, the onus would then lie on the opposite party to show that that admission was false. In the present case therefore all that was necessary for the appellants to do was to prove the execution of the document, for there is a clear admission of the receipt of consideration in the same. The execution of the document has been found established and therefore the onus was transferred to the other side to prove that the admission was incorrect. This onus they have failed to discharge. Mr. Nihal Chand Mehra urged that the pronouncement of this Court reported in *Ram Chand* v. *Chhunnu Mal* (2) had not been made when this suit was being tried and that therefore his client should be given a further opportunity of proving that the consideration under this document had not passed. The pronouncement referred to, however, did not create law but merely stated what the law was and is, and there is thus no ground made out for a remand to take further evidence on this point. It must therefore be held that there was consideration for this third mortgage.

The next point raised was that inasmuch as the subsequent puisne mortgages did not give a right to enter into possession of the property mortgaged, the mortgagor was entitled to obtain possession on redemption of the first mortgage alone. In this connexion our attention was drawn to *Kesar Kanwar* v. *Kashi Ram* (3) and *Phula Singh* v. *Bur Chand* (4), a case not to be found in the authorized reports. The correctness of the view enunciated in the Allahabad authority was doubted by a Division Bench of this Court in *Nathwa* v. *Kanhiya* (5). The Punjab Weekly Reporter case does not afford the respondent any assistance, inasmuch as it very specifically deals with, and proceeded on, the special facts of that case.

A reference to the two subsequent mortgage deeds shows that while in the first one the mortgage is a simple one without possession, the second or the latest mortgage is a mortgage with possession. So far as this latest mortgage is concerned, therefore, it is perfectly clear that the mortgagees can insist on retaining possession unless and until that mortgage is also redeemed. So far as the second mortgage is concerned, it will be found that the monies due thereunder were to be repaid at the same time as the monies due under the first mortgage. That fact distinguishes the present case from *Kesar Kanwar* v. *Kashi Ram* (3). I therefore consider that the case of *Nathwa* v. *Kanhiya* (5) states the correct view of the law and that in the present case the mortgagor is not entitled to get possession of the land without redeeming all the three mortgages. When a suit is brought for redemption the amounts due under all the mortgages will have to be decided. I would therefore accept this appeal with costs and dismiss the plaintiff's suit.

Fforde, J.—I agree. In the present case the three mortgages in question have been specifically charged on the same land. There has been an express stipulation between the parties that these mortgages should be redeemed at one and the same time. Accordingly this case comes within the well established principle of law followed in this country, expressed in a Division Bench decision of this Court in the case of *Nathwa* v. *Kanhiya* (5), referred to by my learned brother.

I may add that the law in this country, and the law in England, in this regard has been very fully discussed in *Ranjit Khan* v. *Ramdhan Singh* (6). The conclusion arrived at in that case is the same as has been expressed by my learned brother in the judgment just delivered.

Appeal accepted.

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(2) A. I. R. 1925 Lah. 471=6 Lah. 470 (F. B.).
(3) [1915] 37 All. 634 = 30 I. C. 177 = 13 A. L. J. 889.
(4) [1917] 60 P. R. 1917=39 I. C. 250.
(5) [1921] 3 L. L. J. 432=65 I. C. 642.
(6) [1909] 31 All. 482=2 I. C. 859=6 A. L. J. 654.

A. I. R. 1926 Lahore 496

BROADWAY AND ZAFAR ALI, JJ.

Bishen Singh and *another*—Convicts—Appellants.

v.

The Crown—Respondent.

Criminal Appeal No. 221 of 1926, Decided on 27th May 1926, from the order of the S. J., Ferozepore, D/- 9th February 1926.

Evidence Act, S. 32—Dying declaration—Third person present and prompting deceased to give out names of certain accused—Statement cannot be relied on.

Although a dying declaration, if properly recorded is a valuable piece of evidence, but if while the statement is being recorded a third person is present and prompts the deceased to give out names of certain accused, it would be exceedingly unsafe to attach any weight to such a dying statement. [P 496 C 1]

Nand Lal—for Appellants.

Des Raj Sawhney—for Respondent.

Broadway, J.—Bishna and Ishar, sons of Dulla, Bhag Singh son of Gajjan Singh and Punjab Singh son of Nanu Singh were committed for trial to the Sessions Court, Ferozepore, charged with having caused the death of one Bhag of mauza Man with the assistance of Pakhar Singh who was absconding. The trial resulted in the acquittal of Ishar and Punjab Singh, while Bishna and Bhag Singh were found guilty, and under S. 302-34, Indian Penal Code, sentenced to death. They have appealed and the case is also before the Court under S.374, Criminal Procedure Code.

According to the prosecution the occurrence took place just before sunset on the 6th September 1925, at a spot a short distance outside the village of Man. The report was made at 10-15 A. M., the following morning although the distance to be traversed was only five miles. Allowing for the fact that Talok Singh who made the report had received injuries himself there can be no doubt that there was delay in giving information to the police and the evidence for the prosecution has, therefore, to be carefully scrutinised.

The story for the prosecution is given in great detail in the judgment of the learned Sessions Judge and need not be here set out at length. Briefly it is as follows: Mt. Kishno had been married to Mahtab Singh and on his death several years ago she went through a karewa marriage with Punjab Singh, Mehtab Singh's brother, with whom she lived for a couple of years and is said to have given birth to a son Bhag Singh, the victim in this case. After living with Punjab Singh for two or three years she is said to have either left, or been turned out by him and to have taken up her abode with Talok Siugh taking her small child with her. With Talok Singh she had been living for a matter of fourteen years or more and has had several children by him. The deceased Bhag Singh had instituted a suit against Punjab Singh for a share in the ancestral property. This suit was pending.

On the 6th September 1925, according to Talok Singh, he and Bhag Singh deceased were fencing a field of theirs outside the village. Bhag Singh went to one side to ease himself and had gone a distance of 80 karams or so when the two appellants with their three companions as named already, suddenly appeared on the scene, Pakhar Singh and Punjab Singh being armed with takwas, Bhag Singh and Bishna with dangs and Ishar with a sharp pointed stick, and set on to the deceased. Talok Singh ran to his assistance taking with him a salang, or hay fork. Bachna also ran to the deceased's assistance but he was unarmed. The deceased, Talok Singh and Bachna were all beaten and received injuries after which their assailants made off. According to the initial report the incident was witnessed by one Gujar Singh who, however, through fear made no attempt to render assistance. When their assailants had gone Bhag Singh was taken home by Gujar Singh and Talok Singh. The story is borne out by the testimony given by Tolak Singh, Bachna and Gujar Singh. The first two of these were undoubtedly present as they both received injuries. It is also clear that their assailants used sharp edged weapons as well as dangs as the deceased and both the witnesses received incised wounds. Gujar Singh and Talok Singh are first cousins. Bachna is not related to them but has admitted that he had brought a case against Bishna and Ishar charging them with having fired a gun at him although the case was not chalaned. In addition to the above evidence there is the testimony of Mt. Kishno (P. W. 6) who stated that on hearing the cries she had gone out and

had met the two appellants and their three companions returning at a run from the direction of the pond, that she then went on and found her son Bhag Singh lying injured and unable to speak. Finally there is the dying statement of the deceased himself which was recorded by P. W. 10 Abdul Majid, Naib Tahsildar, at the Rest House at Giddarbaha on the 8th September 1925. The statement is a brief one and mentions the two appellants and their three companions already named as having been the assailants. The two appellants are said to have beaten the deceased with dangs.

Now, although a dying declaration, if properly recorded is a valuable piece of evidence, in the present case the deceased's statement is considerably discounted by the fact that admittedly one Jai Singh zaildar is said to have been present when it was recorded and to have prompted the deceased while it was being recorded, telling him to name Punjab Singh and Ishar Singh. This circumstance was not noted on the dying statement by the Naib Tahsildar at the time although he has admitted in his evidence at the trial that the incident occurred. It is somewhat surprising to learn that a Magistrate should have regarded an incident of this nature as of such little importance as to have failed to make a note of it. This incident was further proved by D. W. 12 Hardit Singh who in answer to the Court has clearly stated that the deceased named Bishna and Bhag Singh, appellants, of his own accord without any prompting from anyone. In the circumstances we think it would be exceedingly unsafe to attach any weight to this dying statement. Nor is the testimony of Mt. Kishno of any real importance. It is not unnatural, that she should have stated that she met the appellants and their three companions. The case therefore rests on the evidence of the three eyewitnesses and notwithstanding the delay in making a report and the relationship between the witnesses, we think that their evidence should be accepted so far as the appellants are concerned.

An attempt has been made by the defence to prove that it was the prosecution party who suddenly set on to Bishna appellant who was accompanied by Bhag Singh, appellant. Bishna was arrested on the 15th of September at the house of one Dr. Maluk Singh (D. W. 8). This witness is a private practitioner practising at Dabwali. He has stated that Bishna came to him on the 8th September 1925 and that he found a large number of the contusions and other injuries on his person, including a fracture of 7th rib. He prepared a certificate to that effect on the evening of the 8th September 1925, which he gave to Sohna on the following day as Sohna said that the Police required it. Now, Dr. Maluk Singh passed his M. B., B. S. at the Medical College, Lahore, in November 1924. As the certificate shows he has printed on his letter paper an advertisement to the effect that he was prepared to give "medical certificate" relating to injuries and for leave purposes. He has also had the audacity to sign the certificate as "Assistant Surgeon, Mandi Dabwali," knowing full well that he was not an Assistant Surgeon and the certificate therefore, on the face of it, was misleading. There is a dispensary at Dabwali and no real explanation has been given by the defence as to why Bishna proceeded to Dr. Maluk Singh instead of going to the Dabwali dispensary or to Giddarbaha which was the proper place for the residents of his village to go to.

It is probable that Bishna received a few injuries. Talok Singh has stated that when he went to the deceased's assistance he took with him a slang or hay-fork which he wielded and which broke in the course of the fight. That Bishna had his seventh rib broken appears to be wholly untrue and we must regard the testimony of Dr. Maluk Singh as entirely false. The learned Sessions Judge has criticised the evidence for the defence very minutely and has pointed out how discrepant it is and how utterly unreliable. We agree with the learned Sessions Judge's criticism and do not think it necessary to discuss the defence evidence any further. That the two appellants took part in this incident is perfectly clear and, in our opinion, the evidence of Talok Singh, Bachna and Gurdit Singh should be believed. The conviction of the appellants is, therefore, upheld.

There remains the question of sentence. The whole of the evidence shows that the two appellants were armed only with lathis and that two of their three companions had chavis. The death of Bhag Singh was due to an injury on the head

inflicted by a sharp edged weapon such as a chavi. The learned Sessions Judge has found it necessary to give Punjab Singh and Ishar Singh the benefit of the doubt created in his mind by the delay in the report and the manner in which Jai Singh zaildar prompted the deceased when he was making his dying statement. In these circumstances we consider that the appellants should not be awarded the death penalty. We, therefore, alter the sentence in the case of each to transportation for life.

Sentence reduced.

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CAMPBELL AND ADDISON, JJ.

Santokh Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 64 of 1926, Decided on 12th March 1926, from an order of the S. J,, Jullundur, D/- 14th December 1925.

Criminal P. C., S. 465—Non-compliance with S. 465 vitates trial—Question of unsoundness at the time of alleged offence is a separate one.

It is incumbent on the Sessions Judge himself to hold an enquiry on the question whether the accused was capable of making his defence when ths latter came before hlm on commitment, to take the opinion of the assessors on that question, and to come to a decision before proceeding further with the trial.

If he has any reason for supposing that the accused when brought up for trial was of unsound mind, the question whether he was of unsound mind at the time of the alleged offenoe is an entirely separate one to be enquired into in entirely separate manner.

Neglect to follow the mandatory provisions of S. 465 must vitiate the trial : 54 *P. R.* 1905, *Cr., Fol'.* [P. 498, C. 2. P. 499, C. 1.

Raghunath Sahai—for Appellant.

Judgment. — This is an appeal by Santokh Singh against his conviction for an offence under S. 302, Indian Penal Code, and the sentence of death passed by the learned Sessions Judge is also before us for confirmation.

We regret to find that the trial will have to be set aside because the learned Sessions Judge has overlooked the provisions of S. 465 of the Criminal P. C. The Committing Magistrate acted correctly under S. 464. He had reason to think that the appellant might have been incapable of making his defence by reason of unsoundness of mind so he summoned and examined the Civil Surgeon, Major Shamsher Singh and after doing so recorded an order that the medical evidence showed the accused (as he was then) to be sane. It was nevertheless incumbent on the learned Sessions Judge himself to hold another enquiry on the question whether the accused was capable of making his defence when the latter came before him on commitment, to take the opinion of the assessors on that question and to come to a decision before proceeding further with the trial. It was necessary for the learned Sessions Judge to take these proceedings if he had any reason for supposing that the accused when brought up for trial was of unsound mind. The question whether he was of unsound mind at the time of the alleged offence was an entirely separate one to be enquired into in an entirely separate manner.

What the learned Sessions Judge actually did is described by him in his judgment as follows :

In this Court the accused has refused tc plead at all assuming an appearance of imbecility. He would only roll his eyes about and gaze at the ceiling and refuse to answer any question that was put to him. I, therefore, recorded a plea of not guilty and also recorded all the evidence in the case.

After this passage comes the discussion of the evidence. Then the learned Sessions Judge records the following :

The only point for decision in the case is as to whether the provisions of S. 84, Indian Penal Code, apply to the case. This section says that nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act. The Civil Surgeon who had the accused under observation for some time has found that though of peculiar temperament he knew the nature of the deed he was committing. Before the Committing Magistrate the accused made a perfectly intelligent statement and I am of opinion that his imbecility in this Court was largely assumed.

We point out incidentally that the evidence of the Civil Surgeon, on which the learned Sessions Judge appears to have relied in coming tc his conclusion on the question whether S. 84 of the Indian Penal Code applied, was not on the Sessions Judge's record. The reference is to the deposition of the Civil Surgeon in the Committing Court to which we have alluded above. This deposition was not evidence against the appellant at the trial.

The observations of the learned Sessions Judge quoted particularly the words "largely assumed" indicate that the learned Sessions Judge's mind was not free from all doubt as to the appellant's mental state at the time of the trial and in these circumstances his neglect to follow the mandatory provisions of S. 465 must vitiate that trial.

We follow the course taken by the learned Judges of the Punjab Chief Court in returning to the same learned Sessions Judge a case for re-trial on similar grounds [*Pala Singh* v. *King-Emperor* (1).] The convictions and sentence are set aside and the learned Sessions Judges is directed to hold a fresh trial which should commence with the proceedings required by S. 465, Criminal P. C., to be followed by a formal finding as to the capacity of the accused for making his defence. The accused should remain in detention and under medical observation until the fresh trial is held and the result shown by evidence in the enquiry under S. 465, Criminal P. C.

Order accordingly.

(1) [1905] 54 P. R. 1905 Cr.=169 P. L. R. 1905.

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* A. I. R. 1926 Lahore 499

HARRISON AND ADDISON, JJ.

H. H. Maharajah Sahib, Faridkote State—Plaintiff—Appellant.

v.

Kanshi Ram and *others*—Defendants—Respondents.

Civil Misc. No. 126 of 1925, Decided on 28th May 1926, in Civil Appeal No. 1919 of 1920 from the decree of the Senior Sub-J., Ferozepore, D/- 12th June 1920.

* (a) *Civil P. C., O. 41, R. 20—Person party to suit but not a party to decree is not "interested in result of appeal."*

It is not competent to an appellate Court to implead under O. 41, R. 20, a person who had not been made a party to the decree though he had been a party to the suit, as the person is not "interested in the result of the appeal." To hold that an appellate Court can implead a person who has acquired an absolute right by the lapse of time or by the omission of his name from the decree would amount to denying all finality to litigation. *A. I. R.* 1924 *Lah.* 629 and 3 *Pat. L. J.* 409, *Dissented from.*; 44 *I. C.* 480, *Foll.* [P. 500, C. 2]

* (b) *Civil P. C., O. 41, R. 33—Person party to suit but not a party to decree—R. 33 does not apply.*

O. 41, R. 33, does not apply to a case where a person was a party to the suit but was not made party to the decree. [P. 500, C. 2]

Mohammad Shafi, Rafi and *M. L. Puri*—for Appellant.

Tek Chand, M. S. Bhagat, J. N. Bhaudan and *Balwant Rai*—for Respondents.

Judgment.—On the date fixed for the hearing of this appeal counsel for the respondent raised a preliminary objection that one Amar Nath, son of Joti Mal, who had been impleaded in the trial Court was not shown as a respondent and that the appeal could not proceed without him, as the result could only be a dead letter. Council for the appellant applied for an adjournment to enable him to make an application to deal with the matter and presented a petition on 11th February 1925 praying that Amar Nath should be brought on the record under O. 41, Rule 20. This application was heard on the 17th May 1926 and at the very opening of his reply Mr. Tek Chand contended that the proper course would have been to apply for amendment of the decree as a necessary preliminary to any action of this Court under O. 41, Rule 20 and that that application for amendment should have been made to the trial Court.

The necessary facts are these: Two decrees were passed in favour of Kashi Ram and Joti Mal, the original defendants in this case, against a certain Mr. Coats of Ferozepore. In execution of these decrees the decree-holders attached a house. An objection was lodged by Raja Her Indar Singh, the Raja of Faridkote, that this house had been sold to him, that he was the owner of it and that the judgment-debtor had no right, title or interest therein. This objection was dismissed and the decree-holders therefore, as pointed out by Mr. Tek Chand, acquired a definite right defeasible only by a suit. A suit was instituted by the Raja and while it was proceeding Joti Mal died. An application was made to bring his five sons on the record and this was done. They included Lala Amar Nath, Pleader. The suit was dismissed in toto and the decree omitted all reference to this man Lala Amar Nath though the names of the few brothers were entered. The judgment curiously

enough does not contain any reference to this man Amar Nath by name and counsel for the appellant urges that it is through no neglect of his that the name was not entered in the appeal, more especially as the counsel who actually presented the appeal had only come into the case at the stage of arguments in the trial Court. It is contended, therefore, that this is a fit and proper case for the impleading of this man Amar Nath in virtue of O. 41, R. 20, and it is further contended that even if O. 41, R. 20 be not applicable a decree can be passed regarding his share or rights in the property or in the decree under O. 41, R. 33. A large number of rulings have been quoted most of which have no applicability to the peculiar facts of this case. Counsel for the appellant contended throughout that two courses and two courses only were open to him, one was to move the trial Court to amend the decree and the other to move this Court to implead Amar Nath under O. 41, R. 20. He did not see fit to take any action in the matter of amendment of the decree and he contended that, although he had taken no such action and there had been no amendment, it was still open to this Court to act under O. 41, R. 20 and this because Amar Nath was in the words of R. 20, "interested in" the result of the appeal. He could give us no authority in support of this contention but maintained that whether Amar Nath were impleaded or not the decision of the appeal if in favour of the appellant would affect him. We are not concerned at this stage with the possible result of not impleading Amar Nath and what we have to see is whether O. 41, R. 20, enables us to accede to the prayer of the appellant. We are further not concerned at this stage with the advisability or propriety of our taking action if that action be legal. We have to see whether it is within our powers to act or not before we consider any such further development.

Now, the important words are "interested in the result of the appeal" and Mr. Tek Chand has contended very logically and very clearly that under the peculiar facts of this case Amar Nath is not directly interested in the result inasmuch as, not being a party to the decree, it is immaterial to him whether that decree is varied or maintained. He has further explained that Amar Nath is in a peculiarly fortunate position in that by the omission of his name he is more favourably situated than had the suit been dismissed against him. It was dismissed against his brothers and they have acquired a right defeasible only by a successful appeal. He has acquired an undefeasible right by the omission of his name. But it is contended by the other side, his name should have been included. Quite so, but it was not and it was for the aggrieved party, the plaintiff who is now the appellant, to move the trial Court to put matters right and to add the necessary name. As this has not been done Mr. Tek Chand contends his client cannot be said to be interested in the result and therefore, O. 41, R. 20, does not apply and a fortori O. 41, R. 33, is also inapplicable. He relies on *Hari Dass Dey* v. *Kailash Chandra* (1). and *S. C. T. R. M. Chetty* v. *Pau* (2). As against these authorities we find that in *Amar Singh* v. *Kanshi* (3), a single Judge of this Court held that it was competent to implead under O. 41, R. 20, a man who had not been made a party to the decree, though he had been a party to the suit.

For the reasons given in *Hari Dass* v. *Kailash* (1), we find ourselves unable to agree with this view and we also find ourselves unable to agree with the views expressed in *Hemangini Devi* v. *Hardas Banerji* (4). In our opinion to hold that an appellate Court can implead a person who has acquired an absolute right as he has in this case by the lapse of time or by the omission of his name from the decree, would amount to denying all finality to litigation. It might have been urged that had the mistake not been discovered until after this Court had adjudicated upon this appeal that mistake could then have been put right according to the view taken by these High Courts. This may be so but this action would be under S. 152 and the reasoning apparently on which these decisions were based is that it is for the Court, which makes the mistake to put it right and inasmuch as had we adjudicated on the merits of the appeal before the mistake

(1) [1918] 44 I. C. 480.
(2) [1921] 13 Bur. L. T. 163=63 I. C. 973.
(3) A. I. R. 1924 Lah. 629.
(4) [1918] 3 Pat. L. J. 409=5 Pat. L. W. 216=46 I. C. 398=(1918) P. H. C. C. 276.

had been discovered we should have omitted the name of Amar Nath and it would have been for us to put the matter right.

We would have ourselves been prepared to take action under S. 152 or 151, read singly or together, had we had power to do so. We ourselves raised the point and put it to counsel for the respondents and he has satisfied us that we, as an appellate Court have no power under these sections to implead Amar Nath at this stage. He points out that S. 152 does not go so far as the old section and that it only deals with clerical or arithmetical mistakes or errors arising from any accidental slip or omission, the meaning of this word "omission" is explained in *Mangat Rai* v *Alia* (5), and and other rulings. These show that it does not cover and include the facts of this case. It is therefore S. 151, to which we must turn to discover the inherent powers of the Court to bring the decree into consonance with its judgment, and we have no manner of doubt that it is the Court in which the mistake has been made, and that Court alone which can put the matter right. We do not understand the reason why the appellant did not make the necessary application to the trial Court; but he has failed to take the necessary action and as we are unable to act on our own motion, we have no course open to us but to refuse to implead Lala Amar Nath and dismiss this application with costs. We do so.

Application dismissed.

(5) [1919] 92 P. R. 1919=52 I. C. 574.

A. I. R. 1926 Lahore 501

CAMPBELL, J.

Muhammad Ibrahim — Defendant—Appellant.

v.

Hari Chand and *others* — Plaintiffs and Defendants—Respondents.

Miscellaneous First Appeal No. 616 of 1925. Decided on 25th February 1926, from an order of the Senior Sub-J., Delhi, D/- 28th November 1924.

Civil P. C., O. 17, R. 3—Adjournment must be granted for attendance of witness who is ill even in spite of two previous adjournments.

Where two successive adjournments were given to produce evidence but the witnesses did not appear and the report as to one of them was that he was ill in hospital the Court is bound to grant another adjournment for the attendance of the witness who is ill and bound to permit production of other available witnesses on that day. [P. 501, C. 2]

Shamair Chand—for Appellant.

Sardha Ram—for Respondents.

Judgment.—An ex-parte decree was passed against the appellant. On the 9th June 1924 he applied for it to be set aside on the ground that he was ill and unable to attend Court. He was given a date to produce evidence to substantiate his assertion. On that date the witnesses summoned were not served and the Court allowed a second date, the 27th of November, for the appellant's evidence and issued summonses named by him. None of the witnesses appeared but in regard to one it was reported that he had undergone an operation and was lying in hospital. The Court dismissed the application observing that two or three opportunities had been given to the appellant to adduce proof in support of his allegation but he had failed to do so.

In the circumstances the Court should have granted another adjournment for the attendance of the witness who was ill and should have permitted the plaintiff to produce any other witnesses on that date that he was able to produce. There was no obligation to give another adjournment for witnesses whom the process-server had not been able to find unless the appellant had satisfied the Court that the witnesses actually existed and that he had used his best endeavours to assist in the service of process but when the 27th November had been given to the appellant for his witnesses and one to whom process had issued, was found to be temporarily incapacitated from attending Court, the Court had no option but to give another date for this man's attendance. Having given another date, the Court would have been bound to issue for it such other processes as might be applied for, although non-service of these processes would not necessarily mean that yet another date should be granted.

I accept the appeal and return the case with the direction that the Court shall proceed as I have indicated. Costs in this Court will follow the result.

Appeal accepted.

A. I. R. 1926 Lahore 502

HARRISON AND DALIP SINGH, JJ.

Maqtul Singh and *others*--Defendants—Appellants.

v.

Sadhu Ram and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 789 of 1922, Decided on 25th March 1926, from the decree of the Dist. J., Ambala, D/- 31st January 1922.

(a) *Civil P. C., O. 1, R. 8—Question as to custom.*

Where some only of the total proprietary body appealed from adverse decision of trial Court in respect of a custom in the village affecting the whole proprietary body :

Held ; that the appeal was not incompetent *A. I. R.* 1923 *All.* 211 and 53 *I. C.* 548, *Dist.*

(b) *Custom (Punjab)—Alienation.*

In Adhoya Hinduan, Dt. Ambala, the Bania non-proprietors have by custom a right to alienate the sites of their houses and shops.

[P. 503, C. 1]

Sheo Narain and *Gullu Ram*—for Appellants.

Tek Chand and *Anant Ram Khosla*—for Respondents.

Judgment.—The plaintiffs respondents in execution of a decree against one Tulsi, a Bania non-proprietor of Mauza Adhoya Hinduan, attached a house and shop belonging to the judgment-debtor situate in the abadi of that village. Two lambardars on behalf of the proprietors of the village objected to attachment and sale of the site of the house and shop. The objections were upheld by the executing Court and the house and shop were released. The plaintiffs thereupon brought a suit against Tulsi and the two lambardars praying for a declaration that the house and shop with their sites were liable to sale in execution. On the pleading of the defendants the rest of the proprietors were made parties. The trial Court decreed the plaintiffs' suit on the ground that a custom had been established in Adhoya Hinduan by which the Bania non-proprietors were full owners of the sites of their houses and shops and were entitled to alienate the same. The proprietors appealed to the District Judge and he upheld the decision of the trial Court on the same ground. A certificate for the purposes of second appeal was, however, granted by the District Judge and four of the proprietors have appealed. They have not impleaded the rest of the proprietors either as respondents or as appellants. Bakhshi Tek Chand for the respondents raises a preliminary objection that the other proprietors were necessary parties to the appeal and as they have not been impleaded the appeal has not been properly presented. He has cited *Ambika Prosad* v. *Jhinah Singh* (1) following a Calcutta decision reported in *Balaram* v. *Kanyshamajhi* (2). He has also cited *Wali Mahomed* v. *Barkhurdar* (3) in which ruling it was held that even where certain persons have been allowed under O. 1, R. 8, Civil P. C. to sue in a representative capacity the death of any plaintiff other than the persons appointed as representatives causes the suit to abate. On the other hand Mr. Sheo Narain had cited *Udmi* v. *Hira* (4) and contends that as no relief is sought against the proprietors it was unnecessary to implead them and as any one proprietor could maintain the suit on his own account the appeal is properly presented. In *Ambika Prasad* v. *Jhinah* (1) and *Balaram* v. *Kanysham* (2) it is no doubt laid down that a person who wishes to have the benefit of O. 41, R. 4 must implead all the parties to a suit. The facts of those cases were quite different from the present case and without deciding whether those rulings are or are not correct it is sufficient for the purposes of this case to hold that as any one proprietor could sue on his own behalf and maintain the present action the other proprietors were not necessary parties to this appeal though they may have been necessary parties to the suit in the trial Court. The preliminary objection has, therefore, no force and is overruled.

On the merits the sole question for decision is whether in the circumstances of the present case and on evidence led the custom claimed on behalf of the Bania non proprietors has been established. According to the judgment of the trial Court and the lower appellate Court there were some 80 alienations of houses and shops and sites by non-proprietors in this village and the adjoining village of Adhoya Mussalmanan. These two villages

(1) A. I. R. 1923 All. 211.
(2) [1919] 53 I. C, 548.
(3) A. I. R. 1925 Lah. 124.
(4) [1920] 1 Lah. 582=60 I. C. 111=2 L. L J. 762.

were originally one at any rate up to 1876 and it seems that they have been later on separated for the purposes of revenue assessment but we are of opinion that the lower appellate Court was correct in holding that for the purposes of deciding the question of the custom prevailing the instances in the one village were valuable as affording a guide to the custom in the other village. It appears that even in Mauza Adhoya Hinduan alone there were some 28 alienations 11 of which were made within 12 years of present suit and have not yet been challenged. Deducting these 11 there would be 17 unchallenged and unchallengable alienations by the non-proprietors. There are no judicial decision in the case of Mauza Adhoya Hinduan butthere seems to be a decision of the Commissioner that the non-proprietors of Mauza Adhoya Mussalmanan have a right to alienate the sites of the houses. An analysis of the alienations shows that at least four in Mauza Adhoya Hinduan and about 10 in the two villages combined were of sites. It is difficult to see why the proprietors allowed alienations of such sales to go unchallenged if as a matter of fact they had a right to contest these sales. The other alienations are mostly alienations of Banias to Banias and according to the finding of both the Courts the Bania non-proprietors of the village appear to have lodged in this village from time immemorial, have built pakka houses and shops and have transferred sites without objections by the proprietary body. Further it seems that they are not in the position of ordinary traders in a village who exist for the purpose of supplying the needs of the village. It seems that the Bania non-proprietors of Adhoya Hinduan have an independant existence in the sense that Adhoya is a trading centre for the whole ilaka. On the whole therefore, after considering all the evidence we are of opinion that the custom has been established that the Bania non-proprietors have a right to alienate the sites of their houses and shops and we accordingly dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 503

SHADI LAL, C. J., AND LE ROSSIGNOL, J.

Shiv Ram and *others*—Plaintiffs—Appellants.

v.

Prahlad Rai and *others*—Defendants—Respondents.

Letters Patent Appeal No. 49 of 1925, Decided on 7th April 1926, from the order of Martineau, J., in Civil Appeal No. 2175 of 1924, D/- 27th January 1925.

(a) *Civil P. C., S. 16—Property in two provinces—Probate proceedings pending in one—Administration suit in the other province is maintainable.*

Suit for the administration of the estate of the deceased is cognizable by the Court in the jurisdiction of which a portion of the immovable property is situate and where such a suit is directed mainly against the probate proceedings taken in another province, that fact does not oust the jurisdiction of the Court which is established by reason of the relief relating to the administration of the estate including immovable property being situate in the jurisdiction of that Court.

[P 504, C. 1]

(b) *Civil P. C., Ss. 16 and 17—Sections relate to moveable property also.*

Sections 16 and 17 are not confined to suits involving only immovable property but they apply equally to suits for immovable property as well as moveable property provided that the immevable property is situate wholly or in part within the local jurisdiction of the Court.

[P. 504, C. 1

4 *Bom.* 482, *Foll.*

Moti Sagar and *Fakir Chand*—for Appellants.

Badri Dass and *Chandar Gupta*—for Respondents.

Judgment.—In February 1920, one Indar Singh who owned property in the Ludhiana District as well as in Burma died leaving him surviving a brother Shiv Ram and widow Mt. Ishari. It appears that the deceased had made a will before his death disposing of his property, and that the defendant Prahlad Rai made an application in Burma for obtaining a probate of the will. During the pendency of the probate proceedings Shiv Ram and his descendants brought the present action in which they claimed various reliefs. They asked for the administration of the estate left by Indar Singh, for a declaration that the probate proceedings should not affect them and for an injunction restraining the defendant Prahad Rai from interfering with the property of the deceased.

Now, there can be no doubt that the estate of Indar Singh includes immovable as well as moveable property, and that part of the immovable property is situate within the local limits of the jurisdiction of the Ludhiana Court. We consider that the suit for the administration of the estate of the deceased is cognizable by the Ludhiana Court, as a portion of the immovable is situate within the jurisdiction of that Court. The suit involves the determination of a right to, or interest in, immovable property and comes within the purview of S. 16, clause (d) read with S. 17 of the Civil Procedure Code. These sections are not confined to suits involving only immovable property, but they apply equally to suits for immovable property as well as moveable property provided that the immoveable property is situate wholly or in part within the local jurisdiction of the Court : vide; *Jairam Narayan* v. *Atmaram Narayan* (1) which deals with Cl. 12 of the Letters Patent of the Bombay High Court the language of which is indistinguishable from that used in the Code. It is true that the suit is directed mainly against the probate proceedings taken in Burma but that fact does not oust the jurisdiction of the Ludhiana Court which, as stated above, is established by reason of the relief relating to the administration of the estate including immovable property situate in the Ludhiana District.

We accordingly hold that the Senior Subordinate Judge of Ludhiana had jurisdiction to entertain the suit, and accepting the appeal we remit the case to the trial court for determination in accordance with law. The parties are directed to bear their own costs.

Appeal accepted.

(1) [1880] 4 Bom. 482.

✻ A. I. R. 1926 Lahore 504

SHADI LAL, C. J., AND LE ROSSIGNOL, J.

Shiromani Gurdawara Parbandhak Committee, Nankana Sahib—Appellant.

v.

Banta and *others*—Respondents.

Letters Patent Appeal No. 103 of 1925, Decided on 18th March 1926, from the judgment of Harrison, J., D/- 23rd January 1925, in Civil Appeal No. 1316 of 1924.

✻ *Civil P. C., O. 39, R. 1—Suit for declaration only—Another suit necessary to seek relief, injury to which is sought to be prevented by injunction—Temporary injunction cannot be granted.*

Although a hard and fast rule cannot be laid down that ad interim injunction can never be granted in a suit for declaration, it should not be granted when in that suit there is no prayer for consequential relief or for a perpetual injunction, and where the plaintiff if successful in his suit for declaration must bring another action for enforcing the right which he seeks to keep undisturbed by such injunction. [P. 501, C, 2]

M. L. Puri—for Appellant.

Badri Das—for Respondents.

Shadi Lal, C. J.—The plaintiff brought a suit for a declaration that he was entitled to a one-fourth share in a joint holding, and during the pendency of the suit he made an application for a temporary injunction to restrain the defendant Shiromani Gurdawara Parbhandhak Committee from realising the rent of the land from the tenants. The trial judge declined to grant an ad interim injunction but directed the Committee to furnish security. Upon appeal, a single Bench of this Court has granted the injunction, and the question debated before us is whether it is competent to the plaintiff to ask for a temporary injunction in a a suit of this character.

Now, an examination of the plaint makes it absolutely clear that the suit is solely for a declaration ; there is no prayer for consequential relief or for a perpetual injunction. It is further clear, that the plaintiff, if successful in his suit for declaration cannot, in execution of that decree, recover rent from the defendants or the tenants and it will be necessary for him to bring another action for the recovery of the rent. There can be no doubt that in granting a temporary injunction the Court acts in aid of the legal right, and, as pointed above, in the event of the success of the suit for declaration, the temporary injunction would be discharged and would be of no use to the plaintiff. Indeed, the temporary injunction helps only the tenants, because neither the plaintiff nor the defendant Committee can realize rents from them.

While we are not prepared to lay down a hard and fast rule that ad interim injunction can never be granted in a suit for declaration, we are of opinion that in the circumstances of the present case it is not competent to the

plaintiff to ask for a temporary injunction pending the decision of the suit. We accordingly accept the appeal and discharge the order granting a temporary injunction. It appears that the defendant Committee did not prefer an appeal against the order of the trial Court directing it to furnish security, and that order is binding upon it. We leave parties to bear their own costs in the Hi h Court.

Appeal accepted.

A. I. R. 1926 Lahore 505

HARRISON, J.

Shib Dial—Defendant—Petitioner.

v.

Ali Bakhsh & Sons—Plaintiffs—Respondents.

Civil Revision No. 751 of 1925, Decided on 16th March 1926, from the order of the Dist. J., Lahore, D/- 20th July 1925.

Civil P. C., Sch., 2, Para 17 (4)—Order under last portion of Sub-R. (4) cannot be passed when an order under earlier portion is not in existence and if passed is liable to be revised—Civil P. C., S. 115.

An order under the last portion of R. 17 (4) directing a party to nominate an arbitrator or to appoint one itself, is one ancillary to an order under the earlier portion of the sub-rule ordering an agreement to be filed and can be passed only when an order under the earlier portion is in existence and where such an order is passed without an order under earlier portion, it is liable to be revised. [P. 505, C. 2]

Mehr Chand—for Petitioner.

Barkat Ali—for Respondents.

Judgment.—This is a revision from an order of the District Judge of Lahore in which he quashed an order passed by the trial Court. The order quashed ran as follows :

I order the defendant to nominate a substitute for Balkishan Dass within 7 days under paragraph 5 of Schedule II, otherwise I will proceed to appoint another arbitrator."

The District Judge refers to both portions of this order and goes on to say that he leaves the parties to bear their own costs. The defendant has presented this application for revision and a preliminary objection is taken that no revision lies from an order passed on appeal in virtue of S. 104 (1) of the Code of Civil Procedure. Counsel relies on S. 104 (2) read with the enabling S. 115 of the Code and on the authorities *Chandu Lal* v. *Kokumal* (1) *Gur Charan Singh* v. *Shibdev Singh* (2), *Balkrishna Udayar* v. *Vasudevaiyer* (3) and *Har Kaur* v. *Munni Lal* (4).

So far as it goes the objection is sound enough, but it ignores the fact which appears to me to be all important that such an order could only be passed as ancillary to an order directing the agreement to refer to be filed, and there is no such order. In ground No. 5 of the appeal to the District Judge it is clearly stated that no such order has been passed. Ground No. 6 is :

That inasmuch as the order of the lower Court under appeal may be construed as one under paragraph 17, clause 4, Schedule II, Civil Procedure Code, " inferentially directing the agreement to refer to arbitration to be filed" therefore, the present appeal is preferred under section 104 (1) (d), Civil Procedure Code, to avoid all further complication.

This, I understand, is in the alternative, if ground No. 5 does not prove acceptable. In his judgment the District Judge (the word plaintiff being read as defendant) has held that the defendant was estopped from raising this technical objection because he had taken part in the proceedings which followed the passing of the order by the Subordinate Judge. I do not think that this ommission can be cured in this way, nor that because an order under the second portion of 17 (4) follows upon an order under the earlier portion of the same sub-rule, the existence of the latter somehow creates the former. There has therefore been a failure to exercise jurisdiction vested in the Subordinate Judge by law and there has also been an exercise of jurisdiction not vested in him in the sense that he has passed an order which could only be passed under certain conditions which have not been fulfilled. I therefore set aside the whole order and in so far I agree with the District Judge though not with the reasoning adopted by him, I order the trial Court to supplement the defect and to pass such order either directing the filing of the agreement or declining to do so as he may think right after hearing counsel.

Case remanded.

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(1) [1921] 43 All. 334=61 I. C. 36=19 A. L. J. 110.
(2) A. I. R. 1922 Lah. 309.
(3) [1917] 40 Mad. 793=40 I. C. 650=44 I. A. 261 (P. C.).
(4) [1919] 134 P. R. 1919=53 I. C. 441.

A. I. R. 1923 Lahore 506

JAI LAL, J.

Amar Singh and *another*—Defendants—Appellants.

v.

Jat Mal and *others*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 1072 of 1925 Decided on 19th April 1926, from the Senior Sub-J., Hoshiarpur, D/- 14th January 1925.

Co-sharer—Non-proprietor appropriating small area with proprietors' consent cannot be ejected.

Where a non-proprietor occupies a small area in a village under one of the big proprietors in the village and with the permission of a majority of the proprietors ; he cannot be ejected at the instance of the non-consenting proprietors. [P 507 C 2, P 508 C 1]

Abdul Aziz—for Appellants.

Mehr Chand Mahajan—for Respondents.

Judgment.—The plaintiffs in this case were the proprietors of a 1/8th share in the village of Haji Pur. The suit was instituted against Defendant No. 1 Maula Bakhsh for possession of 17 marlas of shamilat land on the allegations that it belonged to the village proprietary body and that the defendant had taken illegal possession thereof without the consent of such body. The remaining proprietors in the village were impleaded as defendants on the allegation that owing to their various vocations they were unable to join the plaintiffs.

Defendant No. 15 is Mr. Amar Singh, Barrister at law, and a proprietor in the village. The plea of Defendant No. 1 was that he was an agent of Defendant No. 15 and therefore no suit lay against him. He also pleaded that his possession was on behalf of Defendant No. 15. It was consequently alleged that the house built by Defendant No. 1 really belonged te Defendant No. 15. The other defendants including Mr. Amar Singh supported the plea of Defendant No. 1.

The first Court granted to plaintiffs a decree for joint possession of the land in suit to the extent of two annas share therein against Defendant No. 15 but left the parties to bear their own costs. The plaintiffs appealed to the Senior Sub-Judge of Hoshiarpur. Defendant No. 1 filed cross-objections as regards the order about costs and Mr. Amar Singh filed cross-objections on the merits. The Senior Sub-Judge held that Maula Bakhsh did not take possession of the land in suit a few months before the institution of the suit as alleged by the plaintiffs but that he built a kacha house thereon about 4-1/2 years before and that this kacha house was converted by Maula Baksh into a pacca building prior to the institution of the suit. He also held that the building complained of by the plaintiffs was constructed by Maula Bakhsh himself as principal and not as agent for Mr. Amar Singh. He, however, held that this was done with the consent of Mr. Amar Singh and some other proprietors. Maula Bakhsh, it appears, has constructed a flour mill worked by an oil engine on the site in dispute. The learned Judge has further held that the plaintiffs had acquiesced in the construction of the kacha house by Maula Bakhsh and the use of the site for building a house has been allowed by them and also that the mere fact that kacha house has been replaced by a pakka one does not give any fresh cause of action to the plaintiffs. He remarks that there is no allegation that the erection complained of causes any special inconvenience to any of the villagers. On these findings he granted the plaintiffs a decree for ejectment of Maula Bakhsh from that part of the land in suit which was not actually covered by buildings and declared that his possession of the land which is under the buildings will be considered to be under all the proprietors. Maula Bakhsh and Mr. Amar Singh have both appealed to this Court and the plaintiffs have filed cross-objections.

Some other facts which are not stated by the learned Senior Subordinate Judge may be mentioned here.

1. Mr. Amar Singh owns a 92 226ths share in the village. The entire common land is more than 150 kanals and the share of Mr. Amar Singh will be much more than the land which is actually in his possession including the land in suit.

2. There are other houses, admittedly in the possession of Mr. Amar Singh which adjoin the land in suit.

3. Originally the plaintiffs had included in their suit rooms which are in possession of Defendant No. 1 but which were excluded from the suit later on. It appears that they were admittedly in possession of Mr. Amar Singh before

they were appropriated by Moula Bakhsh to own use. A reference to the plan will make the position of the building referred to above clear.

On these facts the question is what relief, if any should the plaintiffs be granted.

Counsel for the respondents relied upon the following authorities:—

Jhandu Mal v. *Singh Ram* (1) in which a sale of a part of the village common land by one Kamin to another was held to be invalid and set aside.

Kalu v. *Wasawa Singh* (2). In this case it was held that kamin must occupy the land given to him for the purpose for which it is granted to him and that the cannot build a mosque or a temple thereon and further that he can occupy the land for his residence so long as he plies his trade.

Girdhari Lal v. *Nand Ram* (3). In this case a non-proprietor denying the claim of the proprietors was held to be a trespasser and ejected as such.

All these caees are clearly distinguishable from the one before me. Defendant No. 1 is neither a kamin nor does he deny the claim of the proprietors to the land in suit. *Achharsingh* v. *Badhava* (4) related to village common land which had expressly been reserved for a road but was utilised for other purposes by one of the proprietors. It was held that the plaintiff proprietor need not prove any special damage in order to entitle him to relief against the offending-proprietor. That case is also distinguisable because the land in suit here is not reserved for any special purpose.

Perhaps the strongest case cited on behalf of the respondents is *Manji* v. *Ghulam* (5). That was a case in which some of the co-sharers who owned a seven anna share in the village abadi occupied the land in suit and asserted their exclusive title to it. On a suit by the owners of the remaining nine anna share it was held that the plaintiffs were entitled to a decree for joint possession of the land which was proved to be the property of all co-sharers including the plaintiffs and the defendants. This case again is clearly distinguishable from the one before me because here the title of the plaintiffs to the land in suit as co-sharers in the village abadi is not denied. The only plea of the defendant is that Mr. Amar Singh admittedly a big co-sharer in the village abadi has appropriated, or allowed the appropriation of the land in suit.

On behalf of the appellants reliance was placed on *Gajadhar Ahir* v. *Bhikari Lal* (6) where a Division Bench of the Calcutta High Court held that a co-sharer if dissatisfied with the appropriation of the common land by another co-sharer should sue for partition of his own share. In that case, it appears that some of the defendants co-sharers had appropriated a part of the joint common land and given it for cultivation to other defendants as tenants. The facts of this case are almost identical to those of the present case. In *Kala Singh* v. *Kanna* (7) a Division Bench of this Court held that when a joint owner of land without obtaining the permission of his co-owners builds upon such land, such building should not be demolished at the instance of the co-owners unless they prove that the action of the joint owner in the building upon the joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. In that case also certain non-proprietors had occupied a large area in the village common land with the permission of proprietors who owned a one-third share in the village. The plaintiffs were owners of the third share and on a suit being brought by them the occupying defendants were ordered to vacate such of the area which was not built upon. They were ordered to vacate this area on the ground that the total area occupied by them was large and on account of its proximity to a tank it was required by the other proprietors of the village. The case before me is much stronger from the point of view of Defendant No. 1 because the area occupied is very small and it has been found that its occupation does not do any injury to the other proprietors of the village. It has already been found that he occupied the area under one of the big proprietors on the

(1) A. I. R. 1925 Lah. 380.
(2) [1904] 19 P. R. 1904.
(3) [1917] 98 P. L. R. 1917=42 I. C. 275=154 P. W. R. 1917.
(4) [1912] 9 P. R. 1912=11 I. C. 404=84 P. W. R 1911.
(5) [1921] 2 Lah. 73=61 I. C. 415=3 L. L. J. 75.
(6) [1915] 18 C. W. N. 1011=27 I. C. 228.
(7) [1921] 60 I. C. 531.

village and with the permission of a majority of the proprietors.

In para 225 of Rattigan's Digest of Customary Law the entire case law on the subject is summed up from which it appears that a co-proprietor is entitled to appropriate a part of the village common land provided he does not cause material and substantial injury to other proprietors such as could not be remedied on partition of the joint land. It has not been shown in this case that the plaintiffs have suffered any substantial injury by the appropriation of the land by defendants Nos. 1 and 15. On the other hand, the finding of the learned District Judge on this point is the cther way. The share of Mr. Amar Singh being much more than the land which is actually in his occupation including the land in suit I hold that the plaintiffs have no cause of complaint. I also hold following the authorities already cited that defendant No. 1 who is found to be holding the land under Mr. Amar Singh enjoys the same rights as Mr. Amar Singh with regard to the other co-proprietors. There is no question that Mr. Amar Singh could not under the circumstances be ejected from the land in suit if the appropriation thereof had been by himself personally. The authorities already cited showed that it is immaterial whether Defendant No. 1 has appropriated the land on behalf of or under the authority of Mr. Amar Singh.

The learned Senior Subordinate Judge granted a decree for the ejectment of Defendant No. 1 from that part of the land in suit which in his opinion was not actually covered by any buildings. I do not think there was any justification in this case for making a distinction between one part of the land in suit and the other. A reference to the plan shows that the land which is not actually covered by the buildings is enclosed by a wall and forms a sort of court-yard to the actual buildings and is therefore in my opinion a necessary adjunct to the buildings. Moreover the total area of the land in suit is so small that it is not right to make a distinction such as the learned Senior Subordinate Judge has made. The defendants do not deny the title of the plaintiffs. They have never done so. The case is practically of appropriation of a small area of land by one of the co-proprietors and this area actually adjoins his existing buildings. It has been amalgamated with such buildings. I do not think under these circumstances the plaintiffs are entitled to any relief what soever not even to a declaration because their title has never been denied.

I would therefore accept this appeal and dismiss the plaintiffs' suit with costs, throughout and dismiss the cross-objections filed on behalf of the plaintiffs, and I order accordingly.

Appeal accepted.

A. I. R. 1926 Lahore 508

ADDISON, J.

Buta Mal—Debtor—Appellant.

v.

Gandu and *others* — Creditors—Respondents.

Misc. First Appeal No. 531 of 1925, Decided on 18th February 1926, from an order of the Dist. J., Gurdaspur, D/- 5th January 1925.

Provincial Insolvency Act (3 of 1907), S. 14—Time for procuring further evidence is to be given only after the examination of debtor.

Whether witnesses are or are not present, it is incumbent on the Court to examine the debtor who applies to be declared an insolvent when it declares its intention of hearing the petition. It is after the examination of the debtor in the presence of the creditors that the Court has to consider whether sufficient cause has been shown to grant time to procure further evidence. 9 *A. L. J.* 233, *Foll.* [P 508, C 1]

Devi Dial—for Appellant.

Mehar Chand Mahajan—for Respondents.

Judgment.—The appellant applied to be adjudicated an insolvent on the 7th June 1924. His application was admitted to a hearing on the 28th July 1924. On the date fixed for hearing, namely, the 17th November 1924, it was found that all the creditors had been served except two who were dead and two whose parentage had not been given and one firm which had left and gone to another place. The District Judge then passed an order fixing the 5th January for the appellant to produce his evidence. He passed no order as to bringing the representatives of the deceased creditors on the record or as to giving proper addresses. On the 5th January the Dis-

trict Judge passed an order to the effect that the representatives of the two deceased creditors had not been brought on the record, that the address of the firm which had moved had not been given, and that the parentage of two creditors had not been given while the appellant also had not brought any witnesses. He accordingly dismissed the petition. Against this decision this first appeal has been filed.

The explanation given before me was that the witnesses were not called as the appellant was trying to discover the representatives of the deceased creditors and the whereabouts of the others. The section which governs the procedure at the hearing of an insolvency application is S. 24 of the Act. Under sub-Cl. (2) of that section the Court should have examined the debtor and then under sub-Cl. (3) it should if sufficient cause were shown, have granted time to him or to any creditor to produce any evidence which appeared to it to be necessary for the proper disposal of the petition. Now it has been held on the authority of this section in *Banarsi Das* v. *Banarsi Das* (1) that whether witnesses are or are not present it was incumbent on the Court to examine the debtor who had applied to be declared an insolvent when it had declared its intention of hearing the petition. It was after the examination of the debtor in the presence of the creditors that the Court had to consider whether sufficient cause had been shown to grant time to procure further evidence.

As the procedure followed by the District Judge was defective, I accept the appeal, following the ruling quoted above set aside the order of the District Judge under appeal and send back the case to him to proceed according to law. I make no order as to costs.

Appeal accepted.

(1) [1912] 9 A. L. J. 233=14 I. C. 416.

A. I. R. 1926 Lahore 509

JAI LAL AND ABDUL RAOOF, JJ.

Ranzor Singh—Objector—Appellant.

v.

Secretary of State—Opposite Party—Respondent.

Appeal No. 2519 of 1921, Decided on 22nd December 1924, from a decree of the Dist. J., Ambala. D/- 7th June 1921.

(a) *Civil P. C., S. 149— Appellant misled by error of Court and paying insufficient Court-fee due to bona-fide mistake, is protected—Limitation Act, S. 5.*

Where an appellant is misled by an error of the Court and the insufficiency in the Court-fee originally paid is due to a bona fide mistake on his part he is entitled to the benefit of S. 149 of the Civil P. C. and S. 5 of the Indian Limitation Act. [P 510 C 1]

(b) *Evidence Act, S. 27—Notification for compulsory acquisition of land—Court making offers to owner "without prejudice"—Award by District Judge—Appeal by owner—Previous offers by Government are inadmissible.*

Where after a notification for the compulsory acquisition of land, nogotiations are started with the owner of the property by the Government regarding price and certain offers are made by the Government expressly "without prejudice" evidence of these offers is not admissible in an appeal by the owner from an award as to the price made by the District Judge. [P 510 C 2]

Tek Chand round *Mool Chand*—for Appellant.

Dalip Singh for *Mehr Chand Mahajan*—for Respondent.

Judgment.—This is an appeal by the owner, Kanwar Ranzor Singh, from the award dated the 7th of June 1921 made by the District Judge of Ambala under the Land Acquisition Act. By Notification No. 2588 G. dated the 20th of May 1919 the Punjab Government declared its intention of acquiring the Moroyu Estate situated in Simla for a public purpose, namely, residences for public servants. The Collector by his award, dated the 20th of November 1920, awarded Rs. 29,120-0-0 as the market value of the estate, and Rs. 4,368 the usual allowance of 15 per cent. for compulsory acquisition; the total amount awarded was Rs. 33,488-0-0. The owner having objected to the award the matter was referred to the District Judge of Ambala for determination of the market value of the property acquired, but the learned Judge declined to enhance the award of the Collector.

At the commencement of the hearing the learned Government Advocate took a preliminary objection that the appeal was barred by limitation. It was filed on the 12th of October 1921. That was the first day on which the High Court opened after the long vacation which began on the 29th of July 1921. The memorandum of appeal was returned to the counsel for the appellant on the 4th of November 1921 on the ground that the Court-fee paid was insufficient. It

was re-filed by the counsel on the 7th of November 1921 with the following endorsement :

The Court fee originally paid by the appellant is correct. But to avoid further loss of time, the deficiency is made up and additional Court-fee is paid.

In our opinion the Court-fee orginally paid by the appellant was insufficient ; but it appears that the counsel was misled by the award of the learned District Judge, the last paragraph of which runs as follows :

The objector did not state in his written application the amount which he claimed but his Vakil stated before my predecessor that he claimed Rs. 70,852-0-0, I, therefors, allow the Secretary of State his costs on the difference between this amount and the amount awarded by the Collector, viz., on (Rs. 70.852-0-0) minus Rs. 33,488-0-0)=Rs. 37,364-0-0.

The Court-fee orginally paid was on Rs, 37,364-0-0. As a fact it should have been on Rs. 70,852-0-0 *minus* Rs. 29,120 =Rs. 41,732-0-0. An appeal filed on the 7th of November would be barred by limitation, but as we hold that the appellant was misled by an error of the District Judge and the insufficiency in the Court-fee originally paid was due to a bona fide mistake on his part he is entitled to the benefit of S. 149 of the Civil P. C. and S. 5 of the Indian Limitation Act. We therefore, overrule the objection of the learned Government Advocate.

The only point involved on the merits of this appeal is the market value of the property acquired. The learned counsel for the appellant has relied upon the following evidence in support of his appeal :

(1) Certain offers made by the Superintending Engineer, Imperial Circle, Simla, but declined by the owner.

(2) Evidence of certain witnesses who give their opinion as to the value of the property.

(3) The evidence of Mr. Goldstine, an Engineer of Simla, who prepared an estimate of the value of the building and the land and

(4) The prices realized on sales of other properties in Simla.

As regards (1) it appears that after the issue of the Notification the Superintending Engineer started negotiation with the owner with a view to settle the market value of the property in order to avoid the contingency of going to Court and in the course of such negotiations he made offers of Rs, 40,000-0-0 to Rs. 42,500-0-0 to the owner which were declined. Two of the offers are alleged to be oral ones made by Mr. Aikeman, Superintending Engineer, and the last one was made in writting by Mr. Hope, Superintending Engineer, by means of his letter dated the 25th of February 1920. In this letter Mr. Hope clearly stated that the offer was being made without prejudice. The learned District Judge held that evidence as to these offers was inadmissible under the provisions of S. 23 of the Indian Evidence Act. The learned counsel for the appellant has contended before us that S. 23 does not apply to the facts of this case. He argued that the section applies only when there is a dispute between the parties and an offer is made to settle such a dispute. It was contended by the learned counsel that after the notification there was no occasion for any negotiations between the Government and the owner as it was not within the power of the latter to refuse to sell the property. We consider, however, that it was still open to the owner to take the matter to the civil Courts on the question of amount of compensation, and it was in order to avoid this contingency that negotiations were started by the Superintending Engineers. In our opinion it is clearly established that the offers were made by these Engineers under circumstances from which the Court ought to infer that the parties agreed together that the evidence of the offers should not be given and agreeing with the Court below, we hold that the evidence as to these offers is not admissible.

Regarding the evidence of witnesses who give their opinion as to the market vaiue of the Moroyu Estate, we observe that these witnesses have given no reasons to show that they were in a position to judge of the market value of this estate, Ordinarily such evidence is seldom accepted as a satisfactory guide to determine the market value of property, but in this case it is almost worthless.

As regards (3) Mr. Goldstine has not produced any detailed estimate of his valuation. All that we have on the record is a letter signed by him addressed to the owner in which he stated that in his opinion the value of the buildings on the estate was Rs. 49,852 and the value of the site was Rs. 21,000. making a total

of Rs. 70,852. In the absence of a detailed estimate it is not possible to check the correctness of the figures supplied by the witnesses. We cannot, therefore, accept this evidence.

(4) The Collector awarded 16 times the net rental following two judgments dated the 26th of April 1918 of the Chief Court of the Punjab. The notifications in those cases were issued in 1916 and the properties then acquired had changed bonds shortly before the issue of the notifications and, therefore, the price then fetched was considered by the Chief Court as the best guide in determining their respective market values. This property has not changed bonds for a considerable time. It is situated about 220 yards from the Viceregal Lodge and has always been occupied by high Government Officials. At the time of the acquisition it was occupied by the Hon'ble Mr. Sharp, Secretary to the Government of India. It has a tennis court and a large compound. Its situation and position are both stated to be very good. Its area is 2·15 acres. All these factors contribute materially to appreciate the market value of property. The appellants' witnesses have mentioned certain sales of properties alleged to be inferior to the present one for amounts larger than the market value awarded in this case : but we find that the evidence is mostly hearsay and cannot, therefore, be admitted. Some of the witnesses stated that the market value of house property in Simla was 20 times the net rental while one thought that it was so much as 22 times the gross rental. It is impossible to act on such evidence unsupported by any instances, and there is a vast difference between 20 times the net rental and 22 times the gross rental. There is no evidence on the record that the Moroyu Estate has any potential value beyond the income from its rent. Moreover, the house is old. Having, however, regard to the fact that 16 times the net rental was awarded in one case in 1916 and 18 times in the other, and that this property has certain undoubted advantages, we consider that in the absence of any evidence to the contrary 18 times the net rent will be its fair market value. Mr. Goldstine states that the owners of old houses in Simla get about 5 or 5½ per cent.i nterest in house property. At 5-1/2 per cent. the market value would be 20 times the net rental and at 5 per cent. it will be about 18 times.

The actual rent of the house at the time of the acquisition was Rs. 2,600. It is claimed on behalf of the appellant that the actual rent is low and that the proper rent of the house is somewhere between Rs. 3,500 and Rs. 4,000. We do not think that there is any material on the record to justify our assuming that Rs. 2,600 is a low rent. In order to calculate the net rent of a house the usual rule in Simla appears to be to deduct 30 per cent. out of the gross rent, being 10 per cent. on account of furniture, 10 per cent. on account of repairs and 10 per cent. on account of Municipal taxes. The net rent of the Moroyu estate as found by the Collector is Rs. 1,820 and this figure multiplied by 18 comes Rs, 32,760. The usual allowance of 15 per cent. on this figure comes to Rs. 4,914.

We accept the appeal so as to enhance the award to Rs. 32,760 as a market value and adding Rs. 4,914 the usual 15 per cent. the total award will be Rs, 37,674. Under the peculiar circumstances of the case we leave the parties to bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 511

CAMPBELL, J.

Teju—Plaintiff—Patitioner.

v.

Ralla and *others*—Defendants—Respondents.

Civil Revision Petition No. 560 of 1925, Decided on 16th March 1926, from a decree of the Senior Sub-J., Hoshiarpore, D/- 14th July 1925.

Limitation Act, S. 3—Question of limitation requiring investigation into facts should not be allowed for the first time in appeal.

Where the determination of the question of limitation requires an investigation into facts, in order to see whether a particular payment was made in such a manner as to extend time, the question should not be allowed to be raised in appeal for the first time. [P. 512, C. 1]

Fakir Chand—for Petitioner.

Judgment.—In this case the decree of the trial Court against the surety Ralla was practically a consent decree

Ralla admitted his liability as surety but pleaded an additional payment of Rs. 50 in addition to the payment of Rs.10 admitted in the plaint. The plaintiff accepted the statement that Rs. 50 had been paid and a decree was passed accordingly. Ralla then appealed and set up for the first time the question of limitation. The lower appellate Court allowed him to do so and decided in his favour. The question, however, required for its determination an investigation into the facts to see whether either the payment of Rs. 10, which was said to have been made in December 1923, or that of Rs. 50, of which the date is not stated, were made in such a manner as to extend time under S. 19 or S. 20 of the Indian Limitation Act. The plea should not have been entertained.

I accept the petition, set aside the order of the lower appellate Court, and restore the decree of the first Court. The petitioner will have his costs here and in the lower appellate Court.

Order set aside.

A. I. R. 1926 Lahore 512

LE ROSSIGNOL AND ZAFAR ALI, JJ.

East Indian Railway Company, Calcutta—Defendant—Appellant.

v.

Behari Lal Bulaqi Ram—Plaintiffs—Respondents.

Second Appeal No. 3026 of 1925, Decided on 23rd March 1926, from the decree of the Dist., J., Delhi, D/- 27th August 1925.

Railways Act, S. 72—Consignee cannot refuse delivery on the ground of late arrival.

Property in the goods entrusted to a carrier remains with the owner, and he is bound to take delivery thereof even if they are damaged, his remedy in that case being to claim compensation: *Lah. C. A. 13 of 1924, Foll.* [P. 512, C. 2]

C. H. Carden Noad—for Appellant.

Jaggan Nath Aggarwal—for Respondents.

Zafar Ali, J.—The facts that need be stated to decide the questions involved in this second appeal are few and simple. A consignment of 200 bags of atta despatched by rail from Delhi on the 29th September 1920 reached its destination (Dhanbad) in February 1921, i. e., after about 4-1/2 months. The usual period of transit for goods between the two places is about 15 days. The consignees who were the consignors themselves refused to take delivery, and the railway authorities after some correspondence with them sold the atta by auction at Howrah. The consignees sued for damages for non-delivery. The trial Court held, inter alia, that the consignees were not entitled to refuse delivery, and that they having done so

the Railway Company was perfectly within its rights to sell the goods under S. 55 of the Railways Act.

It, therefore granted the plaintiffs a decree for the price which the goods fetched at auction less auctioneer's commission and certain freight charges, i. e., for Rs. 1,129-4. On appeal by the plaintiffs the learned District Judge held that they were not bound to take delivery, and that the measure of damages was the value of the goods at the place and time at which they ought to have been delivered. He, therefore, decreed the plaintiff's claim in full, less Rs. 217-12-0 due to the Railway Company on account of freight.

It was held by a Division Bench of this Court in Civil Appeal No. 13 of 1924, and the learned counsel for the plaintiffs-respondents concedes before us that a consignee of goods sent by rail is not entitled to refuse delivery on the ground of late arrival or damage to the goods; and this is obvious because property in the goods entrusted to a carrier remains with the owner, and he is bound to take delivery thereof even if they are damaged, his remedy in that case being to claim compensation. This being so, the suit was not maintainable on the ground of non-delivery or late delivery. But on behalf of the plaintiffs-respondents it is contended that the Railway Company should have sold the atta soon after the plaintiffs' refusal to take delivery, and that as it neglected to do so till the month of July next the atta must have so much deteriorated by that time as to fetch a price much less than that for which it might have been sold shortly after its arrival at its destination. This contention has no force and was never raised in the Courts below. The correspondence between the Company and the plaintiffs took some time, and the Company could not proceed to sell the goods without notice to the owners as provided

by S. 56 of the Railways Act, and was entitled to sell them within a reasonable time after that. It is not shown that the time that intervened between the notice to the plaintiffs and sale was unreasonable. Assuming that the atta was in good condition when despatched there is no evidence on the record with regard to its condition on arrival. Thus no damage was established. The plaintiffs were, therefore, not entitled to recover anything more than what was decreed to them by the trial Court.

We, therefore, accept the appeal and setting aside the decree of the lower appellate Court we restore that of the trial Court. The plaintiffs shall pay defendants costs in this Court as well as in the lower appellate Court.

Appeal accepted.

A. I. R. 1926 Lahore 513

CAMPBELL, J.

Gauri Shankar—Plaintiff—Appellant.

v.

Madan Gopal and *others*—Defendants —Respondents.

Misc. First Appeal No. 1273 of 1925, Decided on 25th November 1925, from the order of the Senior Sub-J., Ferozepore, D/- 1st May 1925.

Civil P. C., S. 104—Order removing from record names of those who died before institution of the suit is not appealable—Civil P. C., O. 43, R. 1 (k).

No separate appeal stamped as an appeal from an order lies against an order removing from the record the names of persons who admittedly died before the suit was instituted. [P 513 C 2]

Prem Lal for *S. L. Sardha Ram*—for Appellant.

Jagan Nath Bhandari for *Sri Chand* and *Fakir Chand*—for Respondents.

Judgment.—This was a suit by Gauri Shankar against numerous defendants. Preliminary questions were raised relating to the deaths of certain of the persons impleaded as defendants. Objection was raised by one of the defendants, that three of the so-called defendants Umra, Inder Singh and Asa had died before the institution of the suit and further that two other defendants Arjan and Sri Ram had died during the pendency of the suit and their legal representatives had not been brought on the record within limitation.

Certain preliminary issues were then framed. The first was as to the effect of impleading as defendants Umra, Asa and Inder Singh who admittedly died before the institution of the suit. The decision on this was that these three names should be struck off the list of defendants. The 3rd, 4th, 5th and 6th issues related to the deaths of Sri Ram and Arjan, and it was held, firstly, that the representatives of these persons had not been brought on the record within limitation; secondly, that the suit abated so far as these representatives were concerned; and, thirdly, that the plaintiff had no sufficient cause for not applying for the legal representatives to be joined within time. The question of the effect of the abatement upon the suit against the remaining defendants was reserved for future decision.

The above order was passed on the 19th of March 1925. On the 8th of April 1925, the plaintiff presented a formal application asking that the abatement against the representatives of Arjan and Sri Ram should be set aside. This was refused by order dated the 1st of May 1925, in which reference was made to the previous order as containing all reasons for rejecting the application.

An appeal has been preferred to this Court stated to be under O. 43, R. 1 (k), Civil P. C. which authorizes an appeal against an order refusing to set aside an abatement. The memorandum of appeal, however, contains several paragraphs relating to the pre-deceased defendants, Umra, Assa and Inder Singh. So far as I am aware no separate appeal stamped as an appeal from an order lies against an order removing from the record the names of persons who admittedly died before the suit was instituted. Mr. Sardha Ram for the appellant says that by a previous order the legal representatives of these deceased persons were brought upon the record. If this is so, the order before me does not direct the removal from the record of any living person, and the grievance of the appellant in this connexion is not apparent. (His Lordship then dealt with the cases of Sri Ram and Arjan and proceeded.) I am not prepared to interfere with the order of the Court below. It is quite plain that no sufficient diligence

has been shown by the plaintiff in this suit. To begin with, he included dead persons among his defendants. Secondly, he applied for the impleading of the representatives of Sri Ram and Arjan without taking the trouble to ascertain the dates of their deaths. Thirdly Brij Lal has stated that he was the first person to get news of Sri Ram's death and that he did so in consequence of an order to make enquiries given by the Court and not by the plaintiff. Fourthly, up to the present moment the plaintiff has been unsuccessful in proving when or where Arjan died. His learned counsel relies upon a mutation entry relating to Arjan's inheritance which contains in column 13 the words "*Warasat arsa taqkriban ek mah.*" The patwari's report is dated the 28th of December 1923, and the mutation was attested the next day ; but the words in column 13 supplemented by no sort of explanation are no evidence of any value, if evidence at all, that Arjan died about a month before the 28th of December and they cannot possibly prove that the date of death was the 28th of November.

The appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 514 (1)

LE ROSSIGNOL, J.

Tara Chand—Defendant—Petitioner.

v.

Nasir-ud-Din and *others*—Plaintiff and Defendants—Respondents.

Civil Revision No. 589 of 1925, Decided on 6th April 1926, from the decree of the Dist. J., Multan, D/-18th July 1925.

Evidence Act, Ss. 102 and 103—Onus is immaterial when both sides have produced evidence.

When both sides have produced their evidence, the appellate Court should not decide merely on the onus, but should come to its own finding on the evidence recorded. [P 514 C 2]

A. R. Kapur for *Nand Lal*—for Petitioner.

Amar Nath Choona—for Respondents.

Judgment.—The District Judge has not come to any finding of his own upon the evidence. He states and states incorrectly that the trial Court found that defendant had failed to prove want of consideration ; the trial Couat indeed found that there was no consideration and that finding was based on the consideration of the evidence produced by both sides. When both sides have produced their evidence, the appellate Court should not decide merely on the onus, but should come to its own finding on the evidence recorded.

I accept the petition, set aside the lower Court's decree and remand for redecision after consideration of the evidence. Stamp refunded. Costs to follow event.

Case remanded.

A. I. R. 1926 Lahore 514 (2)

MARTINEAU, J.

Sardar Abdul Kadir Khan Afindi—Judgment-Debtor—Appellant.

v.

Mt. Iqbal Begam—Decree-holder—Respondent.

Miscellaneous First Appeal No. 3165 of 1925, Decided on 19th April 1926, from the order of the Senior Sub-J., Lahore, D/- 31st August 1925.

Civil P. C., O. 21, R. 90—Application signed by vakil only is valid if vakil is so authorised—Legal Practitioners.

An application to have the sale set aside presented by the judgment-debtor's vakil is valid though not signed by judgment-debtor if the vakil is authorised to make the application by the power of attorney. [P 514 C 2]

Muhammad Amin—for Appellant.

Tirath Ram—for Respondent.

Martineau, J.—The judgmont-debtor's application to have the sale set aside was rejected by the Senior Sub-Juge on the ground that it had not been properly made, being presented by the judgment-debtor's vakil Ch. Ahmad Bakhsh and not signed by the judgment-debtor. It was, however, signed by Ch. Ahmad Bakhsh and this was sufficient if Ch. Ahmad Bakhsh was authorised to make the application, a matter which could be ascertained from the power of attorney filed in the suit.

I remand the case to the lower Court under O. 41, R. 25, Civil Procedure Code, for an inquiry and report, after it has seen the power of attorney, whether Ch. Ahmad Bakhsh had authority to make the application for setting aside the sale.

Case remanded.

A. I. R. 1926 Lahore 515

CAMPBELL, J.

Taj Din—Plaintiff—Appellant.

v.

Dula and *another*—Defendants—Respondents.

Second Appeal No. 2570 of 1925, Decided on 29th April 1926, from a decree of the Dist. J., Gurdaspur, D/- 8th June 1925.

Custom—Alienation—Necessity.

Debt incurred by a Jat agriculturist for trading in cattle cannot be said to be not for legal necessity: 19 *P. R.* 1915, *Dist.*; *A I. R.* 1924 *Lah.* 41 and 65 *P. R.* 1900, *Ref.* [P 516, C 1]

Zafurullah Khan—for Appellant.

Niaz Muhammad—for Respondents.

Judgment.—This was a suit by a minor son to contest a sale of land by his father on the ground of lack of consideration and necessity. The sale was dated the 21st of September 1914 and was for Rs. 1,380. Both Courts have concurred in holding consideration to have been paid and the sale to have been for necessity, and the plaintiff has come to this Court on second appeal.

One item of the consideration was a bond for Rs. 800, dated the 8th October 1913, in favour of the vendee himself and out of the consideration for this bond Rs. 550 were debts raised by the alienor from the alienee for the purpose of trading in cattle. The only point in contention both here and in the lower appellate Court was whether or not this item of Rs. 550, which amounts to more than one-third of the total sale price should or should not be passed for necessity.

It was laid down by the Full Bench in *Devi Ditta* v. *Saudagar Singh* (1) as follows :

It is not necessary for the alienee, who is also the antecedent creditor, to prove that all the previous debts were incurred for necessity. But he is, by his position, prima facie, fixed with knowledge of the nature of the debts and of the purposes on which the money borrowed has been spent, and if not being for actual necessity, they singly, or collectively, as shown in para. 3, are unreasonable or prove reckless extravagance or waste, or a design to injure the reversioner's interests on the part of the debtor, the alienation in lieu of such debts cannot be held valid.

Later on the judgment proceeds to say that the main difference between the two classes of alienees in such cases lies in the greater strictness of proof required from the alienee, who is also the antecedent creditor, that the debts were actually incurred and that they were not of the character mentioned above.

In the case reported as *Santa Singh* v. *Waryam Singh* (2) there was a sale for Rs. 2,000 and it was held out of this amount Rs. 1,300 consisted of prior debts due to the vendee himself which had been advanced to the alienor, an agriculturist, in order to enable him to carry on a shop-keeping business. The Bench which decided the case had before it the Full Bench ruling, *Devi Ditta* v. *Saudagar Singh* (1), already referred to, and stated the proposition before them to be whether the debts due to the alienee were just antecedent debts within the meaning of that decision. They held that there was nothing immoral or illegal in the loans and that it also might be admitted that there was nothing opposed to public policy, but that since in their opinion village custom would not look with favour upon the conversion of a Jat agriculturist into a shop-keeping trader and would not countenance an alienation of ancestral land in order to enable such an agriculturist to carry on the business of a shop, the moneys advanced were not advanced for necessity and the debts were not just antecedent debts.

There is reason for suggesting that there is some conflict between these two decisions, but, so far as my experience has gone, it is usual for this Court to restrict the application of what is ruled in *Santa Singh* v. *Wargam Singh* (2) to the exact facts of that particular case, the two most prominent being, (a) that the debts were incurred for the purpose of converting a Jat agriculturist into a shop-keeping trader a—purpose contrary to village sentiment ; and (b) that the amount of these debts constituted considerably more than half of the sale consideration money. In *Muhammad Hussan-ud-din* v. *Saif Ali Shah* (3) this view has been emphasized and because the facts of that case were distinguishable from *Santa Singh* v. *Waryam Singh* (2) the Judges refused to follow it in the case of an agriculturist lambardar who was alienating a part of his ancestral land in order to engage in trade.

(1) [1900] 65 P. R. 1900=322 P. L. R. 1900.

(2) [1915] 19 P. R. 1915=207 P. L. R. 1914=24 I. C. 361=147 P. W. R. 1914.

(3) A. I. R. 1924 Lah. 41=4 Lah. 200.

The facts of the present case, too, are essentially different from those of *Santa Singh* v. *Waryam Singh* (2). The proportion borne by the item in question to the total price is very much less than one-half and, in my opinion, the convorsion of a Jat agriculturist into a dealer in cattle is not likely to be looked upon by village custom in the same light as his conversion into a shop-keeping trader. In my judgment the learned District Judge was correct in refusing to say that in the circumstances the debt of Rs. 550 previously incurred for trading in cattle was not a just antecedent debt.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 516

LE ROSSIGNOL, J.

Data Ram and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 50 of 1925, Decided on 31st March 1925, from an order of the S. J., Hissar.

(a) *Penal Code, S. 99—Matter not being urgent and no serious loss of property being threatened and ample time being had to have recourse to authorities, there is no right of private defence.*

Where the matter is not urgent and no serious loss of property is threatened, and there is ample time to have recourse to the authorities, the accused cannot be said to have been acting in the exercise of the right of private defence of property. [P. 516, C. 2]

(b) *Penal Code, S. 149—Knowledge of likelihood of hurt and actual hurt make all members equally liable for the hurt.*

Where accused were members of an unlawful assembly being determined to resist by violence any attempt by complainant to exercise his rights and where it must have been within the knowledge of all the accused that grievous hurt was likely to be inflicted on the other side in the course of the fight.

Held: all the accused were guilty of an offence under S. 325 read with S. 149 of the Penal Code with regard to the fatal injury inflicted upon one of the other side and of an offence under S. 323 read with S. 149 of the Code with regard to the injuries inflicted upon others. [P. 516, C.2]

Muhammed Shafi and *Shamair Chand*—for Appellants.

Jagan Nath—for the Crown.

Judgment.—In the course of a fight in village Mirchpur one Malu received an injury which resulted in his death and one Ram Chandar also received an injury. The appellants have been convicted of rioting and have been sentenced to six years' rigorous imprisonment in respect of death of Malu under S. 325/149 of the Indian Penal Code and to one year's rigorous imprisonment under S. 323/149 of the Indian Penal Code in respect of the hurt inflicted on Ram Chandar.

They have appealed, and on their behalf it has been contended that as Moulu, appellant, has been found to have inflicted the final blow on Malu he alone is responsible for that blow inasmuch as there was no common object linking together the eight appellants. A further argument is that the death of Malu was more or less an accident such as often occurs in what would otherwise be a petty village squabble.

Having heard counsel and perused the record I see no reason to doubt that the eight appellants made a combined attack upon Malu and Ram Chandar as they were throwing earth upon a narrow path of the shamilat and in so doing threw earth upon the fences with which the appellants had formed enclosures upon the shamilat. The appellants' reason for objecting to the repair and widening of the path no doubt was that their enclosure fence would come under the new deposit of earth and it is, therefore, contended that whatever they did they did in their right of private defence of property. I am unable to accept this contention. The matter was not urgent, no serious loss of the property was threatened and there was ample time to have recourse to the authorities.

The sentences inflicted, however, appear to me to be very excessive. The death of Malu was due to one single blow on the head; for the other marks of injuries upon his person were trifling. I agree with the Courts below that the appellants did form an unlawful assembly determined to resist by violence any attempt by the complainants to repair the pathway, and it must have been within the knowledge of all of them that grievous hurt was likely to be inflicted upon the other side in course of the fight.

For these reasons I accept the appeal and reduce the sentences in the case of each appellant as follows:

Two years' rigorous imprisonment under 325/149, Indian Penal Code.

One year's rigorous imprisonment under Ss. 323/149, Indian Penal Code.

The sentences shall run concurrently.

Sentences reduced.

A. I. R. 1926 Lahore 517

HARRISON AND JAI LAL, JJ.

Emperor—Appellant.

v.

Narain Dass and *others*—Respondents.

Criminal Appeal No. 859 of 1925, Decided on 18th March 1926, from the order of the Mag. 1st Cl., Lahore, D/- 25th May 1925

Punjab Excise Act (1 *of* 1914), *S.* 61 (1) (*a*)—*Foreign absolute alcohol is covered.*

For purposes of S. 61 (1) (a) absolute alcohol of foreign origin is included in the term rectified spirit, all spirit of a strength of more than 43 degrees or more overproof being rectified spirit. [P. 517, C. 2]

Anant Ram Khosla for *Govt. Advocate* —for Appellant.

Moti Sagar—for Respondents.

Judgment.—It is an admitted fact that three persons Narain Das, Bhagwan Das and Bishan Dass, being the proprietors of a chemist's shop were found in possession of 105 bottles of absolute alcohol on 17th September 1924 and have committed an offence under S. 61 (1) (a) of the Punjab Excise Act (1 of 1914) if the possession of absolute alcohol is forbidden. They have all been acquitted and the Crown has appealed against the acquittal.

Great stress is laid by the accused on the fact that the alcohol in their possession was of foreign origin, and it is contended that such liquor is not covered by the prohibition of rectified spirit inasmuch as wherever these words are used they must be read as applying to rectified country spirit only. Arguing by analogy it is contended that as a man is allowed to possess any quantity of foreign portable spirit which has paid duty he should be allowed in the same way to possess as much similar rectified spirit or absolute alcohol of foreign extraction as he pleases. This is a specious argument, but the rules and notifications show that, whatever the reason may be this is not the position. Absolute alcohol is included in the term "rectified spirit", all spirit of a strength of more than 43 degrees or more overproof being rectified spirit. Section 439 of the Punjab Excise Manual, Volume. 1, lays down limits of private possession of foreign liquor, country spirit, rectified spirit and denatured spirit, and there the limit for rectified spirit is one pint and the fact that it is not included in foreign spirit is shown by the wording of the section. The Magistrate, has, I think been misled by the fact that it was found necessary to issue Rule 339-A to draw attention to the fact, which should have been clear before, that absolute alcohol is included in the term 'rectified spirit" for it is a smaller subdivision of the same class of spirit ranging from 75 degrees to 100 degrees over London proof. Another rule which may have misled the Magistrate is that at page 133 of the same Manual a definition is given in S. 453 of rectified spirit as country spirit of not less than 43 degrees overproof. This, however, occurs in the chapter on Distilleries, and in distilleries nothing but country spirit can be distilled inasmuch as the rules only apply to this country. We fail to follow the reasoning of the Magistrate where he says that it is like arguing in a circle to hold that all alcohol is spirit. It is obviously true, and the class in which liquor falls depends upon the strength of the spirit or rather of the alcohol contained therein. Spirit is defined in S. 3 (19) of the Act as any liquor containing alcohol obtained by distillation. Absolute alcohol in the strict sense means spirit which is 100 per cent alcohol, but for purposes of these rules it has been defined (vide Mr. Brady's evidence) as liquor of 75·35 degrees or more over London proof. It follows, therefore, that the accused have committed an offence under S. 61 (1) (a) of the Punjab Excise Act; but no moral obliquity attaches to their conduct and it will be sufficient, in our opinion, if they are ordered to pay a fine of Rs. 50 each. The record shows that the proceedings were terribly and unnecessarily protreated by the asking of many questions of which the answers could not but be inadmissible, and this for no purpose which we can understand.

We accept the appeal, convict the accused and sentence each to pay a fine of Rs. 50 or in default to undergo 3 days simple imprisonment.

Appeal accepted.

A. I. R. 1926 Lahore 518 (1)

SHADI LAL, C. J.

Mana Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Reference No. 610 of 1926, Decided on 11th June 1926, made by the S. J., Lahore.

Punjab Municipal Act, S. 81—*Money due to Committee under a lease—S.* 81 *does not apply.*

Money due to the Committee under a lease or a contract cannot be recovered by proceeding under S. 81. Such money should be realized by action in civil Courts. [P 518 C 2]

Tirath Ram—for Opposite Party.

Reference.—This is a petition for revision of the order of a 2nd Class Magistrate of Chunian, dated 3rd December 1925, purporting to act under S. 81 of the Municipal Act, and directing certain arrears, alleged to be due from the petitioner to the Municipal Committee Chunian, to be recovered under the provisions of S. 81 of the Municipal Act.

The case is referred for the orders of the Honorable Judges under the following circumstances:

It appears that the petitioner and another entered Into a contract with the Municipal Committee, Chunian jointly taking a lease for certain tonga stand within the limits of the Municipality, and agreeing to pay a certain sum as hire for the same.

The Municipal Committee, on the ground that the said sum due under that contract or lease had not been paid to them, took criminal action before the Magistrate which purported to be under S. 81 of the Municipal Act, and which resulted in the above order.

It does not appear that under the provisions of S. 81 of the Municipal Act such sums can be recovered under the above procedure, that section being intended for the recovery of entirely different moneys that may be due to the Committee, as defined in that section.

Lease money that may be due (as in the circumstances of the present case) to the Committee from petitioner, by himself, or jointly with another, should form the subject-matter of an ordinary civil suit in the civil Courts.

I am of opinion that the action of the Committee and the order of the Magistrate is illegal and unjustified.

I accordingly forward the papers for the orders of the Honorable Judges, with a recommendation that the order of the Magistrate concerned be set aside.

Order.—The Municipal Committee of Chunian claims that a certain sum of money is due to it from the petitioner under a lease, but I do not think that the Committee is entitled to recover the debt by setting in motion the penal provisions of S. 81 of the Punjab Municipal Act. The dispute is one between a creditor and a debtor for the recovery of money due under a contract and must be determined by a civil Court.

I accordingly accept the recommendation made by the Sessions Judge and set aside the order of the Magistrate.

Order set aside.

A. I. R. 1926 Lahore 518 (2)

SHADI LAL, C. J. AND LE ROSSIGNOL, J.

Mul Raj—Decree-holder—Appellant.

v.

Kishori Lal—Judgment-debtor—Respondent.

Letters Patent Appeal No. 268 of 1925, Decided on 9th March 1926, from the judgment of Jai Lal, J., D/- 25th June 1925, in Civil Appeal No. 750 of 1925.

Civil P. C., S. 11—*Order of satisfaction of decree bars fresh execution application unless set aside.*

When an order of satisfaction of decree is entered by Court in execution and is not set aside, it operates as res judicata and bars a subsequent application for execution. [P 518 C 2]

Behari Lal—for Appellant.

Ram Lal—for Respondent.

Judgment.—On the 30th October 1922, the Court executing the decree passed an order that the decree had been fully satisfied. That order has never been set aside and operates as res judicata. The present application for execution has, therefore, been rightly rejected.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 519

BROADWAY AND FFORDE, JJ.

Anant Ram-Mangat Rai — Defendants—Appellants.

v.

Gurditta Mal-Ram Partap—Plaintiffs—Respondents.

First Appeal No. 260 of 1922, Decided on 24th February 1926, from the decree of the Senior Sub-J,, Ludhiana, D/- 10th August 1921.

Civil P. C., S. 104 (1) (c)—*Award—Interpolation by arbitrator after signing—Court remitting under Para.* 14, *Sch.* 2—*Award to be considered is the one after amendment by arbitrators—Order modifying such award is appealable—Civil P. C., Sch.* 2, *para.* 14.

After an award was signed by arbitrators but before it was filed in Court one of the arbitrators added in the award the word "Rest of the plaintiffs' claim should be dismissed with costs." When the award was filed the Court finding that the award was not clear as regards the costs remitted it to arbitrators. The arbitrators amended the award and parties were made to pay their own costs in the suit. The Court ignored both the interpolation by one of the arbitrators before first filing the award and the amendment after it was remitted and passed a decree with proportionate costs.

Held : the order fell under S. 104 (1) (c) and was appealable. The Court acted within its jurisdiction in remitting the award as it did under para. 14, Sch. 2. When the award was so remitted the arbitrators had authority to make the alterations they did. Although an award once signed becomes final and cannot be subsequently altered, when however, the Court acts under para. 14, Sch. 2 and remits the award to the arbitrators for reconsideration on any point the arbitrators have authority to alter their original award as a result of their reconsideration and the award refiled by them is the award in the case and should be dealt with as such.

[P 520 C 1]

Manohar Lal—for Appellants.

Kanshi Ram and *Nawal Kishore*—for Respondents.

Broadway, J.—The firm of Gurditta Mal-Ram Partap instituted a suit against the firm of Anant Ram-Mangat Rai for the recovery of Rs. 10,000, due on account of certain dealings. Anant Ram-Mangat Rai contested the suit and instituted a separated suit against Gurditta Mal-Ram Partap claiming a sum of Rs. 812-2-0 as due to them on account of the same dealings.

The two suits were tried by the Senior Subordinate Judge and were referred to arbitration at the instance of the parties, the arbitrators being Lala Puran Chand, Pleader, and Lala Kahan Chand, shopkeeper, both of Ludhiana. These two persons made an award on the 23rd of June 1921. It appears that this award when signed by the arbitrators gave Gurditta Mal-Ram Partap a decree for Rs. 1,924-5-0 with proportionate costs and dismissed the suit of Anant Ram-Mangat Rai with costs. The award had been signed in the Bar Room and was taken across to Court, for the purpose of being filed, by Lala Puran Chand. While Lala Puran Chand was taking it across he interpolated a sentence to the effect that the rest of the claim of Gurditta Mal-Ram Partap should be dismissed with costs. This sentence formed a part of the award when it was filed in Court. The learned Senior Subordinate Judge found that the decision of the arbitrators relating to costs in the suit in which Gurditta Mal-Ram Partap were plaintiffs was vague and indefinite and, acting under para. 14 of the second schedule to the Civil Procedure Code, remitted the award to the arbitrators in order that the question of costs might be made clear. The arbitrators thereupon at once made corrections in the award by which the parties were left to pay their own costs in the suit. This revised award was then filed. Objections were taken to it by both sides, alleging misconduct on the part of the arbitrators and, so far as Gurditta Mal-Ram Partap were concerned, objecting to the manner in which the arbitrators had altered the first award on the question of costs. The learned Senior Subordinate Judge dismissed the objections of the parties and held that Lala Puran Chand's interpolation before filing the first award was ultra vires and that the arbitrators had no authority to alter their award on the matter of costs. He accordingly ignored both the interpolation and corrections in the revised award and granted Gurditta Mal-Ram Pratap a decree for Rs. 1,924-5-0 with proportionate costs. The suit brought by Anant Ram-Mangat Rai was dismissed with costs. Decrees were drawn up in each of the suits in accordance with the award as originally signed by the arbitrators.

Anant Ram-Mangat Rai have appealed to this Court through Mr. Manohar Lal. the claim in appeal being to set aside the order and decree of the Lower Court and to dismiss the plaintiff's suit with costs. Mr. Kanshi Ram on behalf of the respon-

Advocate High Court
Jammu & Kashmir

dents raised the preliminary objection that the appeal was improperly stamped as it only bore a ten-rupees Court-fee on it. Mr. Manohar Lal urged that his appeal fell within the purview of S. 104 (1) (c) of the Civil Procedure Code and urged that he did not wish to be relieved from the payment of Rs. 1,924-5-0 but only sought relief against the payment of costs amounting to Rs. 491. He expressed his willingness to make good the Court-fees on that amount. After hearing arguments Mr. Manohar Lal was ordered to make good the Court-fees on the sum of Rs. 491 within a fortnight from the date of hearing. This order was passed under S. 149 of the Civil Procedure Code and the appeal was therefore heard on the merits.

It appears that neither party took exception to the interpolation made in the original award by Lala Puran Chand. This has been taken exception to by the learned Senior Subordinate Judge alone. When the award was filed this interpolation was present in it and as a result the decision of the arbitrators on the question of costs was not clear. The learned Senior Subordinate Judge was therefore empowered by para. 14 of the second schedule to the Civil Procedure Code to remit the award to the arbitrators in order to have the ambiguity removed. The arbitrators complied with the order of the Court and were, in my opinion, empowered to make the alteration they actually did make. The final award therefore was the award as revised by the arbitrators and it was this revised award which should have been acted upon by the learned Senior Subordinate Judge and should have formed the basis of the judgment which he should have pronounced and the decree which should have followed the judgment so pronounced. Instead of acting on this revised award the learned Senior Subordinate Judge corrected or modified it by ignoring the alterations as well as the interpolation and acting on the award as it read at the time when it was signed by the arbitrators. In these circumstances it seems to me clear that an appeal under S. 104 (1) (c) was competent and further that it must succeed. The learned Senior Subordinate Judge acted within his jurisdiction in remitting the award as he did under para. 14. When the award was so remitted the arbitrators had authority to make the alteration they did.

I quite agree with the view expressed by the learned Senior Subordinate Judge that an award once signed becomes final and cannot be subsequently altered. When, however, the Court acts under para. 14 of the second schedule to the Civil Procedure Cnde and remits the award to the arbitrators for reconsideration on any point the arbitrators have authority to alter their original award as a result of their reconsideration and the award refiled by them is the award in the case and should be dealt with as such. In the circumstances it is clear that the learned Senior Subordinate Judge was wrong in not acting on the revised award and I would therefore accept this appeal and setting aside the decree of the trial Court so far as costs are concerned direct that the decree in this case shall be in the terms of the revised and final award and shall be for a sum of Rs. 1,924-5-0 without costs. The appellant will be entitled to the costs of this appeal in this Court.

Fforde, J.—I concur.

Appeal accepted.

A. I. R. 1926 Lahore 520

ZAFAR ALI, J.

Sher Afzal—Defendant—Appellant.

v.

Mohan Lal—Plaintiff—Respondent.

Second Appeal No. 2172 of 1925, Decided on the 9th February 1926, from the decree of the Dist. J., Rawalpindi, D/- 25th May 1925.

Evidence Act, S. 114—Posting of letter proved —Letters bearing note by postman that it was refused by addressee—Presumption under S. 114 that it was so refused arises.

Where a notice sent by post in a registered cover is returned by the postman with the note that the addressee refused to receive it, and the posting of the notice has been proved, the presumption under S. 114, that the addressee did refuse to receive it, arises : 15 *Cal.* 681 : 17 *C. W. N.* 1073 and 23 *C. W. N.* 319, *Foll.* [P 521 C 1]

Aziz Ahmad—for Appellant.

Gobind Ram Khanna—for Respondent.

Judgment.—This suit by a landlord against his tenant for ejectment and to recover rent was dismissed by the trial Court, but has been decreed by the lower appellate Court.

The only question on which this second appeal by the defendant was admitted was whether he was liable to pay rent for ten months at the enhanced rate charged by the plaintiff. His plea was that he was not, because no previous notice for enhancement of rent had been given to him as required by the terms of the lease under which he had rented the house. The plaintiff produced a notice sent by him to the defendant by post in a registered cover, but returned by the postman with the note that the addressee refused to receive it. The posting of the notice having been proved by the evidence of the plaintiff, the presumption under S. 114 of the evidence Act, as held in *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (1); *Durga Nath Pramanik* v. *Rajendra Nath Saha* (2); and *Girish Chandra Ghose* v. *Kishore Mohan Das* (3) was that the defendant did refuse to receive it. The plaintiff, therefore, did send notice to the defendant and the appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

(1) [1888] 15 Cal. 681.
(2) [1913] 17 C. W. N. 1073=20 I. C. 363.
(3) [1920] 23 C. W. N. 319=54 I. C. 5.

A. I. R. 1926 Lahore 521

DALIP SINGH, J.

Rahman and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 356 of 1926, Decided on 7th May 1926, from an order of the S-J., Gujranwala, D/- 22nd January 1926.

(a) *Criminal P. C. (amended 1923), S. 35—Separate sentences.*

Separate sentences under Ss. 147 and 332 of the Indian P. C. are not illegal in view of amended S. 35: *A. I. R.* 1926 *Bom.* 64 and 49 *Bom.* 916, *Foll.* [P. 521, C. 2]

(b) *Penal Code, S. 147—Five persons charged but four acquitted—One can be convicted under S. 147.*

Where five persons are charged for forming an unlawful assembly and four of them are acquitted as their presence at the place of offence was not satisfactorily proved, the conviction of one only under S. 147 is not illegal: *A. I. R.* 1923 *Lah.* 692, *Dist.* [P. 521, C. 2]

A. K. Janjua—for Petitioners.
Muhammad Monier—for the Crown.

Judgment.—The sole point in this criminal revision on which notice was issued by the learned Judge was whether separate sentences under Ss. 147 and 332 of the Indian Penal Code were legal. Counsel for the petitioners admits that in view of the amendment of the Criminal P. C., and *Piru Rama Havaldar* v. *Emperor* (1) he has nothing much to urge on this point. But he has contended that as four persons have been acquitted by the learned Sessions Judge and three only convicted and one is an absconder, it is, therefore, no longer proved, nor held by the learned Sessions Judge, that there were five persons forming an unlawful assembly. He has cited *Ata Muhammad* v. *Emperor* (2) in support of his contention. In the case cited there was a finding to the effect that it was proved that of the five persons alleged to form the unlawful assembly two were not there. In this case all that the learned Sessions Judge finds is that it is not proved to his satisfaction that the persons he has acquitted were present. The distinction is obvious, therefore, between this case and *Ata Muhammad* v. *Emperor* (2). I, therefore, see no force in this contention. No doubt the Sessions Judge should have found that five persons of whom three have been convicted and some others who have not been convicted formed an unlawful assembly, but in view of the fact that counsel for the petitioners before him only contested the illegality of the sentence under S. 147 and seems not to have contested the fact that the conviction under S. 147 was not justified at all, the omission of the learned Sessions Judge to record a finding is not material.

On the first point I agree with all respect with *Piru Rama Havaldar* v. *Emperor* (1) that the change in the section makes the previous rulings inapplicable. At the same time it would, in my opinion, in the majority of cases be unnecessary to inflict separate sentences in cases of this nature. But there is no illegality in the case and the total sentence inflicted is not, in view of the circumstances, severe. I, therefore, dismiss the revision.

Revision dismissed.

(1) A. I. R. 1926 Bom. 64=49 Bom. 916.
(2) A. I. R. 1923 Lah. 692.

A. I. R. 1926 Lahore 522 (1)

SHADI LAL, C. J., AND LEROSSIGNOL, J.

Piare Lal—Plaintiff—Appellant.

v.

Ishq Lal—Defendant—Respondent.

Letters Patent Appeal No. 64 of 1925, Decided on 31st March 1926, from a judgment of Martineau, J., in Civil Appeal No. 1771 of 1924, D/- 30 1925.

Evidence Act, S. 15—Open user for long time is presumed to be as of right.

An open user continued without interruption for a long time and not shown to be attributable to any permission on the ower's part is prima facie evidence of enjoyment as of right. The presumption is that the user is of right.

Manohar Lal—for Appellant.

Shamair Chand and *Harish Chand*—for Respondent.

Judgment.—The question for determination in this appeal is whether the defendant has proved his right of easement in respect of the wall A B. which has been held to be the property of the plaintiff. Now, the learned Senior Subordinate Judge, on appeal from the decree passed by the trial Court, held that the defendant had been using the wall for more than twenty years, but that he had not acquired any easement because the user of the wall must be regarded as permissive.

There is ample authority for the proposition that an open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is prima facie evidence of enjoyment as of right. We agree with Mr. Justice Martineau that the presumption is that the user was of right and that the defendant has established his easement by prescription.

It is, however, contended by the learned counsel for the plaintiff that the defendant, even if he is entitled to an easement, has no right to prevent the plaintiff from rebuilding the wall as his easement in respect of the new wall is guaranteed. This contention was not raised either before the single Judge, from whose judgment this appeal under Cl. 10 of the Letters Patent has been preferred or in either of the subordinate Courts. We cannot allow the appellant to urge a new point in the Letters Patent appeal.

This appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 522 (2)

JAI LAL, J.

Bhanun Ram and *others*—Plaintiffs—Appellants.

v.

Jiwanda Ram and *others*—Defendants—Respondents.

Second Appeal No. 1772 of 1925, Decided on 26th March 1926, from the decree of the Dist. J., Multan, D/- 9th May 1925.

Partnership—Dissolution—Balance struck by a partner after dissolution—Firm is not liable.

After a partnership has been dissolved and accounts settled any balance struck by a partner is one without authority and consideration. It does not create any liability on the firm. [P 522, C 1]

Mahesh Das—for Appellants.

Jai Gopal Sethi—for Respondents.

Judgment.—The appellants instituted a suit against the respondents for recovery of Rs. 703-6-6 being principal and interest alleged to be due on balance struck for Rs. 521- 9- 6, on the 28th February 1917 by Tota Ram. He was alleged to be a partner in the firm which was jointly owned by the respondents.

The plea of the respondents was that the firm ceased to exist in 1913 and that Tota Ram, therefore, had no authority to strike any balance on behalf of the firm. The liability also was denied on the merits for want of consideration. Tota Ram, it may be mentioned, is an uncle of the plaintiff. The District Judge has held that the balance struck by Tota Ram was without authority and without consideration and was collusive. On behalf of the appellants it was contended that in the account books of the respondents the amount claimed by them is shown to be payable by the respondents. On examination of the account books and the evidence relating to the same it appears that these entries were also in the handwriting of Tota Ram. A suit for the accounts of the dissolved partnership was instituted by the respondents against Tota Ram in 1917 and the pleadings of Tota Ram were that the partnership ceased to exist in 1914 and that all the accounts between the partners were settled then. Under the circumstances mentioned above, I hold that the conclusions of the learned District Judge are quite correct and that the balance in favour of the appellants was struck by Tota Ram with a view to injure the partners and was without consideration. I dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 523

HARRISON, J.

Bantu —Plaintiff—Appellant.

v.

Lehna Das and *others* — Defendants—Respondents.

Misc. Appeal No. 1316 of 1924, Decided on 23rd January 1925, from an order of the Senior Sub.-J., Sheikhupura, D/- 24th March 1924.

Specific Relief Act, S. 42—Suit for declaration —Temporary injunction can be granted.

A temporary injunction can be granted in a suit for a declaration : *A. I. R.* 1923 *Patna* 133, *Dist. A. I. R.* 1922 *Lah.* 356, *Foll.* [B. 523, C. 2]

Badri Das—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—The question in this appeal is whether the Senior Sub-Judge has passed a suitable and proper order under the circumstances of the particular case which was before him. One Bantu, minor, claiming to be the fourth chela of one Nihal Das, deceased, and in virtue of an oral gift in his favour, brought this suit against certain individuals and the Shromani Gurdwara Probhandak Committee for a declaration that he was entitled to a fourth share as the joint holding. By a separate application he prayed for an injunction restraining the defendant Committee from realizing rents of the land in suit from the tenants. The findings of the Senior Sub-Judge were that at the time the suit was instituted, namely, 27th November 1922, the plaintiff was actually in possession through his tenants and that in spite of the fact that on the 24th of October 1922, the Collector had held that the Committee was in possession. The Court further held that subsequent to the institution of the suit, the defendant Committee had taken possession of a part of the land and that the tenants were willing to pay rent to either side if and when a decision were given by a competent authority as to who was the landlord. The Senior Sub-Judge held, therefore, that the suit for a declaration lay, and that on these facts the injunction prayed for should not be given, but he ordered the defendant Committee to give security for Rs. 3,000 per annum, apparently for an indefinite time and until the case was finally decided for the re-payment of any rents realized by them. He pointed out that difficulties must arise at the time of making recoveries, that the plaintiff was a minor and the Committee was a registered body with no funded capital ; but he passed this order as he stated that he apprehended that the grant of the injunction prayed for was likely to lead to the mismanagement of the property and other disputes. At the same time he passed a further order directing the plaintiff to give security for a sum of Rs. 1,500 for the costs of the case. No order was passed calling upon the defendant to give such security although the Sub-Judge held that the defendants had no property beyond the income derived from religious institutions which was spent on certain objects as soon as it was realized.

Counsel for the plaintiff-appellant points out that under O. 25, R. 1, security could not be demanded from him, the plaintiff, as he has a residence in British India. This is so and I set aside so much of the order as refers to the plaintiff. So far as the defendant is concerned it is urged that because it is laid down in *Bishun Prashad Pathak* v. *Sashi Bhusan Misra* (1) that a temporary injunction should not be granted in a suit in which the ultimate result would not be the granting of a permanent injunction or in other words that because the same principles govern the granting of a temporary injunction as the granting of a permanent injunction it follows that a temporary injunction can never be granted in a suit for a declaration. This is going too far and in *Kanshi Ram* v. *Sharf Din* (2) a temporary injunction was so granted in a suit for a declaration. The defendant relies chiefly on the fact that mutation has been recorded in his favour ; but this, I think, goes for very little, if anything against the finding of the Sub-Judge that the plaintiff was in possession at the time of the institution of the suit, and the conduct of the defendant in ousting him to the extent of collecting rents from his tenants show that he is not entitled to any particular sympathy. This case has already lasted for two years and may be expected to last very much longer. A suggestion made that both parties should agree to pay all rents

(1) A. I. R. 1923 Patna 133.
(2) A. I. R. 1922 Lah. 356.

realized by them into Court until the decision of the case is not acceptable to the defendant and under the circumstances it appears to me that the peculiar facts of this case do justify the granting of the injunction sought. I am not passing any order as to possession being given to the plaintiff by the defendant Committee; there is no question of physical possession by either party. The injunction I grant is to restrain the defendant Committee from realizing any rents due from the tenants who are in cultivating possession of the land in suit.

I set aside both orders demanding security.

The costs of this appeal will be paid by the respondent Committee to the appellant.

Order accordingly.

A. I. R. 1926 Lahore 524

SHADI LAL, C. J., AND COLDSTREAM, J.

Jagat Singh and *another*—Plaintiffs—Appellants.

v.

Lachhman Singh — Defendant—Respondent.

Second Appeal No. 1926 of 1922, Decided on 7th May 1926, from a decree of the Dist., J., Amritsar, D/- 10th March 1922.

Custom (Punjab)—Gift with consent of next reversioner—He cannot impeach gift and get possession on donor's death.

Where a gift is made with the consent of the next reversioner, but it is contested by remote reversioners and they obtained a decree declaring the gift to be inoperative as against them, the former, on the death of the donor, cannot impeach the gift and get possession of the property. [P 524, C 2]

S. C. Chatterji—for Appellants.

H. D. Bhalla—for Respondent.

Judgment.—On the 11th August 1910 Mt. Chandi gifted some ancestral land of which she was in possession as widow of Ala Singh to Bhagat Singh and Jagat Singh, the sons of her daughter, with the consent of Lachhman Singh, nephew of Ala Singh and Ala Singh's next reversioner. Ala Singh's other reversioners successfully contested the alienation by declaratory suit getting a decree to the effect that the alienation would not affect their reversionary rights on the death of Mt. Chandi. In that suit Lachhman Singh was joined as a defendant. The decree was confirmed on appeal. Mt. Chandi died and the land in dispute was recorded by mutation in the name of Lachhman Singh who took possession.

Jagat Singh and Bhagat Singh thereupon instituted the suit out of which this appeal arises against Lachhman Singh for possession by virtue of the gift of the 11th August 1910. The Munsif, who tried the suit, held that Lachhman Singh having consented to the gift could not now keep possession against the plaintiffs and upon this finding and the findings upon the other issues struck, he gave a decree. Lachhman Singh appealed, and the District Judge, while agreeing with the finding that the gift had been made with the consent of Lachhman Singh nevertheless held that the latter was not estopped in any way from succeeding to and retaining possession of the land as Mt. Chandi's husband's heir, the gift to the plaintiffs being invalid. He accepted the appeal and dismissed the suit. Jagat Singh and Bhagat Singh have appealed urging that the District Judge's view of the law is unsound.

The appeal must, in our opinion, succeed. The decree in favour of the reversioners declared the gift inoperative as against these reversioners, but so far as Lachhman Singh is concerned the gift being with his consent cannot be impeached by him. So far as he is concerned, the title of Jagat Singh and Bhagat Singh is perfectly sound and invalidates his claim as against the donees. We accept the appeal with costs and remit the case to the learned District Judge who will dispose of it in accordance with the decision on the other points raised by the appeal.

Case remitted.

A. I. R. 1926 Lahore 525

BROADWAY AND JAI LAL, JJ.

C. M. DeSouza—Appellant.

v.

S. B. Billimoria—Respondent.

Miso. First Appeal No. 3035 of 1924, Decided on 17th March 1925, from an order of the Dt. J., Delhi, D/- 17th October 1924.

Civil P. C., O. 39—Though O. 39 applies to liquidation proceedings fact of liquidation proceedings being pending does not give the Court jurisdiction.

Order 39 is applicable to proceedings in liquidation, but the mere fact that liquidation proceedings are pending would not give a liquidation Court jurisdiction to act under O. 39, unless the subject-matter is in dispute. [P. 527, C. 1]

Tek Chand and *Ram Lal*—for Appellant.

Moti Sagar and *Ram Kishore*—for Respondent.

Broadway, J.— A concern known as the Devolopment Corporation of India Limited, which had come into existence in November 1917, went into compulsory liquidation in February 1924. On the 15th of April 1924, one Mr. De Souza addressed the Liquidator, Mr. Billimoria, claiming payment of a specified sum alleging that it was due to him as mortgagee of certain premises known as 10, Alipur Road, forming part of the property of the concern. The liquidator refused to recognize the claim and directed Mr. De Souza to prove his claim in Court. After some correspondence, on the 9th of July 1924, a letter was addressed by Mr. De Souza's counsel to the liquidator again asking him for the money. The payment was refused. Thereupon, on the 26th of September, 1924, another letter on behalf of Mr. De Souza was sent to the liquidator in which Mr. De Souza claimed that he was a secured creditor and announced that he would realize his security. He alleged that under the terms of the mortgage held by him he could sell the property mortgaged after giving six months' notice to the mortgagors, and in his letter gave the required notice stating that he intended to act under that provision of the deed. Thereupon, on the 30th of September 1924, the Official Liquidator brought these facts to the notice of the Court in charge of the liquidation by means of an application and prayed for an injunction restraining Mr. De Souza from exercising the alleged power of sale in respect of the Property No. 10, Alipur Road, Delhi. The Court issued a temporary injunction which was objected to by Mr. De Souza in an application filed on the 4th of October, 1924. Finally, on the 17th of October, 1924, by an order of that date the Court overruled Mr. De Souza's objections and directed temporary injunction to issue to Mr. De Souza restraining him accordingly until such time, if any, as the mortgage in his favour be held to be valid. The actual injunction which was served on Mr. De Souza, was as follows :

In pursuance of the order of the 17th October, 1924, of this Court you are hereby prohibited and restrained from exeroising the alleged powers of sale in respect of No. 10, Alipur Road, Delhi, or dealing with the property in any manner whatsoever until such time, if any, as the mortgage in your favour be held to be valid.

Against this injunction Mr. De Souza has preferred an appeal to this Court and on his behalf Mr. Tek Chand has been heard. Mr. Tek Chand has attacked (1) the general power of the liquidation Court to issue such injunctions to creditors, and (2) has urged that no injunction could issue to a secured creditor. He has contended that S. 141 of the Civil P. C., regulates the procedure to be adopted and does not create any substantive right. He has referred to *K. Damodar Menon* v. *Kittappa Menon* (1), and *C. V. C. T. Venkatachelam Chetty* v. *Ayyamperumal Teven* (2). Further he has contended that if O. 39, Civil P. C., applied to liquldation proceedings, its provisions should be confined to suits and that no suit was or is pending in any Court relating to any dispute regarding 10, Alipur Road. He further contended that if by the term "suit" any proceedings were meant then before an injunction could issue under O. 39, the property relating to which the injunction was prayed for must be in dispute, i. e., that there must be some suit or proceeding actually pending in which the property was actually in dispute. Further, that before an injunction could issue a case should be made out showing that there was urgency and that there was a prima facie case for its issue. *Ramesh-*

(1) [1911] 36 Mad. 16=21 M. L. J. 613=10 I. C. 879=(1911) 2 M. W. N. 13.
(2) [1919] 42 Mad. 702=37 M. L. J. 248=53 I. C. 33=(1919) M. W. N. 768.

war Das v. *Yakin-ud-Din Khan* (3), *Mandhar Lal Mahabir Pershad* v. *Firm Jai Narain, Babu Lal* (4), *Back Fee of Counsel, In re* (5), and *Begg Dunlop & Co.* v. *Satish Chandra Chatterji* (6), were referred to.

On the authority of *Ram Chand* v. *Bank of Upper India Ltd., Delhi* (7), it was urged that a secured creditor was not bound to prove his debt, and that if he did not prove it, the only penalty was that he could not claim for any balance as the result of any shortage due to the realization of the security out of dividends that had already been declared. In the present case it was urged that the ordinary insolvency rule applied and that as Mr. De Souza was a secured creditor who had declared his intention to rest on his security, neither the Liquidator nor the Court could call upon him under S. 185 of the Indian Companies Act or any other section to prove his claim so as to bring the morgaged property into dispute. It was also urged that the present injunction did not maintain the status quo for it was to restrain Mr. De Souza from looking after the property mortgaged which was still in his possession.

On the other side Mr. Moti Sagar claimed that inasmuch as liquidation proceedings were pending there were proceedings going in Court to which the Civil Procedure Code would be applicable and that, therefore, an injunction was capable of being issued under O. 39, R. 1. In addition to the general proceedings, that were going on, it is further urged that there were special proceedings pending with a view to ascertaining the assets of the concern.

It was pointed out that on the 15th April 1924, Mr. De Souza had actually called upon the liquidator to pay a definite sum, but this claim by Mr. De Souza had been disallowed and he had been called upon to prove his claim in Court. It was further urged that when the concern went into liquidation all property belonging to it vested in the Official Liquidator whose duty it was to get possession of the assets and to distribute the same among the various creditors. As a past director Mr. De Souza was amenable to the jurisdiction of the Court and action under S. 185 could be taken against him, the Court being empowered under S. 185 to act suo motu when it was necessary to protect the property of the concern in liquidation. It was admitted that, as laid down in *Chidambaram Chettiar* v. *Tinnevelly Sarangapani Sugar Mill Co. Ltd.* (8), an agent of the concern in liquidation might well have held a lien on the assets of the concern in his possession, but it was urged that in the present case there are no valid liens in existence as the circumstances under which the alleged mortgage was said to have been executed indicated the preparation of a fraud. Reference was also made to the fact that the Alliance Bank of Simla, Limited, in liquidatiou was one of the Development Corporation's principal creditors and that the said Alliance Bank of Simla had claimed to be in possession of the title deeds of 10, Alipur Road, alleging that that property had been mortgaged to it (the Bank). He further urged that as it had been brought to the notice of the Court that he was at one time officer of the Company who was in possession of the property belonging to the concern and claimed to be entitled to sell it in accordance with a mortgage in his favour and threatened to so sell it, and that the claim so advanced by the ex-officer of the company was disputed by the Official Liquidator who attacked it as fraudulent, and further that another creditor was claiming a lien on the same property, the Court had inherent powers to make such an order with the property as would keep it intact till the various claims had been adjudicated upon.

In reply Mr. Tek Chand contended that no proceedings had actually been instituted to avoid the alleged mortgage and that as Mr. De Souza claimed to be a secured creditor he could not be called upon to surrender possession of the property in question. He further urged that so far as S. 185 of the Indian Companies Act was concerned the possession of the ex-officer of the company must have originated in his capacity as such which was not the case in the present instance, reliance being placed on *In re*

(3) A. I. R. 1924 Lah. 633.
(4) [1920] 55 I. C. 403.
(5) [1907] 33 P. L. R. 1907=45 P. W. R. 1907=61 P. R. 1907.
(6) [1919] 46 Cal. 1001=29 C. L. J. 584=54 I. C. 862=23 C. W. N. 677.
(7) A. I. R. 1922 Lah. 281=3 Lah. 59.
(8) [1908] 31 Mad. 123=18 M. L. J. 251.

Palace Restaurants Limited (9). As to the claim by the Alliance Bank, it was contended that at the most the dispute was between two persons who claimed to be the mortgagees of the same property and that these two persons should have been allowed to refer their respective claims to the ordinary Courts and not forced to ask for an adjudication by the Liquidation Court.

After a careful consideration of the arguments addressed to us by the counsel for the parties and of the authorities cited we are of opinion that in the present case the injunction was wrongly issued. In our judgment O. 39 of the Civil Procedure Code would be applicable to proceedings in liquidation, but we do not think that the mere fact that liquidation proceedings are pending would give a Liquidation Court jurisdiction to act under O. 39. According to that order where in any suit it is proved " that any property in dispute in a suit is in a danger " the Court may grant a temporary injunction. While we consider that the expression suit includes proceedings, we are of opinion that before action may be taken under O. 39, R. 1, the property must be in dispute in such proceedings. In the present case the property, to wit, 10, Alipur Road, was not actually in dispute in any proceedings. Whether or not proceedingg under S. 185 or any other section of the Indian Companies Act would have given the Liquidation Court jurisdiction to issue the present injunction is a matter which we do not feel called upon to decide, as, admittedly, no such proceedings were pending at that time, and as far as we are aware none have been instituted. We do not think that the mere fact that the appellant advanced a claim to being a mortgagee of 10, Alipur Road, and signified his attention to act under the terms of that mortgage brought the said property into dispute within the meaning of this rule and order. Nor do we think that the mere fact that another creditor, namely, the Alliance Bank of Simla, Limited, in liquidation also claimed a lien on this property gave the Liquidation Court the necessary jurisdiction. We consider that before the property could be held to be in dispute in order that the provisions of O. 39 could be invoked some definite proceeding should have been instituted relating to the said property. We, therefore, accept the appeal with costs and set aside the temporary injunction. Costs will be paid out of the assets in the hands of the Liquidator.

Appeal accepted.

(9) [1914] 1 Ch. 492=83 L. J. Ch. 427=110 L. T. 534=21 Manson 109=58 S. J. 268=30 T. L. R. 248.

A. I. R. 1926 Lahore 527

CAMPBELL, J.

Jiwan and *another*—Plaintiffs—Appellants.

v.

Nawab and *another*—Defendants—Respondents.

Second Appeal No. 2605 of 1925, Decided on 28th April 1926, from a decree of the Dist. J., Jhelum, D/- 25th May 1925.

(a). *Civil P. C., O. 7, R. 14 (2)—Unlisted documents—Court may refuse to admit later on.*

A document not listed with the plaint may not be admitted by Court at a subsequent stage. [P 527 C 2]

(b) *Punjab Pre-emption Act* (1913), *S.* 15 (b)—*Sharer in a well.*

A co-sharer in a well has no right to pre-empt a sale of land merely because it was sold with right to irrigate it by the water of that well. [P 528 C 1]

Shuja-ud-Din—for Appellants.

Nanak Chand—for Respondents

Judgment.—The second appeal arises out of a pre-emption suit which has been dismissed. The first point taken for the plaintiffs appellants is that certain documentary evidence which was tendered in the trial Court late, that is to say, after the first hearing, was improperly rejected. This point was raised before the lower appellate Court which also refused to accept the documentary evidence, and as this evidence was not listed in a statement attached to the plaint as required by O. 7, R. 14 (2) Civil P. C, I see no reason why the Courts should have admitted it.

The only other point argued is in respect of the plaintiffs' right of pre-emption. The property sold consisted of 23 kanals of land ma bari chah. The plaintiffs have argued that they were co-sharers in the well and that, since a share in the well was included in the sale, hence they became co-sharers within the meaning of S. 15 (b) of the Punjab

Pre-emption Act. The authority against them cited by both Courts below is *Shahu* v. *Haku* (1), where the would-be pre-emptor was a co-sharer in the actual ground in which certain wells stood and in the actual well buildings. It was there held that this fact did not give him a right of pre-emption in respect of land irrigated by means of those wells and of part of the field number in which the wells stood and of the well buildings. In the present case it is not clear that the sale transferred any more than the right to take water from the well. There is no other evidence on the point.

The appeal must fail and is dismissed with costs.

Appeal dismissed.

(1) 44 P. R. 1900.

A. I. R. 1926 Lahore 528

ADDISON, J.

Naqli—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 299 of 1926, Decided on 8th May 1926, from an order of the Mag. 1st Cl., Ambala, D/- 25th January 1926.

Evidence Act, S. 114, *Illus.* (*a*)—*Penal Code*, S. 411.

Possession of stolen property 19 months after theft raises no presumption that the holder thereof was either the thief or received the goods knowing them to be stolen: 22 *C. W. N.* 597, 11 *L.W.* 43 and 22 *Cr. L. J.* 595, *Foll.* [P. 528, C. 2]

Abdul Rashid—for the Crown.

Judgment.—One Naqli, a Sansi of village Naharpur, District Ambala, has been sentenced under S. 411/75, Indian Penal Code, to seven years' rigorous imprisonment including three months' solitary confinement together with a fine of Rs. 100. He has appealed from jail.

On the night of the 15th/16th August 1923, the shop of Udhe Ram, a Bania of Barara, was broken into and jewellery, cloth and utensils stolen. The offence was reported at once but the crime remained untraced for a long period. The Sub-Inspector of Jagadhari police station was investigating another case in September 1925 when he received certain information. The appellant was called and took them to one Mt. Nanki who, at the instance of the appellant, produced a gold nose-ring which the appellant had pawned with her about March 1925. There is satisfactory evidence on the record that he did pawn it and the ornament has been identified as being one which was stolen from Udhe Ram on the night of 15th/16th August 1923.

The case against the appellant, therefore, is at the best that he was in possession of the gold nose-ring and pawned it with Mt. Nanki some 19 months after the burglary. It seems clear to me that no presumption arises under S. 114 of the Evidence Act in these circumstances. In *Joynnllah Bepari* v. *Emperor* (1) possession after three months was held to raise no presumption In *In re Jaimullabdin* (2) it was held that thirteen months was not soon after the theft. In *Hari Ram* v. *Emperor* (3) it was held that possession five months after the offence did not give rise to the presumption under S. 114 of the Evidence Act. The period in the case under appeal is much larger than any of these periods. I must, therefore, hold that there is no presumption in the present case that the appellant was either the thief or received the goods knowing them to be stolen. He must be acquitted.

He explained that the ornament belonged to his sister who was dead though he produced no evidence to substantiate this allegation. That is not important. As there was no evidence against him no explanation could be asked from him.

I accept the appeal and acquit appellant and further direct that the fine, if paid, shall be refunded.

Appeal accepted

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(1) [1918] 22 C.W.N. 597=46 I.C. 158.
(2) [1919] 11 L.W. 43=53 I.C. 819.
(3) [1921] 22 Cr. L.J. 595=62 I.C. 867.

* A. I. R. 1926 Lahore 529 (1)

JAI LAL, J.

Raja Ram—Plaintiff—Appellant.

v.

Firm Nanhe Mal-Lala Mal and *others*—Defendants—Respondents.

Second Appeal No. 2378 of 1925, Decided on 7th April 1926, from a decree of the District J., Delni, D/- 8th July 1925.

* *Limitation Act* (1908), *S.* 12—*Copy of decree applied for within limitation excluding time taken for obtaining copy of judgment—Time required for copy of decree should be excluded.*

Where on the day the application for a copy of the decree appealed from is made, the appeal would have been in time adding the time required for obtaining a copy of the judgment, the time required to obtain the copy of decree should be also exoluded in computing the time allowed for filing of the appeal. *A.I.R.* 1922 *P. C.* 352 and *A. I. R.* 1922 *Lah* 423, *Ref.* [P 529 C 2]

Shamair Chand—for Appellant.
Bishen Narain—for Respondents.

Judgment.—This is an appeal from the decree of the learned District Judge, Delhi, dismissing the appeal as time-barred. The judgment from which the appeal was made is dated the 17th December 1924. An application for copy of the judgment was made on the 2nd January, 1925. It was ready on the 12th January. An application for copy of the decree was made on the 26th January and the appeal was presented without a copy of the decree on the 27th January but was re-filed with such a copy on the 28th. The learned District Judge has held that the appeal had been barred by limitation when it was represented with a copy of the decree on the grcund that the application for a copy of the decree was made after the period prescribed by the Limitation Act for filing the appeal had expired. In coming to this conclusion the learned District Judge has ignored the fact that on the 26th January when the application for a copy of the decree was made the appeal, if filed, would have been within limitation by virtue of the deduction allowed to the appellant of the days spent in obtaining a copy of the judgment. *Promatha Nath Roy* v. *William Arthur Lee* (1) and *Bawa Singh* v. *Thakur Singh* (2) support the contention of the appellant and the view of the learned District Judge is wrong. S. 12 (2) and (3) also gives the appellant the right to deduct the days spent by him in obtaining a copy of the decree and also for obtaining a copy of the judgment.

I accept this appeal and remand the case to the learned District Judge for decision on the merits. Court-fee on the memorandum of appeal will be refunded other costs will abide the result.

Case remanded.

(1) A. I. R. 1922 P. C. 352=49 Cal. 999 (P.C.).
(2) A. I. R. 1922 Lah. 423.

1926 L/67 & 68

A. I. R. 1926 Lahore 529 (2)

BROADWAY AND FFORDE, JJ.

Pal Singh and *others*—Plaintiffs—Appellants.

v.

Jagir—Defendant—Respondent.

Second Appeal No. 1024 of 1922, Decided on 31st March 1926, from the decree of the Dist, J. Amritsar, D/- 3rd April 1922.

Evidence Act, S. 112—*Time of birth and no of conception is material.*

Section 112 refers to the pofnt of time of the birth of the child as the deciding tactor and not to the time of conception of that child. *A. I. R.* 1924 *Mad.* 677 *Foll.* [P 530 C 1]

Bihari Lal—for Appellants.
K. J. Rustomji—for Respondent.

Broadway J.—The question for determination in this second appeal is as to the paternity of one Jagir. It appears that his mother Mt. Harnam Kaur had been married to Hari Singh. Hari Singh died on the 10th January 1919 and Jagir was born of Mt. Harnam Kaur on the 17th October 1919, that is, 279 days after Hari Singh's death. On these facts Jagir claims to be the son of Hari Singh. His claim was decreed on appeal by the learned District Judge of Amritsar. The judgment of the learned District Judge shows that in coming to his conclusion he was clearly influenced by the provisions of S. 112 of the Indian Evidence Act, but in applying the provisions of that section the learned District Judge omitted to see that the presumption raised by that section was, in the present case, against Hari Singh being the father of Jagir. For it has also been found as a fact that after the death of Hari Singh Mt. Harnam Kaur married

Sohan Singh, a cousin of Hari Singh, by chadar andazi, on the 25th February 1919. The presumption, therefore, under S. 112 of the Indian Evidence Act, was that Sohan Singh was the father of Jagir. Evidence appears to have been led to prove that Hari Singh had access to Mt. Harnam Kaur at a time when Jagir could have been conceived, but this evidence was on the facts of this case wholly irrelevant. Mr. Rustomji for the respondent referred to *Palani* v. *Sethu* (1) but that authority is clearly against him. It was pointed out by Mr. Justice Krishnan in that case that S. 112 of the Evidence Act refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child—a view in which I thoroughly concur. In my opinion, the view taken by the trial Court was correct and I would therefore accept this appeal with costs and setting asside the decree of the lower appellate Court restore that of the Subordinate Judge.

Fforde, J.—I agree.

Appeal accepted.

(1) A. I. R. 1924 Mad. 677=47 Mad. 706.

A. I. R. 1926 Lahore 530 (1)

JAL LAL, J.

Harnam Singh and *another*—Plaintiffs —Appellants.

v.

Jiwan Singh and *another*—Defendants —Respondents.

Second Appeal No. 402 of 1926, Decided on 4th May 1926, from a decree of the Addl. Dist. J., Lahore, D/- 27th October 1925.

Custom (Punjab)—Alienation by father—Mortgage is valid if necessity for it existed at the time of mortgage.

In a suit for a declaration to the effect that a mortgage of the ancestral land created by the plaintiffs' father was without consideration and necessity, what the Court has to see is whether at the time there was a legal necessity for the mortgage. If on account of circumstances which came into existence after the date of the mortgage, some of antecedent debts constituting legal necessity have been extinguished, the original transaction cannot on that ground alone be set aside. [P 530, C 2]

Devi Das—for Appellants.

Ishar Das—for Respondents.

Judgment.—This was a suit for a declaration to the effect that a mortgage of the ancestral land created by the plaintiffs' father and grandfather was without consideration and necessity. The District Judge has held against the plaintiffs on both these points. The only point argued before me is that out of the consideration mentioned in the mortgage deed certain debts had become barred by limitation at the time of institution of the suit. It is admitted that they were within time when the mortgage was created. It is contended that as at the time of the suit the legal obligation to pay some of the debts had ceased to exist, therefore, the mortgage ceased to that extent to be for valid necessity.

I am unable to see the force of this contention. What we have to see is the facts as they existed at the time of the execution of the mortgage-deed. It is, in my opinion, quite clear that at that time there was a legal necessity for the mortgage in suit and that is all that the Court has to see in suits like the present. If on account of circumstances which came into existence after the date of the mortgage, some of antecedent debts have been extinguished, the original transaction cannot, on that ground alone, be set aside. The fact that the mortgagee has not yet paid the antecedent debts does not affect the question of the validity of the mortgage.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 530 (2)

CAMPBELL, J.

Ladha Singh—Defendant—Appellant.

v.

Sundar Singh—Plaintiff—Respondent.

Second Appeal No. 1335 of 1924, Decided on 8th January 1925, from a decree of the Addl. Dist. J., Amritsar, D/- 7th February 1924.

(a) *Registration Act, S. 17—S. 17 must be strictly construed—Benefit of doubt must be given to the person who wants a document to be admitted.*

Section 17 being a disabling section must be strictly construed so that unless a document is

clearly brought within its purview non-registration is no bar to the document being admitted in evidence : (*A. I. R.* 1922. *Lah.* 43, *Foll.*) And if there is any doubt on the subject the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. *A. I. R.* 1922 *Lah.* 43, *Foll.* [P. 531, C. 2]

(b) *Registration Act, S.* 17—*Document not superseding or substituting previous contracts but creating charge of less than Rs.* 100 *does not come within S.* 17.

Where the contents of the deed do not supersede the previous mortgage contracts nor substitute an entirely fresh contract but mean that the redemption price of the two previous mortgages is increased by a further sum less that Rs. 100, the document is not one which comes within the scope of *S.* 17. [P. 531, C. 2]

(c) *T. P. Act, S.* 100—*Mortgagee's interest is charge on mortgaged property—Rule should not be shaken—Mortgage—Rights of mortgagee—Lim. Act, Art.* 132.

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary and it is most important that this general rule should not be shaken in any particular : *A. I. R.* 1924 *P. C.* 183 *Foll.*: *A. I. R.* 1924 *Lah.* 273, *not Foll. being considered as overruled by A. I. R.* 1924 *P. C.* 183. [P. 532, C. 1]

Fakir Chand—for Appellant.

Duni Chand for *Ganpat Rai*—for Respondent.

Judgment.—This judgment will dispose of Second Appeals Nos. 1335 and 1336 ot 1924.

There are two suits for redemption of two mortgages of two plots of land which were executed on the 25th June 1906. One mortgage was for Rs. 500 in favour of Sohan Singh and the other was for Rs. 300 in favour of Ladha Singh. In both suits the mortgagees represented that a further charge had been created in the sum of Rs. 56 by an unregistered deed of the 2nd March 1911. The lower appellate Court has held that the unregistered deed was inadmissible in evidence for want of registration and that the transaction recorded in it could not be proved. It held further that if the deed was admissible the interest claimed by the mortgagees on the principal sum of Rs. 56 was not a charge upon the mortgaged land. Redemption was allowed on payment of Rs. 800 due on the two former deeds but as the plaintiff had deposited Rs. 850 in Court this was actually the sum which the mortgagees obtained.

In both cases the mortgagees have appealed. Rs. 212 are claimed on the unregistered deed, i.e., Rs. 6, the balance of principal and Rs. 206 interest and this amount is equally divided between the two mortgagees. It has been urged that both the decisions of the lower appellate Court described above are contrary to law.

In regard to the question of compulsory registration the learned Additional Judge, has held that the document of the 2nd March 1911 effected a consolidation of the two previous mortgage-deeds and has the effect of increasing the charge on either plot by a sum certainly exceeding Rs. 100, the consequence of which was that the bond was inadmissible in evidence for want of registration. I do not comprehend the reasoning of the learned Additional Judge and no further light is thrown upon it by the learned vakil for the respondent who has asserted that the finding is right but has not been able to quote me any authority in support of it. I have examined the terms of the document carefully and am unable to say that its effect is more than to create a further charge of Rs. 56 upon the two previously mortgaged plots. If it required registration it must have purported or operated to create, declare, assign, limit or extinguish some right, title or interest in immovable property of the value of Rs 100 and I cannot see that it does this. In *Attra* v. *Mangal Singh* (1) the learned Judges declared it to be a well-established rule of construction that S. 17 of the Registration Act being a disabling section must be strictly construed that unless a document is clearly brought within its purview non-registration is no bar to the document being admitted in evidence, and that if there is any doubt on the subject the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. The contents of the deed in question are not those of a document superseding the previous mortgage contracts and substituting an entirely fresh contract and the words cited by the learned Additional Judge in his judgment mean no more, in my opinion, than that the redemption price of the two previous mortgages was increased by a further sum of Rs. 56. I hold that the document was not one which comes within the scope of S. 17 of the Registration Act.

(1) A. I. R. 1922 Lah. 43.

The stipulation obout interest immediately followed the words quoted by the learned Additional Judge and were as follows : *'au sud fi sadi do rupaya mahwari dena mukarir kiya haii'*. The learned Additional Judge decided that this was a separate sentence which had nothing to do with the previous sentence providing for redemption and that there was not the remotest indication in the deed that interest had also to be paid before redemption could be effected. For this conclusion he relied upon *Aulia Khan* v. *Kanshi Ram* (2) and *Jawala Singh* v. *Teja Singh* (3). The latter case certainly supports him, but in my judgment it must be taken to have been overruled by the decision of their Lordships of the Privy Council in *Ganga Ram* v. *Natha Singh* (4). It was there held that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary and that it is most important that this general rule should not be shaken in any particular.

Accordingly I accept both appeals and in each case modify the decree by directing that the redmption price to be paid by the plaintiff shall be increased by Rs. 106. The appellants will have their costs in this Court and in the lower appellate Court.

Appeals accepted.

(2) [1913] 45 P. R. 1913=145 P. L. R. 1913 =17 I. C. 677=25 P. W. R. 1913.
(3) A. I. R. 1924 Lah. 273.
(4) A. I. R. 1924 P. C. 183.

A. I. R. 1926 Lahore 532

BROADWAY, J.

Abdul Rahim—Petitioner.

v.

Mt. Amir Begum—Respondent.

Criminal Revision No. 294 of 1926, Decided on 26th March 1926, reported by the S. J., Rawalpindi, on 13th February 1926 with his No. 176 G.

(a) Criminal P. C., S. 488—Order for maintenance prior to date of application is illegal.

The Magistrate has no power to make an order for payment of any sum for the maintenance for any period prior to the date on which the application for maintenance is lodged, 5 *P. R.* 1870 (*Cr*) *Foll.* [P 532 C 2]

(b) Criminal P. C. S, 488 (1)—Father is not liable for the maintenance of a child of another man.

A father is liable for the maintenance of his legitimate or illegitimate child unable to maintain itself but not for the child of another man. [P 532 C 2]

Report.—This case was under S. 488, Criminal P. C., by a wife against her husband for an order of her own maintenance and that of her two children, one daughter of her present husband, the petitioner, and a boy by her former husband. The application under S. 488, Criminal P. C., was filed before the Magistrate on the 7th Octoper 1925.

The defence was that the appellant had been divorced on the 4th July 1925. The Magistrate accepted the plea that the applicant had been divorced on the 4th May 1925 and held that her divorce was communicated to her on the 15th July 1925 and that the applicant with her children had been neglieted by her husband from about the middle of October 1924 to about the 14th July 1925, and for this period he granted maintenance to the wife at the rate of Rs. 25 a month and to her two children at the rate of Rs. 10. The second party has filed a revision application on the following grounds :

(1). The Magistrate at the most could award in law maintenance from the date of the application and his order for maintenance for the period prior to the date of the application was illegal. (2.) The petitioner was not liable for the maintenance of the boy who was the son of another man. (3). The monthly rate of maintenance is excessive.

Section 488 (2) says that such allowance shall be payable from the date of the order or if so ordered from the date of application for maintenance. According to *Omree* v. *Elahee Bukhsh* (1) the Magistrate had no power to make an order for payment of any sum for the maintenance for any period prior to the date on which the application for maintenance was lodged As in this case the application for maintenance was filed in Court on the 7th October 1925 the order of maintenance for a period prior to this date was clearly illegal. Under S. 488 (1) a father is liable for the maintenance of his legitimate or illegitimate child unable to maintain itself but not for the

(1) [1870] 5. P. P. 1870 Cr.

child of another man. So the order of the Magistrate regarding the maintenance of the boy in this case was also clearly wrong.

The petitioner is bound to maintain his minor daughter Shah Jahan Begum aged 15 months, who is with her mother, but the Magistrate made no order for her future maintenance. A sum of Rs. 5 per month for her maintenance is not too much because her father, the petitioner, is an Overseer and is drawing Rs. 80 a month. The proceedings are forwarded to the High Court under S. 488 Criminal. P. C., with the recommendation that the order for the maintenance of the divorced wife Mt. Amir Begum and her son be quashed and an order for the future maintenance of the minor daughter Mt. Shah Jahan Begum at the rate of Rs. 5 a month from the 7th October 1925 be passed against her father Abdul Rahim.

Broadway, J.— For the reasons given in the first order of the reference I set aside the order directing payment of maintenance prior to the date of the application and order that the petitioner Abdul Rahim shall pay to the respondent Mt. Amir Begum the sum of Rs. 5 per mensem from the 7th October 1925 for the support of his daughter Mt. Shah Jahan Begum.

Order set aside.

A. I. R. 1926 Lahore 533

BROADWAY AND FFORDE, JJ.

Gopali—Defendant—Appellant.

v.

Mt. Shamon—Plaintiff—Respondent,.

Second Appeal No. 1013 of 1922, Decided on 22nd March 1926, from the decree of the Dist. J.. Ludhiana, D/- 16th March 1922.

Custom—Punjab—Widow in possession of her husband's joint estate can claim partition.

A widow in possession of her husband's joint and undivided estate has a statutory right of partition : 70 *P. R.* 1912 ; *A. I. R.* 1923 *Lah.* 625 and *A.I.R.* 923 *Lah.* 81, *Foll.* ; 219, *P.L.R.* 1913, *Diss. from.* [P. 534, C. 1]

Nawal Kishore for *Manohar Lal* — for Appellant.

J. G. Sethi—for Respondent.

Broadway, J.—Hukmi and Gopali were two brothers who held a joint holding. Hukmi died and his widow Mt, Shamon succeeded to his estate and held joint with Gopali. Disputes arose between her and Gopali, whereupon she claimed partition. The revenue authorities found that Gopali was not treating her properly but directed her to have recourse to the civil Courts. She thereupon instituted a suit for a declaration that she was a joint owner and in possession of one-half share of the joint holding and that she had a right to get it partitioned.

The suit was contested on various grounds, Gopali claiming that he had contracted a karewa marriage with her, and also asserting that she was not entitled to partition. Her claim was decreed by the trial Court, it being held that she had not married Gopali and the appeal was dismisssd by the learned District Judge. Against that decree a second appeal has been preferred to this Court on behalf of Gopali which was admitted to a hearing in view of the conflict between *Mt. Bhag Bhari* v. *Wazir Khan* (1) and *Parshotam* v. *Mt. Raj Devi* (2).

The question whether a widow in possession of her husband's joint and undivided estate is entitled to partition was decided in the widow's favour in the first of the cases above mentioned and against her in the second. It appears, however, that this question has been set at rest by more recent authorities. The view taken in *Mt. Bhag Bhari* v. *Wazir Khan* (1) was accepted as correct in *Milkhi* v. *Mt. Punni* (3) and the same view was followed in *Shadi* v. *Mt. Jeoni* (4). Mr. Justice Martineau and Mr. Justice Moti Sagar came to a similar conclusion in *Ghansham* v. *Ramji Lal* (5) and the same Division Bench took the same view in a case not to be found in the Indian Law Reports but reported in an unauthorized report : *Sant Singh* v. *Mt. Basant Kaur* (6). In this case the learned Judges have gone very thoroughly into the whole question and have reviewed practically all the authorities on the point. In my opinion, the matter is now definitely settled and it

(1) [1912] 70 P. R. 1912=91 P.W.R. 1912=14 I. C. 45=124 P. L. R. 1912.
(2) [1913] 219 P. L. R. 1913=19 I.C. 702=129 P. W. R. 1913.
(3) [1921] 2 Lah. 348.
(4) A. I. R 1922 Lah. 362=3 Lah. 236.
(5) A. I. R. 1923 Lah. 625=4 Lah. 344.
(6) A. I. R. 1923 Lah. 81.

must be held that a widow has a statutory right to claim partition. The present appeal must therefore be dismissed with costs.

Fforde, J.--I agree.

Appeal dismissed.

A. I. R. 1926 Lahore 534 (1)

LEROSSIGNOL, J.

Ramditta—Defendant—Appellant.

v.

Maru and *another*—Plaintiffs—Respondents.

Second Appeal No. 2348 of 1925, Decided on 3rd February 1926, from a decree of the Dist. J., Hoshiarpur, D/- 6th April 1925.

Appeal—Preliminary decree set aside on appeal—Appeal against final decree is not necessary.

It is not necessary to appeal against a final decree when the preliminary decree on which it is based has been set aside on appeal : 37 *Mad.* 29 and 36 *All.* 532, *Foll.* [P. 534, C 1]

Fakir Chand - for Appellant.

Chandar Gupta for *D. N. Agarwal*—for Respondents.

Judgment.—A preliminary decree was passed in a partition suit and was taken to the appellate Court. During the pendency of the appeal, the trial Court issued a final decree which was not challenged in appeal.

The appeal against the preliminary decree was successful whereupon the trial Court reviewed its final decree and brought it into agreement with the amended preliminary decree.

The District Judge on appeal has set aside the amended final decree on the ground that there had been no appeal against the original final decree.

Whether it is necessary to appeal against a final decree when the preliminary decree on which it is based has been set aside is a matter on which there has been conflict, but I consider that *Lakshmi* v. *Marudevi* (1) and *Kanhaiya Lal* v. *Tirbeni Sahai* (2) lay down correct law and that when the foundation has been demolished, the superstructure (the final decree) cannot remain, but is swept away with the foundation.

I accept the appeal and restore the trial Court's second final decree with costs throughout.

Appeal accepted.

(1) [1914] 37 Mad. 29=12 I. C. 664=21 M. L. J. 1063.

(2) [1914] 36 All. 532=24 I.C. 827=12 A.L.J 876.

A. I. R. 1926 Lahore 534 (2)

ADDISON, J.

Attar Singh- -Appellant.

v.

Bur Singh and *another*—Respondents.

Mis. First Appeal No. 2663 of 1925, Decided on 10th May 1926, from an order of the Senior Sub-J., Hoshiarpur, D/- 9th July 1925.

Civil P.C., S. 151—Court can restore application for execution dismissed for default under its inherent powers.

The Court has, in the exercise of its inherent powers expressly recognized by S. 151, right to restore an application for execution which has been dismissed for default and should do so if the Court is satisfied that it should exercise its inherent jurisdiction ex debito justitae. [P. 535, C. 1]

Badri Das—for Appellant.

Fakir Chand—for Respondents.

Judgment.—This appeal is concerned with the execution of a decree for costs in a suit which was finally decided by their Lordships of the Privy Council on the 2nd December 1910. The present application for execution was filed on the 17th March 1922. Notice was issued and, on the 1st July 1922, the judgment-debtors filed objections that one decree-holder had died and that they were his heirs and that the two applicants could not take out execution by themselves. On the 28th August 1922 the proceedings were adjourned to allow of a succession certificate being obtained for the deceased decree-holder's share of the decree. The next date fixed was the 12th December 1922. In the meanwhile a suit was instituted by one Harnam Singh claiming to be an heir under a Will of the deceased decree-holder and this held up the proceedings for the succession certificate. Thereafter there were numerous adjournments and ultimately the application for execution was dismissed in the absence of both parties on the 2nd December 1924. Up to that time it had not been possible to obtain the succession certificate.

On the 9th December 1924, the decree-holders applied for the restoration of the former proceedings to the pending file on the ground that the decree would be barred by time if this was not done. Next day, i.e., the 10th December 1924, the executing Court restored proceedings to the pending file, pointing out that the decree-holders' counsel was the Public Prosecutor who must have been attending a Government prosecution on the day in question and also mentioning that if this was not done the decree which was for a large amount would be barred by time.'

Thereafter fresh attachments issued and certain cattle were attached. The judgment-debtors filed objections on the 9th July 1925. The only one of these which requires mention was that the proceedings were void because the application for execution had already been dismissed in default on the 2nd December 1924 and could not be restored. The executing Court repelled this objection and this first appeal has been filed against this order. I have not mentioned the other objections as this was the only one pressed before me. The argument of the appellant's counsel was that a valuable right had accrued to his client by reason of the dismissal in default and that, therefore, the application for execution should not have been restored. He admitted that S. 151 of the Civil P. C. would apply to the present case, but that the provision for restoration of a suit did not apply to executions proceedings. On the other hand I have been referred to *Bholu Ram* v. *Ram Lal* (1) which is nearly on all fours with the present case. There, also, a decree would have been become time-barred if the decree-holders had been compelled to file fresh application. It was held that the Court had in the exercise of its inherent powers, expressly recognized by S. 151 of the Code, right to restore an application for execution which had been dismissed for default and should exercise its inherent jurisdiction ex debito justitiae.

In the case before me the decree-holders have not been able to realise with costs though they have been proceeding diligently since they obtained their decree. They have been prevented from doing so by various suits and the other usual methods. They kept the last application for execution alive from the 17th March 1922 to the 2nd December 1924 and during all that time they were doing their best to get a succession certificate which could not be granted till the 4th April 1925 because of the action of the judgment-debtors and the suit filed by Harnam Singh. It was purely an accident, influenced by the fact that it was near the end of the year, that the execution proceedings were dismissed on the 2nd December 1924. This is a case where the Court should have exercised its inherent jurisdiction under S. 151 of the Code.

I dismiss the appeal with costs.

Appeal dismissed.

(1) [1921] 2 Lah. 66=60 I.C. 720.

A. I. R. 1926 Lahore 535

COLDSTREAM. J.

Bakhsi—Plaintiff—Appellant.

v.

Mt. Mehrajo and *others*—Defendants—Respondents.

Second Appeal No. 138 of 1926, Decided on 5th May 1926, from a decree of the Senior Sub.-J., Kangra, D/- 10th November 1925.

Civil P. C., S. 100—Decision based on finding of fact contrary to case set up—Second appeal lies

Where the decision in favour of a party is based on a finding which is dead against the case set up by him, it is contrary to law and second appeal lies although the finding is one of fact.

[P. 536, C. 1 2

Mehr Chand Mahajan—for Appellant.

Dev Raj Sawhney—for Respondents.

Judgment,—Gajja, father of the present appellant, sued against the defendants-respondents to recover Rs. 25 on account of mangoes taken by them from two mango trees and Rs. 15 on account of damage done by them to the crops on the land on which the mango trees stood, alleging that the land was his and the trees also. The respondents alleged that the land and trees were joint property of the parties. The first issue framed was whether the trees and the land on which they stood were joint. During the course of the suit Gajja died and was replaced by the minor son Bakhsi.

The Subordinate Judge found that one tree belonged to Bakhsi and the other to

the respondents, and that no damage had been done to the crop other than the mangoes. He gave a decree for Rs. 10 which he estimated to be the value of the mangoes taken by respondents from the plaintiff's tree. The respondents appealed and the Senior Subordinate Judge came to the conclusion on the evidence that the field on which the tree in respect of which the decree had been passed stood on land belonging to the defendants. He accepted the appeal and dismissed the suit. Bakhsi has appealed urging various grounds on which he disputes the justice of the lower appellate Court's decision.

I may say at the outset that counsel agree that the fruit of each tree belongs to the owner of the land on which the tree stands and that, apart from the preliminary point taken by the respondents' counsel as to the admissibility of the appeal, the only question is to whom belongs the land on which the tree stands in respect of whose fruit Bakhsi got a decree.

Respondents' counsel naturally opposes the appeal on the ground that the finding in dispute is one of fact and no second appeal lies. To this it is replied by Mr. Mehr Chand for the appellant that the finding is no doubt one of fact but as the finding is against the contention on which the respondents based their case, namely, that the land and both trees were joint, the judgment is contrary to law. Reference is made to *Ramgopal* v. *Shamskhaton* (1), *Baj Singh* v. *Partap Singh* (2) and *Malraju Lakshmi Venkayyamma Row* v. *Venkatadri Appa Raw* (3). Against this contention respondents' counsel cites the principle laid down in *Firm Sundar Das-Vir Bhon* v. *Firm Jassa Singh-Jiwan Singh* (4). This ruling does not appear to me to be relevant in the present circumstances where the sole question was whether a tree was joint property or was the property of the plaintiff.

I have no hesitation in accepting the contention that this appeal lies on the ground that the decision in favour of the respondents being based on a finding which is dead against the case set up by them is contrary to law.

The trial Court went most carefully into the evidence and its conclusions are I think correct for the reasons stated by it in detail. There is statutory presumption that the current revenue records are correct, a presumption which the lower appellate Court has apparently ignored. The records support the trial Court's finding as to the ownership of the tree found to be on the field No. 1153. I accept the appeal and deciding that the tree found by the trial Court to belong to the plaintiff does belong to him, remand the case for disposal to the lower appellate Court in accordance with the finding to which it may come on the question to what damages, if any, the plaintiff is entitled.

Appeal accepted.

(1) [1893] 20 Cal. 93=10 I. A. 228=6 Sar. 247 (P. C.).
(2) A. I. R. 1923 Lah. 497.
(3) [1921] 19 A. L. J. 97=59 I. C. 767=40 M. L. J. 144 (P. C.).
(4) A. I. R. 1926 Lah. 417.

A. I. R. 1926 Lahore 536

CAMPBELL, J.

Sultan—Accused—Petitioner.

v.

Mahtab Bibi—Complainant—Respondent.

Criminal Case No. 1943 of 1925, Decided on 5th March 1926, reported by the S. J., Sialkot, on 26th November 1925.

Criminal P. C., S. 488 — Husband ready maintain wife and children—Court must enquire as to the wife's unwillingness to live with husband —Minority of children is no ground for separate maintenance.

Where the husband is ready to keep the wife and children, the Court must enquire from the wife why she is unwilling to go and live with her husband and then decide the case according to law.

The minority of children is no reason for withholding them from their father, and therefore separate maintenance cannot be claimed for them. [P. 537, C. 1]

Grounds. — The petitioner's learned counsel contends that the order is bad in law because the Magistrate did not make any enquiry from the complainant as to why she was not willing to go and live with her husband when the latter was ready to receive her. He cites *Pandula Subbaya* v. *Pandula Ambamma* (1). In my opinion his contention is correct.

The complainant was no doubt examined on 11th June 1923 and she stated that her husband used to maltreat her

(1) [1909] 2 I. C. 155.

and she was turned out by him on the accusation that she was living in adultery with one Rakha. But this statement was no direct answer to the offer of the accused who was now ready to keep her. The omission of this enquiry on the part of the lower Court has, according to the ruling cited vitiated the proceedings. It is urged that as the husband has produced oral evidence to the effect that the woman lives in adultery with Rakha since a long time and has also produced a copy of register showing that he had proceeded against Rakha and others in the year 1919 under S. 498, I. P. C., it is now a sure indication of the fact that he is not pleased with her and will not be willing to keep her with him and that the woman is therefore entitled to receive maintenance. But this is not apparently the meaning of the husband. He says that if she comes to live with him, she would be saved from leading an unchaste life and that, if she persists in living apart, she is not entitled to maintenance as she is living in adultery. Moreover the complainant has not produced any evidence on the point of maltreatment. I therefore agree with the contention raised in revision. The learned Magistrate's finding should be quashed, I recommend, accordingly. As regards the maintenance of the two children of two and six years of age respectively also, the order is illegal. The husband is ready to keep them and it is no reason to withhold them from him that they are minors. see *Zaidullah* v. *Mandar* (2) ; *Duni Chand* v. *Muhammad Hussain* (3) ; *Pachoo Dass* v. *Sreemotee* (4) ; *Ralla* v. *Mt. Atti* (5).

Judgment.—There is no appearance on either side to-day. As recommended by the learned Sessions Judge I set aside the order.

Order set aside.

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(2) [1894] 18 P. R. 1894.
(3) [1917] 22 P. R. 1917=40 I. C. 220=14 P. W. R. 1917.
(4) [1871] 16 W. R. 72 Cr.
(5) [1914] 21 P. W. R. 1914 Cr.=115 P. L. R. 1914=24 I. C. 841=15 Cr. L. J. 529.

A. I. R. 1926 Lahore 537

JAI LAL, J.

Nand Lal—Defendant—Appellant.

v.

Baij Nath—Plaintiff—Respondent.

Miscellaneous Second Appeal No. 439 of 1926, Decided on 7th May 1926, from an order of the Addl. Dist. J., Lahore, D/- 19th January 1926.

Civil P. C., S. 151 — Remand under S. 151, should not be ordered when it can be ordered under another provision—Civil P. C., O. 41, R. 23.

It is not competent for a Court to remand a case under S. 151 when the case is clearly covered by another provision of the law under which a remand could be made. S. 151 only comes into operation in the absence of an express provision of the law governing the case before the Court and is to be used in exceptional cases. [P 538, C 1]

Charan Singh—for Appellant.

Jai Gopal Sethi—for Respondent.

Judgment.—The plaintiff and the defendant are owners of adjoining shops. The plaintiff instituted a suit against the defendant for an injunction restraining him from demolishing the wall between the two shops on the ground that it belonged exclusively to the plaintiff or, in the alternative, if the Court held that it belonged to the defendant then the plaintiff had a right of easement on it.

The first Court dismissed the suit finding against the plaintiff on both these allegations. The District Judge on appeal held that the plaintiff had failed to prove that he was the sole owner of the wall. He gave no definite finding as to the right of easement claimed by the plaintiff but seems to be inclined to differ from the trial Court. He, however, held that another question arose in the case, that is, whether the wall was the joint property of both plaintiff and the defendant as some evidence was given in the trial Court on this question. He, therefore, remanded the case to the trial Court for a fresh decision on the merits and ordered the Court fee stamp on the memorandum of appeal to be refunded.

The defendant is the appellant before me. It is rightly contended on his behalf that the case should not have been remanded under O. 41, R. 23, but that under the circumstances mentioned by the District Judge the remand should have been under O. 41, R. 25. It was also contended that the question of the joint ownership of the wall in suit did

not arise on the pleadings of the parties and, therefore, the District Judge was not justified in making any remand at all. The counsel for the respondents contends that the remand was under S. 151 of the Civil P. C., and that, therefore, no appeal lies to this Court. He cited authority in support of his contention that in the case of a remand under S. 151, of the Civil P. C., no appeal lies. He also cited authority in support of the prosecution that the Court is entitled to remand a case under S. 151, Civil P. C. With both of these propositions as broadly stated I have no concern. In my opinion it is not competent for a Court to remand a case under S. 151, when the case is clearly covered by another provision of the law under which a remand could be made. S. 151, only comes into operation in the absence of an express provision of the law governing the case before the Court and is to be used in exceptional cases.

Then the learned counsel contended that no appeal lies if the remand is under O. 41, R. 25 but then the remand in this case was not under that section but though no section of the Civil P. C. is quoted under which the remand was made, in substance the remand was under O. 41, R. 23, and from such a remand an appeal lies to this Court. I therefore, overrule these objections of the counsel for the respondent. I also hold that this was obviously a case for a remand under O. 41, R. 25.

As regards the contention of the Counsel for the appellant no question of the joint ownership of the wall arose in this case. I consider that, under all the circumstances of the case, the learned District Judge was entitled to call for a finding on the question. I do not wish to express my further opinion on this aspect of the case as it may prejudice the case of the parties before the lower Court.

I accept the appeal, set aside the order of the District Judge remanding the case to the trial Court under O. 41, R. 23, and direct the District Judge to make an order of remand under O. 41, R. 25.

The parties will bear their own costs of this appeal,

Case remanded.

A. I. R. 1926 Lahore 538

JAI LAL, J.

Firm Nanak Chand-Kalu Mal—Plaintiffs—Petitioners.

v.

Firm Gujar Mal-Kundan Lal and *others*—Defendants—Respondents,

Civil Revision Petition No. 714 of 1925, Decided on 8th May 1926, from the decree of the Senior Sub-J., Ambala, D/- 18th August 1925.

Civil P. C., S. 73—Application for execution must be made to Court holding assets.

Section 73 lays down as a condition precedent for rateable distribution of the assets realized that the application for execution should be made to the Court where assets are held. [P 539 C 1]

Jagan Nath Aggarwala — for Petitioners.

Badri Das—for Respondents.

Judgment.—This a petition for revision of an order passed by the Senior Subordinate Judge, First Class, of Ambala on the 18th August 1925. The respondent before me had three money-decrees against a judgment-debtor. He applied for execution of two of the decrees in the Court of the Subordinate Judge, Third Class, Ambala. He also applied for the execution of the third decree in the Court of the Subordinate Judge, Fourth Class, Jagadhri. It appears that the same property was attached in all the three decrees. The petitioner also had a decree against the judgment-debtor, which he executed in the Court of the Subordinate Judge, Fourth Class, Jagadhri, and attached the same property. The sale proceeds were received by the Subordinate Judge, Jagadhri, on the 6th August 1925. On the 2nd of August the respondent applied to the Subordinate Judge of Ambala under S. 63 of the Civil P. C., praying that the sale-proceeds of the property attached be received or realized by such Court, that is, the Court of the Subordinate Judge, Ambala, or that in the alternative the two applications for execution pending in his Court be sent to theSubordinate Judge of Jagadhri for a rateable share out of the sale proceeds being given to him. On the 6th August the Subordinate Judge of Ambala passed an order that the applications for execution be transferred to the Court of the Subordinate Judge, Jagadhri, for grant of a rateble share to

the respondent in respect of the decrees so transferred.

In the meanwhile the respondents had applied to the Subordinate Judge of Jagadhri on the 4th August 'that two of his applications for execution were pending in the Court of the Subordinate Judge, Ambala, and that he may be given rateable share in respect of those decrees. The Subordinate Judge of Jagadhari distributed the assets held by him among all the decree-holders including the respondent in respect of the decrees which were being executed in Ambala.

The present suit was instituted by the petitioner for a refund by the respondent of the amount received by him in respect of the two Ambala decrees. The suit has been dismissed by both the Courts below.

I am not prepared to agree with the reasoning of the Senior Subordinate Judge, who dismissed the petitioner's appeal that the respondent was entitled to a rateable share " as he applied for execution to the proper Court before the receipt of assets" as S. 73 lays down as a condition precedent for rateable distribution of assets realized that the application for execution should be made to the Court where assets are held. In this case the assets were held by the Subordinate Judge of Jagadhri, an application for execution to the Subordinate Judge, Ambala, did not, therefore, entitle the respondent to claim a rateable distribution is respect of the assets realized by the the sale of the property attached by the Subordinate Judge of Jagadhri. S. 63 of the Civil P. C., however, provides that if property is attached in execution of decrees by two different Courts then, the Court which shall realize and distribute the assets shall be the superior of the two Courts. The respondent pointed this out to both the Courts at Ambala and Jagadhri, but both failed to take action under S. 63. If the prayer of the respondent had been granted, and it should have been granted, then there is no doubt that the assets would have been distributed by the Ambala Court and in the manner in which they were distributed by the Court at Jagadhri.

Under these circumstances though, in my opinion, the order of the Subordinate Judge of Jagadhri giving a rateable share to the respondent was technically incorrect, I decline to set aside that order in exercise of my revisional jurisdiction. I dismiss this petition, but leave the parties to bear their own costs.

Petition dismissed.

A. I. R. 1926 Lahore 539

JAI LAL, J.

Sansar Chand — Defendant — Appellant.

v.

Mt. Shanti Devi—Plaintiff—Respondent.

Second Appeals Nos. 2661 and 2662 of 1925, Decided on 5th May 1926, from the decree of the Dist. J., Hoshiarpur, D/- 27th April 1925.

Hindu Law — Maintenance—Rate of maintenance fixed by decree or agreement may be changed if change of circumstances justifies it.

The amount of maintenance, whether it is fixed by decree or by agreement, is liable to be increased or disminished, if there has been such a change of circumstances as would justify a change in the rate. Thus the rate of maintenance may be enhanced,if the income or the estate has materially increased or there has been a material increase in the cost of living.

[P. 540 C. 1]

Badri Das—for Appellant.

Nand Lal—for Respondent.

Judgment—This judgment will dispose of Civil Appeals Nos. 2661 and 2662 of 1925. One Hira Nand of Bajwara, District Hoshiarpur, made a gift of his entire property for the benefit of a High School. The appellant Rai Bahadur Lala Sansar Chand was to administer and carry out the trust. Hira Nand left a widow and a daughter and apparently made no provision for their maintenance. In 1910. Mt. Tej Kaur, his widow, brought a suit againsi Rai Bahadur Lala Sansar Chand for possession of the property left by her husband. The dispute was referred to the arbitration of Lala Hans Raj, who made an award that the widow should get a monthly maintenance of Rs. 10 and that Rs. 300 be deposited in a bank for the 'marriage expenses of the daughter Mt. Shanti Devi. The other provisions in the award are not relevant for the purpose of this case. A suit was instituted by Mt. Tej Kaur for increase of her monthly maintenance of Rs. 10 to Rs. 30.

It appears that a house was also assigned to her by the award for the purpose of her residence, but it has since been sold in execution of a decree passed against the estate of the deceased, so it is alleged by the widow. Another suit was brought by Mt. Shanti Devi for maintenance and increase of the amount fixed for her marriage expenses. We are concerned in this appeal only with the question of the marriage expenses. The District Judge had increased the amount of maintenance of the widow to Rs. 15 per month on the ground that the cost of living has substantially increased since 1911 when the monthly maintenance was fixed at Rs. 10. He has increased the amount fixed for the marriage expenses of the daughter to Rs. 800. It was conceded before the District Judge that the award which was incorporated in the decree was no bar to the present suit. Before me it was half-heartedly contended that the present suit did not lie in view of the former decree, but no authority was cited in support of the contention. In paragragh 474 of the Principles of Hindu Law by D. F. Mulla, the law is stated as follows :

> The amount of maintenance, whether it is fixed by decree or by agreement, is liable to be increased or disminished, if there has been such a change of circumstances as would justify a change in the rate. Thus the rate of maintenance may be enhanced. if the income of the estate has materially increased or there has been a material increase in the cost of living.

The same view is expressed in S. 88 of Gour's Hindu Code. This view is supported by judicial decisions. I hold, therefore, that the award and the decree of 1911 are no bar to the present suit. The finding of the District Judge that her cost of living has increased is based on evidenee and is obviously correct. Rs. 15 a month fixed by him include compensation for loss of the right of residence in the house assigned to the widow for the residence. I see no ground to interfere with the decree of the District Judge so far as the appeal against Mt, Tej Kaur, the widow, is concerned.

In the case of the suit by the daughter however, different considerations arise. I understand she has already been married. Rs. 300 fixed as reasonable expenses of her marriage ceremony was invested in a bank by the appellant. With the accumulation of interest, it now amounts to Rs. 500 or Rs. 600. No authority has been cited in support of the view of the District Judge that it is permissible to increase the amount fixed for the marriage expenses of the daughter under the circumstances of this case. I hold that there was no legal justification for increasing this amount.

I accept appeal No. 2661 and dismiss the suit of Mt. Shanti Devi so far as the prayer for increase of marriage expenses is concerned. No arguments were addressed to me as regards the decree granting her maintenance. The parties will bear their own costs throughout. I dismiss Appeal No. 2662 and leave the parties to bear their own costs throughout. Rai Bahadur Lal Sansar Chand will be entitled to recover his expenses from the gifted property.

Appeal No. 2661 *accepted and*
No. 2662 *dismissed.*

A. I. R. 1926 Lahore 540

JAI LAL, J.

Kishori Lal and *others*—Defendants—Applicants.

v.

Tilak Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 2755 of 1925, Decided on 12th April 1926, from a decree of the Dist. J., Ludhiana, D/- 15th July 1925.

(a) *Civil P. C., O. 41, R. 1—Copy of decree in cross appeal is not necessary.*

For a proper presentation of an appeal, it is not necessary to file a copy of decree in cross appeal in the lower appellate Court; *Lah. App 2425 of 1925, Foll.* [P. 541, C. 1

(b) *Registration Act, S. 17—Partition deed.*

A partition was effected between the parties and a deed drawn up under which plaintiff was to get a certain share in a house. Plaintiff not having got possession of the house sued to recover possession and relied upon the partition deed. The deed was not registered.

Held: that the deed was an instrument of partition and not record of already eompleted partition and thus required registration : 35 *P. R.* 1916, *Rel. on.* [P. 541, C. 2]

N. C. Pandit—for Appellants.

Fakir Chand—for Respondents.

Judgment.—A preliminary objection was raised on behalf of the respondents that this appeal was barred by limitation and had not been properly presented as the copy of the decree of the appel-

late court in the cross appeal had not been filed. This objection is concluded by a judgment in Civil Appeal No. 2425 of 1925, *Imam Din* v. *Lekh Ram*, decided by a Division Bench of this Court on the 18th February 1926, and is consequently overruled. The plaintiff instituted a suit to recover Rs. 200 as damages and possession of a portion of a house which he alleged fell to his share in a private partition effected in 1920. It was alleged by him that arbitrators were appointed to effect a partition; that after the partition had been completely effected a document was written which was signed by the parties and provided that the plaintiff would pay Rs. 120 to the defendant as compensation for having been allotted a larger share in the house. The document further provided that whichever party failed to keep his part of the contract would pay Rs. 200 as damages to the other. An objection was raised that the document in suit was an instrument of partition and as such required registration. The trial Court held that the document recorded a partition that had already been completed and that it did not, therefore, require registration. It was also held that the plaintiff had not paid Rs. 120 which he should have done. The Court, therefore, decreed the plaintiff's suit for possession of the share allotted to him at the partition on condition of the payment of Rs. 120 to the defendant. The suit as regards damages was dismissed.

Both parties appealed to the District Judge who agreed with the conclusions of the trial Court and dismissed the appeals. This is an appeal by the defendant and it is contended on his behalf that the document on which reliance was placed by the plaintiff created an interest in immovable property of the value more than Rs. 100 and, therefore, required registration. A number of authorities were cited on both sides. I do not propose to notice them in detail because, in my opinion, the case is concluded by *Jat Mal* v. *Beli Ram* (1). On the allegations of the plaintiff possession of the property allotted to him at the partition was not actually given to him. The District Judge has held that the plaintiff did not pay to the Defendant Rs. 120 which he was bound to pay jn order to complete the partition It is difficult under the circumstances to understand how the document in suit can be interpreted as a record of an already completed partition.

In my opinion the document in suit was compulsorily registrable and, therefore, was inadmissible in evidence and no oral evidence could be given of the alleged partition. This appeal, therefore, must be accepted and the plaintiff's suit dismissed with costs throughout. I order accordingly.

Appeal accepted.

(1) [1916] 35 P. R. 1916=33 I. C. 948=52 P. W. R. 1916.

A. I. R. 1926 Lahore 541

JAI LAL, J.

Lachman Das—Plaintiff—Petitioner.

v.

Ramji Das—Defendant—Respondent.

Civil Revision No. 571 of 1925, Decided on 7th May 1926, from an order of the Addl. Dist. J., Hoshiarpur, D/- 30th April 1925.

(a) *Civil P. C., O. 9, R. 9—Illness of plaintiff can be a sufficient cause.*

Where plaintiff could not attend Court, being indoor patient in a dispensary.

Held: that there was sufficient cause for his non-attendance. [P. 542, C. 1]

(b) *Civil P. C., S. 100—Misreading of evidence.*

Judgment of lower appellate Court based on misreading of evidence is liable to be set aside in second appeal, [P. 542, C. 1]

Sunder Das—for Petitioner.

H. J. Rustomji—for Respondent.

Judgment.—The plaintiff's suit was dismissed for default. An application for restoration made by him was dismissed and so was his appeal to the District Judge. The reason given by plaintiff for his absence was that he was suffering from dysentery and was an indoor patient in the Nurpur dispensary just before the dismissal of the suit and that the interval between his discharge and the date of the hearing was not sufficient to enable him to attend the Court and that in any case after discharge he was not in a fit condition to travel. He produced a medical certificate which has not been duly proved. The compounder, however, appeared as a witness and supported the plaintiff,

but could not specify the disease with which he was suffering.

The District Judge has dismissed the appeal on an erroneous assumption that the plaintiff did not go into the witness box to prove his inability to make a journey or the certificate which was obtained by him. A reference to the record shows that the plaintiff did go into the witness-box and deposed to his inability to attend the Court owing to illness. The judgment of the District Judge is, therefore, based on a misreading of the evidence on record and must, therefore, be set aside.

I hold that the plaintiff has proved that he had a sufficient cause for not appearing on the date of the hearing. I accept this petition and set aside the dismissal of the plaintiff's suit and order the trial Court to restore the plaintiff's suit to its original number and proceed with it according to law. Parties to bear their own costs of proceedings.

Petition accepted.

A. I, R. 1926 Lahore 542 (1)

ADDISON, J.

Karam Chand and *others*—Plaintiffs—Appellants.

v.

Karam Singh and *others*—Defendants—Respondents.

Second Appeal No. 532 of 1925, Decided on 10th December 1925, from the decree of the Dist. J., Jhelum D/- 4th December 1924.

Civil P. C., S.100—Whether a place is a town or a village is a question of fact.

Whether a particular place is a town or a village is a question of fact and cannot be considered in second appeal (*Case Law referred*). [P 542 C 2]

Amar Nath Chona—for Appellants.

M. L. Puri—for Respondents.

Judgment.—A preliminary objection has been taken that the finding of the learned District Judge that Sanghoi is not a town but a village, is a question of fact which cannot be raised in second appeal. It was laid down in *Mahmud* v. *Jumma* (1) that it was most doubtful that the question whether a place was a town or a village could be raised on second appeal. This was followed in *Diwan Chand* v. *Nizam Din* (2). There the question was whether the land was urban immovable property or village immovable property, so that it had to be decided whether the place was a town or a village. The learned Judge who decided that case followed the Division Bench ruling. *Mahmud* v. *Jumma* (1). In *Mansa Ram* v *Joti* (3) it was held that the question whether the place was a town or a village was a question of law. The attention of the Judge, who decided this case, however, was not directed to the remarks in *Mahmud* v. *Jumma* (1). It seems to me that the question is clearly one of fact and that the authorities are on the whole in favour of this view. I hold, therefore, that this question cannot be raised in second appeal.

No other point was argued and it was admitted that this was the only possible point that could be taken in the appeal I accordingly dismiss it with costs.

Appeal dismissed.

(1) [1919] 23 P. R. 1916=54 I. C. 646.

(2) A. I. R. 1923 Lah. 449.

(3) [1921] 62 I. C. 808.

A. I. R. 1926 Lahore 542 (2)

SHADI LAL, C. J., AND COLDSTREAM, J.

Bur Singh—Defendant—Appellant.

v.

Firm Jodha Ram-Hannu Ram—Plaintiff—Respondent.

Second Appeal No. 1383 of 1922, Decided on 4th May 1926, from a decree of the Dist. J., Lyallpur, D/- 23rd February 1922.

(a) *Limitation Act, S. 5—Affidavit to account for delay should be filed with memo. of appeal.*

According to the rules framed by the Lahore High Court, an affidavit to account for the delay should be filed along with the memorandum of appeal. [P. 543, C. 1]

(b) *Limitation Act, S. 5—Discretion—Exercise of, by lower appellate Court cannot be interfered with by High Court.*

The Court of second appeal cannot consider the sufficiency or otherwise of the reasons given by the lower appellate Court for declining to exercise his discretion under S. 5. [P. 543, C. 1]

Ram Chand Manchanda—for Appellant.

Judgment.—The appeal preferred by the defendant, Bur Singh, to the District Judge was admittedly barred by time, and no affidavit showing sufficient cause

for not presenting the appeal within the prescribed period of limitation was filed in the District Court. The learned Judge consequently held that there was no ground for extending the period of limitation. An affidavit has been filed in this Court in support of the allegation that, though the copies of the judgment and decrees were ready for delivery on the 23rd December 1921, they were not actually delivered to the appellant until the 4th January 1922 and we are asked to act upon this affidavit and to interfere with the judgment of the District Judge.

The learned counsel for the appellant admits, that according to the rules framed by this Court, an affidavit to account for the delay should have been filed along with the memorandum of appeal, and it is clear that upon the materials before him the learned District Judge was justified in declining to extend the period of limitation. The Court of second appeal cannot consider the sufficiency or otherwise of the reasons given by the learned Judge for declining to exercise his discretion under S. 5 of the Indian Limitation Act.

The appeal is accordingly dismissed.

Appeal dismissed.

A. I. R. 1926 Lahore 543

CAMPBELL, J.

Kanshi Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 657 of 1926, Decided on 29th April 1926, reported by the S. J., Karnal, on 19th April 1926.

Criminal P.C., S. 423—Enhancement—What is.

Where the accused was insolvent and unable to pay the fine imposed and the original sentence was for two months' rigorous imprisonment and Rs. 50 fine, or in default one month's rigorous imprisonment, and it was altered in appeal to one of rigorous imprisonment for six weeks and a fine of Rs. 200 or in default six weeks' further rigorous imprisonment

Held: that it amounted to enhancement of sentence. 7 *P. R.* 1915 *Cr., Appl.* [P. 543, C. 2]

Report.—In the execution of a decree obtained by one Sada against Kanshi Ram 80 maunds of gram belonging to Kanshi Ram was attached and placed in the custody of one Nathu Brahman. At that time Kanshi Ram was away from his house and his wife begged that the attached gram might be left where it was in the kotha until the return of Kanshi Ram. Her request was complied with and the room containing the gram locked and the key entrusted to Nathu. In the absence of Nathu, Kanshi Ram (the judgment-debtor), with the help of his brother Suraj Mal secretly carried away the gram from the locked kotha to the shop of Suraj Mal. This happened apparently on the 31st of July 1925. Immediately Nathu was informed of this and he reported the matter to the Police Station.

Both Suraj Mal and Kanshi Ram were challaned and sentenced to two months' rigorous imprisonment and Rs. 50 fine or in default one month's rigorous imprisonment under S. 454, Indian Penal Code, by Nawab Muhammad Sajjad Ali Khan, Magistrate, Second Class, Karnal, on 6th February 1926.

They filed an appeal against the above order to the Court of the District Magistrate, Karnal, who acquitted Suraj Mal, but confirmed the conviction of Kanshi Ram and altered the sentence to one of rigorous imprisonment for six weeks and a fine of Rs. 200 or in default six weeks' further rigorous imprisonment.

Now Kanshi Ram has filed an application for revision of the order of the District Magistrate, Karnal, dated 16th March 1926.

I see no reason to differ from the lower Court as to the facts of the case. The conviction is, therefore, right. But the alteration of the sentence by the District Magistrate amounts to enhancement of the sentence, because the applicant is an insolvent and cannot pay the fine, see *Kirpa Ram* v. *Emperor* (1). The alteration, therefore, means that while the original sentence was practically three months and Rs. 50 fine the altered sentence is equal to three months and Rs. 200 fine. The case is, therefore submtited to the High Court for revision of the sentence and restoration of the first Court's sentence.

Order.—According to the recommendation of the Sessions Judge I set aside the sentence imposed on Kanshi Ram by the District Magistrate and restore that of the trial Magistrate.

Sentence altered.

(1) [1916] 7 P. R. 1915 Cr.=30 I. C. 155=26 P. L. R. 1916.

* A. I. R. 1926 Lahore 544 (1)

JAI LAL, J.

Jai Chand — Decree-holder— Petitioner.

v.

Chiragh Din and *another*—Judgment-debtors—Respondents.

Civil Revision Petition No 13 of 1926, Decided on 13th May 1926, from an order of the Small Cause Court, J., Amritsar, D/- 9th November 1925.

* *Execution—Fresh application likely to be barred under Civil P. C., S. 48—Court should allow decree-holder to exhaust all lawful means for realizing his decree before dismissing pending application.*

Where the decree-holder is debarred from executing his decree in the future because any further applicatfon for execution would be barred by time under S. 48, Civil P. C., the Court should allow the decree-holder to exhaust all lawful means of realising his decree before finally dismissing the application for execution pending before it. [P 544 C 1]

L. C. Mehra—for Petitioner.

Judgment.—A money decree was passed on the 4th March 1913. A portion of the amount decreed has already been realized by the decree-holder and the last application for execution of the decree was made by him on the 17th March 1924. The prayer was to arrest the judgment-debtor. On the 9th November 1925 the Judge, Small Cause Court, dismissed the petition on the ground that the judgment-debtor had not been arrested and it was useless, in his opinion, to take any further proceedings.

This petition for revision has been presented by the decree-holder and it is represented on his behalf that the result of the dismissal of his application by the learned Judge is that he is debarred from executing his decree in the future because any further application for execution would be barred by time under S. 48 of the Civil P. C. The learned Judge of the lower Court did not consider this point when dismissing the application for execution. Under all the circumstances the lower Court should have allowed the decree-holder to exhaust all lawful means of realizing his decree before finally dismissing the present application for execution. I accept this petition, set aside the order of the Judge, Small Cause Court, and direct him to proceed with the execution of the decree in accordance with law.

Order set aside.

A. I. R. 1926 Lahore 544 (2)

MARTINEAU, J.

Faqir Singh—Decree-holder — Appellant.

v.

Ganda Mal and *another* — Judgment-debtors—Respondents.

Miscellaneous Second Appeal No. 2632 of 1925, Decided on 27th April 1926, from an order of the Dist. J., Lahore, D/- 13th July 1925.

Civil P. C., S. 145—Section does not deal with refund of deposit of surety.

S. 145 deals only with the execution of a decree or order against a surety and not with the question of a refund of money deposited by a surety. [P 544 C 2]

Jagan Nath Aggarwal—for Appellant.

D. S. Chand—for Respondents.

Judgment.—Ganda Mal executed a security bond by which he undertook to produce the judgment-debtor in Court, and also deposited Rs. 100. The decree-holder and judgment-debtor afterwards compromised. Ganda Mal applied for the return of the Rs. 100. His application was rejected on the ground that it did not lie under S. 145, Civil P. C.; but he applied again, and the Court, holding that the application was maintainable under S. 151, Civil P. C., and that a mistake of law had been made, set aside its first order and re-opened the matter. An appeal by the decree-holder to the District Judge was dismissed, and he has presented a second appeal to this Court.

It is objected for the respondent that a second appeal does not lie, and this objection appears to be correct. Counsel for the appellant contends that the order of the first Court granting the second application of Ganda Mal was one passed under S. 145 of the Civil P. C., but that section deals only with the execution of a decree or order against a surety, whereas the question involved here is that of a refund of money deposited by a surety. S. 145 does not, in my opinion, apply. The order of the first Court apparently passed, as it purported to be passed; I hold that this appeal does not lie. There is also no ground for interfering in revision as no final order has yet been passed on Ganda Mal's application, but the question whether the money should be refunded to him has yet to be disposed of.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 545 (1)

JAI LAL, J.

Budha Singh—Plaintiff—Appellant.

v.

Sant Singh and *others*—Defendants—Respondents.

Second Appeal No. 1358 of 1925, Decided on 7th April 1926, from the decree of the Dist. J., Gurdaspur, D/- 13th February 1925.

Civil P. C., O. 1, R. 1—Ejectment suit to eject trespasser from village abadi—Single proprietor can maintain the suit—Decree enures to the benefit of all proprietors.

A single proprietor is entitled to maintain a suit for ejectment against a trespasser on the village abadi who is not a proprietor. The decree given in favour of one of the proprietors under such instances would be for the benefit of the entire body of the proprietors. [P 545 C 2]

Mehr Chand Mahajan—for Appellant.

Jagan Nath Bhandari—for Respondents.

Judgment.—The suit out of which this second appeal has arisen was instituted by the plaintiff for the ejectment of the defendants from a house which he had purchased from a kamin in the village. The plaintiff alleged in the plaint that the house was situate in Patti Nand Lal and that he and two others, who were impleaded as pro forma defendants, were the proprietors of that patti. The sale being by a kamin was alleged to be invalid.

The trial Court decreed the suit, but the learned District Judge has dismissed it on the ground that the house in suit was not situated in Patti Nand Lal but in the village Harpura of which Patti Nand Lal is a part. He held, therefore, that the village abadi in which the house was situated was shamilat deh and that the village site is not divided into tarafs. He considered, therefore, necessary for every proprietor in the village to join in the suit. He further held that as the plaintiff has asserted in the first instance that he was one of the three proprietors in Patti Nand Lal who owned the house no decree could be granted in his favour.

On appeal by the plaintiff it is contended that the view of the learned District Judge as to the competency of the plaintiff to maintain this suit is erroneous. It was argued that assuming that the house in suit was situated in shamilat deh, the plaintiff, as one of the proprietors in the village, was entitled to maintain a suit for the ejectment of a trespasser. On page 347 of Rattigan's Digest of Customary Law, 10th Edition, the following remark is made:

In the case of wrongful appropriation of a portion of the common land by a single proprietor it is not necessary that all the remaining proprietors should join in a suit to oust the defendant. Any one of the proprietors would be entitled to maintain a suit.

This remark is supported by authorities which are cited there. A fortiori a single proprietor would be entitled to maintain a suit for ejectment against a trespasser who is not a proprietor.

The decree given in favour of one of the proprietors under such instances would be for the benefit of the entire body of the proprietors. It is not asserted that the plaintiff deliberately set up a claim in order to deprive the other co-proprietors of their interest in the land. If such a course was necessary the plaintiff could have been permitted to amend his plaint so as to state that the house in suit was situated in village Harpura.

The view of the trial Court that the plaintiff had a right to sue even if the village had not been divided into partis because any one of the proprietors can bring a suit for ejectment against a trespasser is correct, and accepting this appeal I set aside the decree of the District Judge and restore that of the Subordinate Judge with costs against the respondents throughout.

Decree set aside.

Advocate High Court
Jammu & Kashmir

A. I. R. 1926 Lahore 545 (2)

SHADI LAL, C. J., AND COLDSTREAM, J.

Maula Dad—Defendant—Appellant.

v.

Mt. Fateh Bibi—Plaintiff—Respondent.

Second Appeal No. 1437 of 1922, Decided on 7th May 1926, from the decree of the Dist. J., Gujranwala, D/- 20th March 1922.

Mahomedan Law—Marriage—Girl married before puberty—Option of puberty continues till wife knows of the fact of her marriage.

In the absence of consummation of her marriage the right of a wife, given in marriage by her mother before she attained the age of puberty, to repudiate her marriage continues

until she is acquainted with the fact that she has been married: *A. I. R.* 1923 *Lah.* 502, *Foll.* [P 546 C 2]

Khalifa Shuja-ud-Din—for Appellant.

Shamair Chand—for Respondent.

Judgment.—Mt. Fateh Bibi, the plaintiff in the case out of which the appeal arises, was married on the 21st February 1911, when she was about six years old, to Maula Dad. Her father was dead and she was given in marriage by her mother. On the 9th March 1921 she instituted a suit against her husband alleging that she had exercised her option of repudiating the marriage after attaining the age of puberty and had renounced Islam and praying for a declaration that she was not his legal wife. The Subordinate Judge held that Mt. Fateh Bibi was competent to exercise the option of repudiation, that she had become a Christian and that her apostasy had the effect of dissolving her marriage with Maula Dad. He decreed the suit accordingly. On appeal the District Judge agreed with both the findings on which the suit had been decreed and confirmed the decree.

The defendant Maula Dad has now appealed to this Court, urging that a new case had been made out on behalf of the plaintiff by the District Judge, that according to her own evidence the plaintiff was debarred from exercising her option of repudiating her marriage and that the District Judge's finding that apostasy dissolved the marriage was erroneous in law.

The second issue, which was whether the plaintiff was competent to exercise her option on attaining puberty, covered all questions of law arising in connexion with this point. On behalf of the appellant Dr. Shuja-ud-Din has argued that the literal and strict application of the Muhammadan Law as set forth in the ancient texts and repeated by authorities such as Amir Ali and Wilson requires that the option claimed to have been exercised must be exercised if it is to be operative immediately on attaining puberty. In support of his contention that expediency or policy must not be allowed to interfere with the strict administration of the law by which the parties to a suit are governed he cites *Kullan* v. *Mt. Piari* (1) and he supports his statement as to the law by reference to *Bakhsha* v. *Mirbaz* (2).

For the respondent Mr. Shamair Chand has referred us to rulings of this Court published as *Hussaina* v. *Mt. Jivani* (3), *Khanoo* v. *Mt. Bhag Bhari* (4); *Sultan* v. *Waryam* (5); and the Allahabad ruling *Mt. Bismillah Begam* v. *Nur Muhammad* (6). The first two of the rulings referred to by Mr. Shamair Chand show that recent decisions of this Court are to the effect that in this Province the question in all these cases is: 'Has the plaintiff acquiesced.' We do not, however think it necessary to discuss the soundness or otherwise of this principle in view of the admission before us by the appellant's learned counsel of the correctness of the principle followed in *Sultan* v. *Waryam* (5) that in the absence of consummation of her marriage the right of a wife, given in marriage by her mother before she attained the age of puberty, to repudiate her marriage continues until she is acquainted with the fact that she has been married. In the present case there was no consummation and in the circumstances proved by the evidence we think that the District Judge was justified in finding that Mt. Fateh Bibi did not know that she had been married until shortly before she brought her suit. It becomes unnecessary to decide the question how soon after the appearance of the signs of puberty the wife's option must be exercised. We may, however, remark that Dr. Shuja-ud-Din has not been able to cite any rulings of this Court to the effect that in the absence of consummation or acquiescence a wife loses her right of exercising her option by delay after the appearance of her puberty. We are not prepared in the circumstances of this case to interfere with the decree obtained by Mt. Fateh Bibi and we dismiss the appeal with costs.

Appeal dismissed.

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(1) [1879] 157 P. R. 1879.

(2) [1888] 51 P. R. 1888.
(3) A. I. R. 1924 Lah. 385.
(4) A. I. R. 1925 Lah. 66.
(5) A. I. R. 1923 Lah. 502.
(6) [1921] 19 A. L. J. 845=63 I. C. 702.

A. I. R. 1926 Lahore 547 (1)

ADDISON, J.

Ahmad Yar—Judgment-debtor—Appellant.

v.

Co-operative Credit Society — Decree-holder—Respondent.

Misc. Second Appeal No. 272 of 1926, Decided on 22nd May 1926, from the order of the Dist. J., Lyallpur, D/- 26th October 1925.

(a) *Civil P. C., S.* 104—*Order refusing to execute award under Co-operative Societies Act is appealable.*

An order refusing o execute an award under the Co-operative Societies Act holding that it was a mere nullity is appealable : *A, I. R.* 1924 *Cal.* 117 ; *A. I. R.* 1924 *Lah.* 544 and *A.I.R.* 1922 *Bom.* 377 (2), *Rel. on.* [P 547 C 1]

(b) *Execution — Decree binding — Executing Court cannot question validity of award under Co-operative Societies Act.*

A Court executing an award under the Co-operative Societies Act has no power to do anything except to execute the award as if it were a decree of the executing Court : *S. A. No.* 695 *of* 1923, *Foll.* [P 547 C 1]

Barkat Ali—for Appellant.

Badri Das—for Respondents.

Judgment.—An award under the Co-operative Societies Act was filed in the Court of the Subordinate Judge, 2nd Class, Lyallpur. He refused to execute it holding that it was a mere nullity. On appeal the learned District Judge held that the executing Court had no power except to execute the award as if it were a decree of the Court. The appeal was accepted and the Subordinate Judge, 2nd Class, was directed to execute the award in the manner in which a decree is executed without going into the validity thereof. Against this decision this seoond appeal has been filed.

It was admitted before me that the decision of this Court in Second Appeal No. 695 of 1923, which was followed by the learned District Judge, concludes the question whether the executing Court could refuse to execute the award. It was held there that it had no power to do anything except to execute the award as if it were a decree of the executing Court. With this finding I am in entire agreement. It follows from R. 18 (h) of the rules framed under S. 43 (1) of the Act. This rule lays down that an award shall on application to any civil Court having jurisdiction in the area in which the society operates be enforced in the same manner as a decree of such Court.

It was argued, however, that no appeal lay to the District Judge, because it was not a decree under the Civil Procedure Code, but a special sort of decree provided by the Co-operative Societies Act. But the words of R. 18 (h) are very clear. The decision has to be enforced by the executing Court as a decree of such Court. That means that the whole of the Civil Procedure Code applies and that an appeal lay to the District Judge.

There is ample authority for this proposition. It was held by the Calcutta High Court in *Gladstone Wyllie* v. *Joosub Peer* (1) that inasmuch as under S. 15 of the Arbitration Act an award when filed is enforceable as a decree (just as is the case under the Co-operative Societies Act) all the provisions of the Code of Civil Procedure applicable to the execution of decrees applied to an award so filed. The same view was taken by this Court in *Pokhardas* v. *Radha Kishen* (2). Moreover, in *Krishnaji Sridhar Barde* v. *Mahadeo Sakharam* (A. I. R. 1922) Bom. 377 (2) it was held that a Court which has power to execute an award under R. 34 framed under S. 43 of the Bombay Co-operative Credit Societies Act has the power to transfer it for execution. This means that it was held by the Bombay High Court that all the provisions of the Civil Procedure Code applied in the execution of such an award as a decree of the Court executing it : see also *Sital Prasad* v. *Messrs. Clement Robson* (4).

The decision of the District Judge was correct and I dismiss the appeal with costs.

Appeal dismisssd.

(1) A.I.R. 1924 Cal. 117.
(2) A.I.R. 1924 Lah. 544.
(3) [1921] 43 All. 394.

A. I. R. 1926 Lahore 547 (2)

CAMPBELL, J.

Khem Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 197 of 1924, Decided on 10th May 1926, from an order of S. J., Rawalpindi, D/- 2nd January 1926.

Penal Code, S. 366—*Consent of girl makes no difference to offence but has bearing on sentence.*

In a case under S. 366 the consent of the girl makes no difference to the offence but it has a bearing on the sentence when she is not altogether a child, although legally a minor. [P 548 C 1]

Abdul Ghani for *Aziz Ahmad*—for Petitioner.

Ram Lal—for Opposite Party.

Judgment.—The question in this revision is the sentence of four years' rigorous imprisonment imposed upon the petitioner for an offence under S. 366, Indian Penal Code. It is pleaded on his behalf that the sentence is excessive. The facts found by the lower appellate Court are these:

The female in question is Mt. Vidya Wanti, the daughter of Mulk Raj Sub-Postmaster at Ghora Galli. She was born on the 8th February 1910 and was abducted by the petitioner on the 19th March 1925. The petitioner was post-man under Mulk Raj. The petitioner induced Mt. Vidya Wanti to run away with him from her father's house by making tempting offers, but the girl was a willing party to the elopement and on various occasions thereafter when she could have complained of her abduction, she did not do so. Intimacy between the petitioner and the girl commenced before the elopement and the parents of the girl were lax in allowing opportunity for this intimacy to occur.

The question of sentence in such cases is always a difficult one. The learned Sessions Judge has been impressed with the disgrace inflicted upon the parents and by the ruin of the girl's matrimonial prospects resulting from the occurrence. The consent of the girl makes no difference to the offence but it has a bearing on the sentence since she was not altogether a child, although legally a minor. The fact too that intimacy commenced before the abduction is also one to be taken into consideration, for the inference must be in the circumstances that the girl was a consenting party to the start of the intrigue and that she was not ignorant of what she was doing.

In my opinion a sentence of 18 months' rigorous imprisonment is sufficient and I accept the petition and reduce the sentence accordingly.

Petition accepted.

A. I. R. 1926 Lahore 548

CAMPBELL, J.

Firm Bulaki Ram-Amar Nath—Defendant No. 1 —Appellant.

v.

Bhagat Ram and *others*—Plaintiff and Defendant No. 2 —Respondents.

Second Appeal No. 3078 of 1925, Decided on 29th April 1926, from a decree of the Addl. Dist. J., Lahore, D/- 14th October 1925.

Evidence Act (I. of 1872), S. 23—Admission before person asked to settle dispute is ordinarily admissible.

Admissions to a person to whom the parties went for compromise are not inadmissible in evidence unless there was an express agreement that the evidence of the statements was not to be given. [P 548 C 2]

Narinjan Das—for Appellant.

Mehar Chand—for Respondents.

Judgment.—The lower Appellate Court has held that 35 maunds of cotton was sold by the plaintiff to Defendant No. 1 on the guarantee of Defendant No. 2 who is the dharwai of the plaintiff's village, and has given a decree for Rs. 700 the price of that cotton against both defendants. Defendant No. 1 has come to this Court on second appeal.

There is no force in the contention that the lower appellate Court's finding of fact is not based on evidence. The other point urged is that the evidence of a certain witness, Sardar Bahal Singh of Raja Jang, which is given prominence in the lower appellate Court's judgment is inadmissible in evidence under S. 23 of the Indian Evidence Act. This witness related statements made by the defendants on an occasion when they and the plaintiff came to him for purpose of having their dispute settled. The objection of inadmissibility was not taken in either Court below and there is no evidence of any express condition that evidence of the statements was not to be given. It is now contended before me that there were circumstances from which the Court could infer that the parties agreed together that evidence should not be given. Assuming that the present objection can properly be taken in second appeal, there is nothing on the record to indicate such circumstances. In fact the contrary is indicated, because

the appellant himself entered the witness-box after Sardar Bahal Singh had been examined and while, he mentioned a panchayat held at Sardar Bahal Singh's house, he said nothing about the proceedings being confidential.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 549

BROADWAY AND FFORDE, JJ.

Jiwan Singh and *another*—Defendants—Appellants.

v.

Ghasita and *others*—Plaintiff—Defendants—Respondents.

Second Appeal No. 1247 of 1922, Decided on 8th April 1926, from a decree of the Dist. J., Hoshiarpur, D/- 4th March 1922.

(a) *Civil P. C., O. 2, R. 2—Landlord taking possession of tenant's land after his death—Some land remaining with mortgagee of tenant—Suit by tenant's heirs for possession against landlord—Subsequent suit by the heirs against mortgagee for redemption is not barred.*

A mortgaged a part of his land. On his death the whole of his land was taken possession of by landlord claiming that the same escheated to him. Mortgagee remained in possession of the land mortgaged to him. *A's* heirs sued landlord for possession and got it. Subsequently they sued mortgagee for redemption.

Held: their suit was not barred by O. 2, R. 2. [P 549 C 2]

(b) *Adverse possession—Mortgagor and mortgagee — Assertion of title by mortgagee is not sufficient.*

A mortgagee cannot by mere assertion of title start possession adverse to the mortgagor or the mortgagor's heirs: 32 *Cal.* 296 (*P. C.*) and 89 *P. W. R.* 1918, *Dist.* [P 550 C 1]

Badri Das—for Appellants.

Mehar Chand Mahajan and *Faqir Chand*—for Respondents.

Broadway, J.—One Waryama was the owner of certain land. He died without issue in 1906. Ten kanals of his land had been mortgaged by a mortgage-deed dated the 29th June 1899 for Rs. 700 in favour of Jiwan Singh and others. On Waryama's death, in 1906, the proprietary body claimed that the land had escheated to them and took possession of the entire holding. The mortgagees, however, continued as mortgagees in possession of the ten kanals mortgaged to them. Ghasita and others, claiming to be the heirs of Waryama, instituted a suit on the 30th of December 1906 against the village proprietary body as such. Mutation was effected in favour of the proprietary body on the 14th June 1906. The trial of that suit ended in favour of the plaintiffs who were accorded a decree for possession as heirs of Waryama. In that suit the ten kanals held by Jiwan Singh, etc., as mortgagees, were not included. The mortgage was with possession for a term of 17 years which had still something like ten years to run at the date of that suit.

In 1919 Ghasita and others instituted the present suit against the mortgagees, and the other proprietors of the village as pro forma defendants, for possession of the ten kanals of land by redemption. The mortgagees pleaded that the suit was barred by the provisions of O. 2, R. 2, Civil P. C., and further that they had held possession of this mortgaged land for a period of over 12 years and were, therefore, entitled to remain in possession as owners. The learned District Judge held that the suit was not barred by O. 2, R. 2, Civil P. C., and that the mortgagees' possession was adverse only qua their own share in the mortgaged property which amounted to something like 7 marlas. Accordingly the plaintiffs were granted a decree for possession by redemption of all but that share (amounting to 7 marlas) on payment of a proportionate sum, namely Rs. 676. Against this decree the defendants-mortgagees have come up to this Court in second appeal through Mr. Badri Das, while the plaintiffs have filed a cross-appeal through Mr. Fakir Chand claiming that they were entitled to redeem the entire property on payment of the full amount.

So far as the applicability of O, 2, R. 2, Civil P. C., is concerned, in my opinion the view taken by the learned District Judge is correct. The proprietary body were not in possession of the land now in suit, and all that the plaintiffs could then have done would have been to bring a suit for a declaration that they were entitled to the equity of redemption. As I read O. 2, R. 2, it was not compulsory on the plaintiffs to bring such a suit.

As to the next point, namely, the question of adverse possession, it has to be borne in mind that the defendants' poss-

session was from its inception that of mortgagees, and it has been established that a mortgagee cannot by mere assertion of title start possession adverse to the mortgagor or the mortgagor's heirs. In this connexion I would draw attention to the case of *Khiarajmal* v. *Daim* (1), where their Lordships of the Judicial Committee, at page 312, say as follows:

> Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem.

In this case it is perfectly clear that there has been no acquiescence on the part of the mortgagor or his heirs nor has the equity of redemption been in any way relinquished in favour of the mortgagees.

The learned District Judge has based his conclusions to a large extent on *Ram Singh* v. *Basti* (2). The facts of that case, however, are somewhat different from the facts of the case before us now. There may be cases where a mortgagee can by a clear and unequivocal overt act bring the Statute of Limitations into operation. The present is not one of those cases, and I would, therefore, hold that the possession of the mortgagees has never been adverse to the mortgagors. In fact, as appears from the mutation proceedings, the mortgagees took care to have it entered in the mutation register that the mortgage was a subsisting one in 1906.

I, therefore, dismiss the appeal of Jiwan Singh, etc., No. 1247 of 1922, and accept the appeal of Ghasita and others, No. 1496 of 1922, and grant the plaintiffs a decree for possession of the entire property on payment of the sum of Rs. 700. The plaintiffs are entitled to their costs throughout.

Fforde, J.—I agree.

Appeal No. 1247 *dismissed*:
Appeal No. 1496 *allowed.*

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(1) [1905] 32 Cal. 296=32 I. A. 23=9 C. W. N. 201=1 C. L. J. 584=8 Sar. 734 (P. C.).
(2) [1918] 89 P. W. R. 1918=48 I. C. 447.

A. I. R. 1926 Lahore 550

BROADWAY, J.

Ahmad Din and *others*—Defendants—Petitioners.

v.

Jiwan and *another*—Plaintiffs—Respondents.

Criminal Revision No. 241 of 1926, Decided on 30th April 1926, reported by the S. J., Sialkot, on 3rd February 1926.

Criminal P. C., S. 147—Dispute as to a water-course—Breach of peace apprehended—Security should be taken under S. 107 and parties ordered to refer dispute to civil Court.

Where in a case under S. 147 regarding a dispute about water-course a witness stated that there would be a fight if the other party would demolish a certain bund.

Held: that there was sufficient material for a Magistrate to hold that there was a danger of the breach of the peace and the proper course to adopt would be to place both sides on security under S. 107 of the Criminal P. C. and leave them to have their rights settled by the civil Courts. [P 550, C 2, P 551, C 1]

Sohan Lal—for Respondents.

Order.—On an application made by Jiwan and Fazal under S. 147 of the Criminal P. C. a Magistrate of the First Class in the Sialkot District took steps under that section, and on the 24th of November 1925 passed an order in favour of the applicants. The dispute relates to a question of the use of certain water. The learned Sessions Judge has referred the case to this Court under S. 438 of the Criminal P. C. with the recommendation that the proceedings should be quashed and the application dismissed. He has based his recommendation on the facts that before the issuing of process the learned Magistrate has not found that there was a danger of the breach of the peace and had not discussed the evidence recorded by him.

Reference to the evidence from the record shows that one of the witnesses named Teja Singh clearly stated that there would be a fight if the petitioners, that is to say, Jiwan and Fazal, attempted to demolish the bund that had been erected by the other side. To my mind that would be sufficient material for a Magistrate to hold that there was a danger of the breach of the peace. The order, however, as pointed out by the learned Sessions Judge, is not a happy one, and it seems to me that to allow it to stand would invite the very

trouble that it is intended to prevent. It seems to me that the proper course for the learned Magistrate to adopt in this case would have been to have placed both sides on security under S. 107 of the Criminal P. C. and left them to have their rights settled by the civil Courts.

I, therefore, accept this recommendation and set aside the order passed by the Magistrate, but at the same time direct him to place both sides on security under S. 107 of the Criminal P. C. directing them to have this dispute settled in the civil Court.

Order set aside.

A. I. R. 1926 Lahore 551 (1)

JAI LAL, J.

Ghulam Muhammad and *others*—Plaintiffs—Appellants.

v.

Mt. Begum and *others*—Defendants—Respondents.

Second Appeal No. 1350 of 1924, Decided on 1st April 1926, from a decree of the Dist. J., Jullundur, D/- 25th March 1924.

Practice—New plea.

A party basing his claim on cussom but failing can fall back on personal law. [P 551, C 2]

Badri Das—for Appellants.

Ram Lal and *Ghulam Mohi-ud-Din*—for Respondent.

Judgment.—The plaintiffs instituted this suit to set aside a gift made by Mt. Rahmate. The house in suit originally belonged to Ibrahim who left a son Muhammad Din and a widow Mt. Rahmate. Muhammad Din also is dead and subsequent to his death Mt. Rahmate made the gift in suit. The plaintiffs are the collaterals of Ibrahim. The learned District Judge has held that the parties are governed by Muhammadan Law and not by any special custom as claimed by the plaintiffs, and on that finding the learned Judge has dismissed the suit. It is contended on behalf of the appellants that the finding of the learned District Judge is wrong, but the finding is one of fact and there is no certificate so far as the question of the existence of the custom claimed by the plaintiffs is concerned. The plaintiffs are not, therefore, entitled to contest the finding of the District Judge on this second appeal.

It is, however, further contended on behalf of the plaintiffs that the finding of the learned District Judge did not conclude the case because, assuming that the parties were governed by Muhammadan Law, the next question for decision was what share, if any, the plaintiffs had in the property in suit under that law as residuary heirs to Ibrahim or Muhammad Din, and that in any case they were entitled to a declaration to that extent. This contention of the plaintiffs has force and I must set aside the decree of the learned District Judge and remand the case to him for decision of the other points that arise as a result of his finding that the parties are governed by the Muhammadan Law. Costs will abide the result.

Case remanded.

A. I. R. 1926 Lahore 551 (2)

FFORDE, J.

Lachhman Singh — Convict — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 468 of 1926, Decided on 4th June 1926, from the order of the Sub-Divl. Mag., Rupar, D/- 10th April 1926.

Criminal P. C., S. 342 (1)—Provisions are mandatory—Questioning accused before closing of prosecution evidence only is illegality vitiating trial.

The provisions of S. 342 (1) are mandatory and not merely directory. Strict compliance with its terms is necessary.

Where the Court, after recording the depositions of some of the prosecution witnesses had recorded the statements of the accused, but after further prosecution wttnesses had been examined no statements of the accused were recorded.

Held; that the trial was illegal and it must be set aside: *A. I. R.* 1925 *Cal.* 574, *Rel. on.* [P 552, C 2]

Shamair Chand—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—The appellant who has been an absconder for over six years has been tried for the attempted murde of Sant Ram and Dwarka Nath, and ha been convicted under S. 307, India Penal Code and sentenced to seven year

rigorous imprisonment with three months' solitary confinement.

Mr. Shamair Chand who appears for the appellant, has raised the objection that the trial was illegal, inasmuch as the appellant was not questioned generally on the case after the witnesses for the prosecution had been examined and before he was called on for his defence, as required by S. 342, sub-S. (1) of the Criminal P. C. It is admitted by the Public Prosecutor and, indeed, it is apparent on the record that the appellant was in fact questioned by the Court after two witnesses for the prosecution had given evidence. A charge was then framed and he was asked to plead to that charge whereupon he pleaded not guilty. Four more witnesses for the prosecution were examined, and after the prosecution evidence had been closed the defence evidence was taken. The appellant was not questioned further by the Court. It is clear upon these facts that the provisions of S. 342 (1) have not been complied with.

The learned Public Prosecutor argues that provided an accused person is examined in the course of the prosecution evidence, it is not necessary that he should be examined generally at the close and before he enters on his defence. The section, however, expressly requires that for the purpose of enabling the accused person to explain any circumstances appearing in the whole of the evidence which has been produced against him, the Court shall question him generally at the conclusion of the prosecution evidence and before he is called upon to enter on his defence.

There are a number of decisions of the High Courts in India holding that non-compliance with the requirements of S. 342 (1) is an illegality, and that a conviction resulting after such a mode of trial must be set aside. Mr. Shamair Chand has referred me to *Surendra Lal Shaha* v. *Isamaddi* (1), decided by a Division Bench of the Calcutta High Court where the examination of the accused appears to have taken place at a later stage than is provided in S. 342. The Court in that case set aside the conviction and sentence and ordered the trial to be taken up from the close of the prosecution evidence and directed that the accused be examined in accordance with the provision of S. 342 before they entered on their defence. Mr. Shamair Chand has also referred to *Hamid Ali* v. *Sri Kissan Gosain* (2). In this case the Court, after recording the depositions of some of the prosecution witnesses had recorded the statements of the accused, but after further prosecution witnesses had been examined no statements of the accused were recorded. Upon these facts which are precisely analogous to the facts before me, the Court, consisting of a Division Bench of the Calcutta High Court, held that it had no alternative but to set aside the finding and sentence, and ordered the trial to be resumed from the point where the Court examined the accused person after the examination of the prosecution witnesses was concluded. The learned Judges in that case impressed upon the Magistrates the necessity for strict observation of the provisions of the Criminal P. C., and pointed out that where the terms of the Code were perfectly clear there was no excuse whatever for a deliberate disregard of them.

I have no doubt whatever myself that in the present case, the Court having failed to comply with the requirements of S. 342 (1), the trial has been rendered illegal. The conviction and sentence must, therefore, be set aside, the trial must be taken up from the close of the prosecution case and the accused be examined in accordance with the provisions of S. 342 before he enters on his defence.

It is unfortunate that this course must be adopted, as it seems to me that the only result is to put the accused to the ordeal and expense of a further trial. But, as the provisions of this section of the Criminal P. C. are mandatory and not merely directory, I have no alternative.

Re-trial ordered.

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(1) A. I. R. 1925 Cal. 480=51 Cal. 933.

(2) A. I. R. 1925 Cal. 574.

A. I. R. 1926 Lahore 553 (1)

HARRISON, J.

Maula Bakhsh—Plaintiff—Appellant.

v.

Karim Bakhsh and *others* — Defendants--Respondents.

Second Appeal No. 2016 of 1924, Decided on 8th May 1926, from a decree of the Dist. J., Amritsar, D/-11th June 1924.

Evidence Act, S. 109 *and Ss.* 101 *to* 103—*Suit for contribution by one judgment-debtor against others—Any one of them may plead and he must prove his non-liability to contribute.*

Where on the decree as passed several defendants were made jointly and severally liable, in the subsequent suit for contribution by one of them, it was for any defendant, who contended that he was not liable to pay the full share, to plead and prove it. The mere fact that he was a sleeping partner did not shift the onus from where it primarily lay. [P 553, C 2]

Ghulam Mohi-ud-Din—for Appellant.

Judgment.—The facts of this case are that four men, Maula Bakhsh and his three brothers-in-law, Aziz Din, Hakam Din and Ali Gauhar, jointly executed a bond for Rs. 1,000 in favour of one Paira Mal, the money being required for a kiln, in which they were all interested and which was managed solely by Maula Bakhsh. The account with Paira Mal stood in the name of Maula Bakhsh and his son. Eventually, Paira Mal brought a suit to recover the money on this bond and this suit was contested by the three brothers who disclaimed all liability. A decree was given jointly and severally against all four signatories and the whole amount was paid by Maula Bakhsh. He then brought this suit against the other three for contribution and was given a decree by the trial Court.

On appeal it was held that as Maula Bakhsh was the sole manager of the kiln and the only person acquainted with its finances, the burden lay on him of proving in a contribution suit of this nature how he used the money and of establishing that his co-sharers owed him anything. This would, I think, be equivalent to going behind the decree and would also be open to this objection that the co-sharers would be entitled to have the whole account opened and a suit for account heard without paying any stamp and bringing a suit in proper form, or claiming a definite set-off. On the decree, as passed, all four were jointly and severally liable, and in the subsequent suit for contribution it was for any defendant, who contended that he was not liable to pay the full share, to plead and prove it. He could have called for the accounts of the business had he wished to do so and the mere fact that he was a sleeping partner did not shift the onus from where it primarily lay, that is, on the defendants who denied their liability to contribute.

I, therefore, accept the appeal and reversing the order of the District Judge. I restore that of the trial Court. Costs of the plaintiff to be paid throughout by the defendants.

Order reversed.

A. I. R. 1926 Lahore 553 (2)

BROADWAY, J.

Hazara Singh and *another*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 1660 of 1925, Decided on 29th January 1926, from an order of the Addl. S. J., Lahore, D/-26th August 1925.

Criminal P. C., S. 342 — *Though failure to comply with S.* 342 *vitiates trial, High Court in revision may not set aside conviction.*

Although the failure to comply strictly with the provisions of S. 342 vitiates the trial, it is not incumbent on the High Court in revision to set aside a conviction in every case where an illegality has been committed, especially when no prejudice is caused by such illegality : 5 *P. R.* 1906, *Foll.* [P 554, C 1,2]

Nand Lal—for Petitioners.

Broadway, J.—The point for determination in this case is whether the failure on the part of the Magistrate to comply strictly with the provisions of S. 342 of the Code of Criminal Procedure vitiates the trial in toto.

It appears that the petitioners were fully examined on the 1st of July prior to the charge being framed against them. Subsequent to the framing of the charge some of the prosecution witnesses were further cross-examined on the 4th July 1925, and on the 6th July a witness named Chaudhri Ali Gauhar was examined no behalf of the prosecution.

Without any further examination of the petitioners they were called upon to enter upon their defence. It has been urged before me that the fact that after the examination of Chaudhri Ali Gauhar the petitioners were not examined by the Magistrate vitiates the entire trial, and in support of that contention Dr. Nand Lal has drawn my attention to various authorities, the authority of this Court being *Gulla* v. *Crown* (1). In that case *Emperor* v. *Savalya* (2) was referred to and followed, and it was held that the failure to comply with the provisions of S. 342 raised the presumption that the present accused had been prejudiced and rendered a re-trial necessary. *Surajpandey* v. *Emperor* (3); *Mozahur Ali* v. *Emperor* (4), *Promotha Nath* v. *Emperor* (5) and *Dibakanta* v. *Gour Gopal* (6) were the other authorities cited. An examination of the authorities shows that the view taken by Mr. Justice Scott-Smith in *Gulla* v. *Crown* (1) is the correct view and were I sitting as a Court of appeal as Mr. Justice Scott-Smith was, I should feel compelled to adopt the course taken by him and order a re-trial. Sitting as a Court of revision, however, I do not feel pressed with the necessity of adopting that course unless I am satisfied that the petitioners were, as a fact, and not presumably, prejudiced by the failure on the part of the Magistrate to examine them for a second time after the evidence of Chaudhri Ali Gauhar had been recorded.

I asked Dr. Nand Lal specifically to explain to me in what way his clients had been actually prejudiced and all that he could say was that the last witness examined namely Chaudhri Ali Gauhar was an enemy of an ancestor of the petitioners and that this matter could have been explained on their being examined and they would have been in a position to prove the fact. I am unable to see that this explanation has any weight. In *Allah Diya* v. *Crown* (7) it was held by Sir Clerk, Kt. C. J., and Mr. Justice Lal Chand that it is not incumbent on this Court on revision to set aside a conviction in every case where an illegality has been committed, especially when no prejudice is shown to have been caused by such illegality. It is, of course, imperative that a Magistrate should carry out very strictly the provisions of the Criminal Procedure Code when trying cases but it seems to me that in a case like the present when no actual prejudice has been shown I am justified in following the course adopted in *Allah Diya* v. *Crown* (7) and I, therefore, decline to interfere. The petition is dismissed.

Petition dismissed.

(1) [1918] 1 P. R. 1918 Cr.=44 I. C. 184.
(2) [1907] 9 Bom. L. R. 356.
(3) [1920] P. H. C. C. 281 = 58 I. C. 521 = 1 P. L. T. 641.
(4) A. I. R. 1923 Cal. 196=50 Cal. 228.
(5) A. I. R. 1923 Cal. 470=50 Cal. 518.
(6) A. I. R. 1923 Cal. 727=50 Cal. 939.
(7) [1906] 5 P. R. 1906 Cr.= 116 P. L. R. 1907.

** A. I. R. 1926 Lahore 554

JAI LAL AND DALIP SINGH, JJ.

Waryam Singh—Convict—Appellant

v.

Emperor—Opposite Party.

Criminal Appeal No. 291 of 1926 Decided on 7th June 1926, from the order of the S. J., Gujranwala, D/- 2nd March 1926.

(a) *Evidence Act, S. 24—Confession must be read as a whole*

A confession or statement of an accused person must be read and accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected. [P 556, C 1]

** (b) *Penal Code, S. 79—Death caused under mistake of fact.*

Where accused assaulted a man believing him to be a ghost and the assault proved fatal :

Held : that he was neither guilty under S. 302 nor S. 304, nor S. 304 A: 11 *P. R.* 1888 *Cr., Expl.* [P 558, C 1]

Kidar Nath Chopra—for Appellant.
Abdul Rashid—for the Crown.

Jai Lal, J.—The appellant Waryam Singh has been convicted by the Sessions Judge of Gujranwala under S. 302 of the Indian Penal Code and has been sentenced to transportation for life.

It is alleged that Waryam Singh had three children who all died during their infancy. The last child a boy, died on the 7th of November 1925. It was suggested to his wife, Mt. Radhi, that if she wanted her future children to live she should go and bathe on the tomb of her child who had recently been buried in the cremation ground. Consequently both husband and wife went to the

cremation ground on the night of the 8th of November with an earthen vessel full of water. It was a dark night. Mt. Radhi took off her clothes and sat on the tomb of her child and the appellant began to pour water on her. The deceased Phagga Singh appeared on the scene and the appellant attacked him with a stick causing him ten injuries, four of which were on the head, three on the shoulder and three on the hand. As a result of these injuries Phagga Singh died in the hospital on the 12th of November. After causing the injuries to the deceased the appellant and his wife ran back to the village. Mt. Radhi states that she was frightened and, therefore, she left after two blows had been given by her husband to the object of his attack which they both took to be a ghost. It is, however. clear that they both reached the village together as they were seen by Sundar Singh going hastily towards the village and on enquiry had informed him that they had killed a ghost. It also appears from the statement of the accused that he met Ajit Singh and Uggar Singh in the way and on an enquiry by them made the same statement and that later both these men and the appellant went back to the cremation ground to see the ghost, and there discovered that it was Phagga Singh who had been beaten and who had been seriously injured and was lying senseless on the spot. They removed and left him near a pond. Later the appellant met Sundar Singh again and told him that it was Phagga Singh whom he had beaten during the night. Sundar Singh went and informed Teja Singh, a brother of the deceased, who brought him to the village, took him to the hospital and reported the matter at the thana.

The above facts are established by the statement of Mt. Radhi. Sunder Singh, Teja Singh, the Civil Surgeon and the statement of the appellant himself. It is proved that the appellant on the very first occasion mentioned that he had killed a ghost. The only point on which the prosecution version differs from that of the appellant is that according to the prosecution, the convict knew at the time of the beating that it was Phagga Singh who was the object of his attack. The version of the appellant on the other hand is that he thought it was a ghost, and that it as later when he went to the cremation ground with Ajit Singh and Ujagar Singh that he discovered that it was Phagga Singh whom he had beaten. Ajit Singh and Ujagar Singh have not been produced, as witnesses in this case. It is likely that if produced they would not have supported the accused owing to his allegation that they assisted him in removing Phagga Singh from the cremation ground to the pond.

In her deposition at the trial Mt. Radhi did not first make any mention of this second visit to the cremation ground, but the Public Prosecutor confronted her with her statement before the committing Magistrate where she had mentioned this fact. Her statement before the committing Magistrate was transferred to the Sessions file. The appellant, when questioned by the committing Magistrate, mentioned this visit and in this he is corroborated by Sundar Singh who states that first the appellant told him that he killed a ghost, but later he told him that he had killed Phagga Singh. Sunder Singh does not definitely state how much time passed between the first and second statement to him, but it appears that the latter was early in the morning and, therefore, after a considerable time after his first meeting with the appellant and his wife. It is to be observed that the only direct evidence of the incident consists of the statement of Mt. Radhi and the appellant and both state that they thought it was a ghost, that had appeared on the scene and who was beaten by Waryam Singh, and having regard to the 'ghostly' nature of the object that had taken both to the cremation ground and the prevalent superstition that ghosts generally visit the cremation grounds on dark night and specially when people go there on unnatural missions, we are of opinion that this is the more probable version of the incident.

It may be mentioned that Mt. Radhi stated that the ghost gave a blow with a stick to Waryam Singh on his arrival. We are not prepared to believe this part of her statement. It is not corroborated by the medical evidence and no stick was found either at the scene of the assault or where the deceased was found by his relations the next morning. The learned Sessions Judge is of opinion that even if the appellant made a mistake of fact in believing that

Phagga Singh was a ghost and not a human being it cannot be said to have been made in good 'faith' in face of the indisputable fact that the accused gave a merciless beating to the deceased which proved fatal.

We are, however, of opinion that the accused acted in 'good faith' as that term is defined in the Indian Penal Code and are not able to endorse the view of the learned Sessions Judge when he holds that the accused cannot plead a 'mistake of fact' because he had no facts whereon to build his honest belief as required by law. The question of good faith has to be determined in the light of all the surrounding circumstances; these clearly lead to the inference that the convict had no reason to think that a human being would arrive or had arrived on the scene at such a time and place and that he probably thought that a ghost had actually appeared. He would be predisposed to expect a ghost and his natural impression would be that one had appeared. It was contended before us on behalf of the Crown that the factum of assault having been admitted by the appellant the burden of proving the existence of circumstances which exonerated him from punishment, lay on him. This as an abstract proposition of the law is true, but it was not necessary for the appellant to produce independent evidence to establish his plea. He is entitled to rely upon the evidence which has been produced on behalf of the prosecution and to urge that such evidence establishes his plea. Moreover it has repeatedly been held that a confession or statement of an accused person must be read and accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected. In the case before us whatever evidence there is on the record fully supports the statement of the accused. It is not proved, indeed it is not suggested that the appellant had any motive for doing an injury to the deceased. We are, therefore, of opinion that it has been established that at the time when he beat Phagga Singh the appellant believed him to be a ghost and that it was later after his visit to the spot in the company of Ajit Singh and Ujagar Singh that he discovered that it was Phagga Singh whom he had beaten. It is on these facts that we have to determine the guilt or otherwise of the appellant.

Counsel for the appellant relied upon S. 79 of the Indian Penal Code which provides that nothing is an offence which is done by any person who by reason of a mistake of fact in good faith believes him to be justified by law in doing it. It was rightly contended that this exception fully covers the case of the convict. The following cases were cited by the learned counsel on both sides :

Gour Gobindo Thakoor, In re. (1). In that case the deceased was knocked down by a blow behind the ear and then hung up by the prisoners to a tree where he was found dead. The Magistrate convicted one of the prisoners of voluntarily causing hurt and the other of abetting the same. The conviction was quashed with a view to commitment of the persons implicated to the Sessions. In the course of the judgment the following remark was made by one of the learned Judges:

> Suppose that the Thakoors had no intention of killing the deceased, but finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover. under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under S. 304, for culpable homicide not amounting to murder.

With great respect we venture to doubt the correctness of this view. The learned Judges appear to have ignored the fact that mens rea or guilty intention or knowledge necessary for a conviction for culpable homicide did not exist in the case before them. Moreover the remark appears to be in the nature of an obiter dictum as the learned judges did not finally decide the point. In any case the facts of that case are distinguishable from those of the present one. There the convicts knew that they were dealing with a human being. They had actually beaten him whether or not under the circumstances they should have exercised more care and caution before hanging him to the tree was a question that necessarily arose on the facts disclosed. In the prsent case the appellant believed that a ghost had appeared and it is not reasonable to expect him to exercise the same care and attention as under ordinary circumstances

(1) 6 W. R. 55 Cr.

Queen-Empress v. *Kangla* (2) in which under the circumstances and for the reasons almost similar to those in the last mentioned case it was held that the accused was punishable under S. 304 of of the Indian Penal Code. Our remarks about the case of *Gour Gobind Thakoor* (1) apply mutatis mutandis to this case also

Queen-Empress v. *Khandu* (3). It was found the accused struck the deceased three blows on the head with a stick, with the intention of killing him. The deceased fell down senseless on the ground. The accused, believing that he was dead, set fire to the hut in which he was lying, with a view to remove all evidence of the crime. It was proved that the blows were not the cause of the death but the injuries from burning. It was held by a majority of the Judges that the accused was guilty of attempt to murder. One learned Judge was of opinion that the accused was guilty of murder under S. 302 of the Indian Penal Code. That case is also to be distinguished from the present one owing to the knowlege of the assailants that the object of the assault was a human being and to the existence of the initial intention to kill the deceased.

The Emperor v. *Dalu Sardar* (4). In this case the accused assaulted his wife and gave her kicks, blows and slaps. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up her unconscious body, thinking it to be a dead body and hung it by a rope. The death was found to be due to hanging. It was held that the accused could not be convicted of murder but of an offence under S. 325 of the Indian Penal Code for having given the deceased kicks, blows and slaps before she fell down on the ground that the convict could not have intended to kill the deceased if he thought that the woman was already dead.

Palani Gounden v. *Emperor* (5). In this case the accused struck his wife a blow on her head with a ploughshare which rendered her unconscious. The accused believing her to be dead in order to lay the foundation of a false defence of suicide by hanging, hanged her on a beam by a rope and thereby caused her death by strangulation. A Full Bench of the Madras High Court held that the accused was not guilty of either murder or culpable homicide not amounting to murder. The ratio decidendi in the case was that 'causing death' means 'putting an end to human life' and that the intention of the accused must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life, and further that the knowledge must have reference to the particular circumstances in which the accused is placed. An illustration is given in the judgment that if a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide, because, though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The learned Judges also remarked that a man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. In our opinion if a man kills another by shooting at what he believes to be say a beast or a stump of a tree he would not be guilty of culpable homicide. He had no intention of killing anybody. Whether under the circumstances he would be guilty under S. 304-A of the Indian Penal Code is a matter which must depend on the facts of each case.

The Empress v. *Hayat* (6). The facts of this case come nearest to those of the case before us. The prisoner entertained a belief that a stooping child whom he caught sight of in the early glooming was a spirit or demon, the child being in a place which the prisoner and his fellow villagers deemed to be haunted, and acting on this belief caused his death by blows he inflicted before he discovered his mistake. No other motive for the assault had been proved. The Sessions Judge was of opinion that S. 79 of Indian Penal Code did not apply to the case.

(2) [1898] A.W.N. 163.
(3) [1891] 15 Bom. 194.
(4) [1915] 18 C.W.N. 1279=26 I.C. 157.
(5) [1919] 42 Mad. 547=37 M.L.J. 17=10 M. L.W. 45=51 I.C. 164=(1919) M.W.N. 340.
(6) [1888] 11 P.R. 1888 Cr.

The learned Judges of the Punjab Chief Court gave the following opinion :

Now, as he (the Sessions Judge) finds the prisoner was under a distinct mistake of fact, believing that is, that his blows were aimed at a spirit and not at a human being, we can only explain this finding by assuming that the Judge must have meant that the prisoner did not in good faith, that is, 'with due care and attention' (S. 52, Indian Penal Code) believe himself justified in doing the act., If this be what the Sessions Judge meant when negativing S. 79 Indian Penal Code, we are not prepared to differ from him, and we on this ground decline to interfere.

The convict, it may be mentioned, has been convicted under S. 304 A of the Indian Penal Code. It would be observed that the judgment of the learned Judges proceeds on the hypothesis that the convict did not act in good faith. The decision of the case, therefore, turned on the peculiar facts found therein. But for the finding that the convict acted without care and attention he would have been acquitted.

An examination of the cases cited above shows that the better judicial opinion is that if the accused believed in good faith at the time of the assault that the object of his assault was not a living human being but a ghost or some object other than a living human being then he cannot be convicted of an offence under S. 302 or S. 304 of the Indian Penal Code. The ground for such opinion is that mens rea or an intention to do wrong or to commit an offence does not exist in such a case and that the object of 'culpable homicide' can be a 'living human being' only. We are, therefore, of opinion that on the facts found by us the appellant could not, having regard to S. 79 of the Indian Penal Code, be convicted under S. 302 of the Indian Penal Code or even under S. 304. We are further of opinion that S. 304-A of the Indian Penal Code does not apply to the facts of this case because the circumstances under which the appellant was placed do not lead to the conclusion that he acted rashly or negligently, on the other hand they negative any such idea.

We accept this appeal, set aside the conviction of Waryam Singh and order his release forthwith.

Appeal accepted.

A. I. R. 1926 Lahore 558

SHADI LAL, C. J., AND COLDSTREAM, J.

Firm Nihal Chand-Atma Ram—Plaintiffs—Appellants.

v.

Sardari Mal and *others*—Defendants—Respondents.

First Appeal No. 25 of 1922, Decided on 15th May 1926, from the decree of the Sub-J., 1st Cl., Lahore, D/-29th July 1921.

Court Fees Act Ss. 28 and 7 (i)—Appeal not properly stamped—Whole appeal will not be dismissed—Amount covered by Court-fee paid will be decreed.

A sued B on bahi accounts for Rs. 4,969-0-6 principal and Rs. 1,631-10-0 interest. Trial Court decreed the suit for Rs. 3,385-11-6 only. Plaintiff appealed asking for full amount claimed but paid Court fees covering a demand of Rs. 3,215 only.

Held : the whole appeal will not be dismissed but appellant will not get a decree in appeal for more then the amount for which fee was paid. [P 559. C 1]

Harish Chandra for *Amar Nath Monga*—for Appellants.

Devi Das and *Tulsi Das* — for Respondents.

Judgment.—The plaintiffs-appellants Nihal Chand-Atma Ram, as proprietors of the firm Nihal Chand-Atma Ram brought a suit for the recovery of Rs. 4,969-0-6, principal and Rs. 1,631-10-0 interest, due on bahi accounts, against Sardari Mal and Girdhari Mal alleging that the defendants were the proprietors of a firm styled as Sardari Mal Atma Ram. The defendants denied the debt and their liability, and pleaded that Atma Ram one of the plaintiffs was himself a member of the firm 'Sardari Mal-Atma Ram' and that consequently the present suit would not be lie until the defendant firm had been dissolved, that Hazari Mal, brother-in-law of Atma, plaintiff, was also a partner of the defendant firm, that the books of accounts of the business of the firm 'Sardari Mal-Atma Ram' which business had ceased on the 20th Har, Sambat 1977, had been taken away by this Hazari Mal, and that Sardari Mal was not personally accounttable for the balance claimed, as his work as a partner had been merely to make purchases for the business.

The Subordinate Judge found that Atma Ram, the plaintiff, had not been proved to be a partner of defendant firm,

that the defendants had not proved that the plaintiffs were in possession of the account books and that Girdhari Mal had not been proved to be a partner of the firm Sardari Mal-Atma Ram. As regards the alleged debt, he found that the amount due from the defendant firm to the plaintiff firm was Rs. 3,385-11-6. He held the defendants not liable to pay any interest on the debt for the period before suit but allowed to the plaintiffs interest from the date of the decree at 6 per cent. per annum. Against this decree the plaintiffs have appealed asking for the full amount claimed Rs. 6,600-11-0 against Girdhari Mal as well as against Sardari Mal and also for interest at 12 per cent. per annum.

A preliminary objection is taken by Mr. Tulsi Das for the respondents to the effect that the appeal having not been properly stamped must now be dismissed on the ground of limitation. He points out that the stamps covers a demand of Rs. 3,215 only and not of Rs. 6,600-11-0. We find in this contention force to this extent only that the stamp will not admit the passing of a decree in excess of Rs. 3,215 against Girdhari Lal.

Coming to the merits we do not find sufficient grounds for setting aside the lower Court's finding as to the amount due from the defendant to the plaintiff firm. Mr. Harish Chandra points to various items in the accounts filed by the plaintiffs which he says have been proved, but for which credit has not been allowed by the Court. The entries to which he refers are unreliable and vague and contain no clear explanation of the real nature of the transactions entered. We are no better impressed by Mr. Harish Chandra's arguments in support of his contention that Girdhari Mal is proved to be a partner of the defendant firm. He appears to rely, so far as direct evidence is concerned, mainly if not wholly, on an entry in the accounts of the plaintiffs, which will be found at Item No. 3 on the debit side on page 5 of the printed book. The entry is signed by Girdhari Mal. The form of the other entries in this account does not support the conclusion which Mr. Harish Chandra would draw from the signature of Girdhari Mal in this particular entry, for in many of these we find amounts credited or debited to the firm Sardari Mal-Atma Ram. The mere signature of Girdhari Mal of one entry is, therefore, not a safe basis for the finding demanded by Mr. Harish Chandra. As regards interest we are unable to find that the plaintiff has proved any legal ground on which he is entitled to a decree for this. No agreement and no custom by which interest is claimable for the period prior to the suit has been proved. We are at the same time of opinion that the Court would have acted reasonably in allowing further interest from the date of the suit and not merely from the date of decree.

The result is that the appeal is dismissed as against Girdhari Mal and Hazari Mal. Girdhari Mal will get his costs in the appeal. As against Sardari Mal we accept the appeal to the extent that we modify the decree so that it will include interest at 6 per cent. per annum from the date of the filing of the suit. The defendants Sardari Mal and Hazari Mal will pay their own costs in the appeal.

Appeal dismissed.

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* A. I. R. 1926 Lahore 559

BROADWAY AND ADDISON, JJ.

Diwan Chand—Plaintiff—Appellant.

v.

Ralla Ram and *another*—Defendants—Respondents.

Second Appeal No. 2755 of 1922, Decided on 28th June 1926, from the decree of the Dist. J., Shahpur, D/- 29th July 1922.

* (a) *Civil P. C., O. 2, R. 2—Mortgage and lease executed the same day—Suit for rent decreed—Fresh suit on mortgage is barred.*

Defendant mortgaged a shop to plaintiff for a certain sum. The mortgage was with possession but the mortgagors executed the same day a deed of lease under which they agreed to hold the shop as tenants for a certain period at a fixed rate. The mortgagee sued for rent and got a decree. He afterwards sued for principal and interest on the mortgage.

Held: that the two documents formed one transaction and the second suit is barred: *Civil Appeal* No. 1970 of 1920, *Foll.*; *A. I. R.* 1922 *Lah.* 111 and *A. I. R.* 1923 *Lah.* 203; *Dissented from*, 3 *P. R.* 1887, *Dist.* [P 561, C 1]

* (b) *Civil P. C., O. 2, R. 2—R. 2 is directed against splitting of claims and splitting of remedies.*

Order 2, rule 2, is directed against two evils, the splitting of claim and the splitting of

remedies. If a man omits from his suit a portion of his claim he shall not afterwards sue in respect of it. If he omits one of his remedies he cannot afterwards pursue it ; 1 *Lah.* 457; 56 *I. C.* 966 and 268 *P. W. R.* 1912, *Foll.* [P 561 C 1]

Badri Das and *Daulat Ram*—for Appellant.

M. L. Puri—for Respondents.

Broadway, J.—On the 29th of April 1914, Ralla Ram and Ganpat Rai mortgaged a shop to Diwan Chand for Rs. 1,000. The mortgage was with possession, but the mortgagors executed on the same day a deed of lease under which they agreed to hold the shop as tenants for a period of 11 months at the rate of Rs. 4 per mensem. The mortgage was for a term of 18 months. On the 12th June 1917 Diwan Chand sued to recover a sum of Rs.120/- claiming that amount as rent due from the mortgagors Ralla Ram and Ganpat Rai. The suit was decreed for a sum of Rs.4/- on the 23rd of December 1918, it being held that tenancy had terminated after the period of 11 months had expired. On the 1st May 1919 Diwan Chand brought another suit claiming a sum of Rs.1,256-6 principal and interest, due on the mortgage. This suit was dismissed under O. 2, R. 2, Civil P. C., it being held that in the previous suit instituted on the 12th of June 1917 the plaintiffs should have claimed the principal and interest as well. This decision was confirmed by a Division Bench of this Court, in Civil Appeal No. 1970 of 1920, dated 24th February 1921. It was there held that the intention of the parties was that the two deeds should be read together. The rent payable under the deed of lease was to be devoted to the liquidation of a part of the interest and was merely a method of realization. The mortgage itself contains a reference to the lease and though the lease was for a period of 11 months, it actually provides that if the mortgage was redeemed within a period of six months neither interest nor rent would be payable. On the 8th of August 1921 Diwan Chand instituted a third suit in which he claimed possession of the shop which had been mortgaged to him. In the plaint he clearly refers to the mortgage deed and in the clause relating to the relief sought he asks to be put in possession as mortgagee. In the body of the plaint the deed of lease is referred to. This suit has been dismissed by the Court below under O. 2, R. 2, Civil P.C., and Diwan Chand has now come up to this Court in second appeal and on his behalf we have heard Mr. Badri Das.

It has been urged that O. 2, R. 2 does not apply inasmuch as the plaintiff was not bound by law to have claimed possession when he brought either of the two former suits. In support of his contention Mr. Badri Das has referred to *Subraya Chetti* v. *Rathnavelu Chetti* (1), in which it was laid down that a suit to eject a tenant holding under a lease is not a bar under S. 43 of the Code of Civil Procedure (now O. 2, R. 2) to a subsequent suit to recover arrears of rent under the terms of the lease. The facts of that case are different from the facts in the present one and I, therefore, do not consider that this authority assists us in any way. He next cited *Khushi Ram* v. *Abdul Ghafur* (2) which again in my judgment does not assist us. Similarly *Nandan Singh* v. *Ganga Prasad* (3) and *Ponnamal* v. *Ramamrida* (4) are authorities which do not afford any assistance in the decision of the point before the Court. *Lalessor Babu* v. *Janki Bibi* (5) dealt with the case of mesne profits, a matter which is specifically provided for by O. 2, R. 4 of the Civil P. C. He next placed reliance on *Mohammad Hussain* v. *Abdul Ghafur Khan* (6) and *Rallia Ram* v. *Amir Chand* (7). In both these cases it was held that the deed of mortgage and the deed of lease formed two separate transactions. In the present case I consider that we are bound by the decision referred to above *viz.*, *Bala Ram* v. *Diwan Chand* (8) and that the two documents form one transaction. He next cited *Gunda Mal* v. *Nanak Chand* (9), where in a suit by a mortgagee for possession of the mortgaged property under the terms of the mortgage deed in which it was found that the plaintiff had been in constructive

(1) [1909] 32 Mad. 330=2 I. C. 313.
(2) [1921] 63 I. C. 978.
(3) [1913] 35 All. 512=20 I. C. 892=11 A.L.J. 786.
(4) [1915] 38 Mad. 829=28 M. L.J. 127=27 I. C. 679=(1915) M.W.N. 130 (F. B.).
(5) [1892] 19 Cal. 615.
(6) A. I. R. 1922 Lah. 111=3 Lah. 1.
(7) A. I. R. 1923 Lah. 203=4 Lah. 52.
(8) [1921] 36 P. W. R. 1921=63 I. C. 928=3 L. L. J. 390.
(9) [1887] 3 P. R. 1887.

possession of the property within 12 years of the institution of the suit it appeared that the said plaintiff had already sued for and obtained a simple money decree on his mortgage, but had allowed the execution of such decree to become barred by lapse of time. It was held that it could not rightly be contended that the mortgage debt was extinguished by operation of law, there being no provision in the Limitation Act that a decree whose execution is time barred is therefore extinguished, and that, therefore, although the decree could no longer be executed, the mortgage-debt, and consequently the plaintiff's right to take possession of the mortgaged property until the mortgage was paid off, survived. It would seem that no reference whatever was made to O. 2 R. 2, Civil P. C., or any corresponding section in the Code which was then in force. The question which is now before the Court was therefore not before the learned Judge who dealt with that case.

On the other hand Mr. Puri for the respondents has placed reliance on among other cases *Permeshari Das* v. *Fakir* (10) and *Harnam Singh* v. *Bhola Singh* (11). He also referred to the judgment of Mr. Justice Kensington in an unreported case which is to be found published as *Brijlal* v. *Ram Ratan* (12). These authorities appear to me to be in point and lay down that O. 2, R. 2 is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim he shall not afterwards sue in respect of it. If he omits one of his remedies he cannot afterwards pursue it. *Harnam Singh* v. *Bhola Singh* (11) was a case in which the facts were exactly converse to those in the present case, and it was held that having omitted to sue for the mortgage money in the first suit which was for possession the plaintiffs were precluded from suing for it in the suit then under consideration. In my judgment the cause of action in the former case was one which gave rise to the present relief. The plaintiff could have sued for possession and instead of doing so preferred to pursue other remedies. As he has chosen to adopt this course he must take the consequences.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

(10) [1920] 1 Lah. 457=59 I. C. 71=2 L.L.J. 466.
(11) [1920] 56 I. C. 966,
(12) [1912] 268 P. W. R. 1912=17 I. C. 581.

A. I. R. 1926 Lahore 561

JAI LAL, J.

Sarwan Singh and *others*—Plaintiffs—Appellants.

v.

Dip Singh and *another*—Defendants—Respondents.

Second Appeal No. 679 of 1926, Decided on 8th June 1926, from a decree of the Dist. J., Ludhiana, D/- 9th December 1925.

Specific Relief Act, S. 42—Major reversioners failing to sue within limitation—Declaration sought in the name of minor reversioners as plaintiffs can be refused.

Where major reversioners adopt the device to bring a suit to contest an alienation in the name of minor reversioners as plaintiffs, when their suit is dismissed as not wfthin time. Court exercises its discretion wisely if it dismissed the suit by minors. [P 562 C 1]

R. K. Bal—for Appellants.

Devi Dayal and *Din Dial*—for Respondents.

Judgment.—This judgment will dispose of Appeals Nos. 679 and 680 of 1926. The suits were filed to set aside two alienations made by one Kishen Singh. The District Judge had dismissed them on the ground of limitation and also on the ground that the nominal plaintiffs being minors are represented by their uncle as the next friend, and that their elder brother is financing the suits, the inference being that the real plaintiffs in the case are their elder brother and the uncle of the nominal plaintiffs. He is of opinion that the suits have been brought in the names of the minors in order to avoid the difficulty about limitation.

I do not propose to give any finding on the question of limitation. In my opinion this appeal should fail on the second ground on which the suits have been dismissed by the learned District Judge. According to him the real plaintiffs in the case are the uncle and the brother of the minor plaintiffs. They did not institute any suit within

the period of limitation and consequently adopted the device of instituting the suits in the name of the minors. On these findings, in my opinion, the learned District Judge exercised a wise discretion in refusing to grant a declaratory decree to the plaintiffs. I dismiss these appeals but leave the parties to bear their own costs throughout.

Appeals dismissed.

A. I. R. 1926 Lahore 562

JAI LAL, J.

Muhammad Khan and *others*—Plaintiffs—Appellants,

v.

Mt. Nekan and *others*—Defendants—Respondents.

Second Appeal No 477 of 1926, Decided on 10th May 1926, from the decree of the Dist. J., Attock, D/- 10th December 1925.

Civil P. C., O. 9, R. 9—Previous suit dismissed for default—Subsequent suit in effect the same but claiming different relief is barred.

A subsequent suit, in effect the same as previous suit but claiming a relief different from the previous suit dismissed for default under R. 8, is barred by R. 9. [P 563 C 1]

Badr-ud-Din Kureshi—for Appellants.

Gobind Ram Khanna for *M. S. Bhagat*—for Respondents.

Judgment.—In May 1924 the plaintiffs-appellants instituted a suit for recovery of possession of the land in suit on the following allegation. That Mt. Nekan mortgaged the land to them with possession for Rs. 1,500, that they paid the remaining consideration except Rs. 500 which was left with them in order to redeem the land from the previous mortgagees, that the defendants mortgagors denied this transaction during the mutation proceedings, and consequently mutation was refused, and that in spite of demands the defendants have not given possession. Mt. Nekan, Muhammad Khan, Fazal Khan, sons of Allah Yar Khan and Attar Khan were impleaded as defendants. Though a decree for possession was claimed against all the defendants, the interest of the last four defendants in the land in suit was not disclosed in the plaint.

On the 1st of July the counsel for the plaintiffs made a statement in which he made the plaintiffs' position clear that the suit was for possession of the mortgagees' rights in the land in suit, that though it was mortgaged for Rs. 500 with the defendants, the plaintiffs did not seek to redeem that mortgage but would do so on payment of Rs. 500 later. It appears that on account of some other facts that were discovered on this date, the plaintiffs thought that their suit would not succeed.

The suit out of which this second appeal has arisen was filed on the 8th July 1924. The suit previously instituted was allowed to be dismissed for default under O. 9, R. 8 of the Civil P. C., on the 9th July that is to say, a day later than the institution of the second suit. In this second suit two more persons Sher Khan and Amir Khan, were added as defendants. The plaint is very vague. It does not disclose what the plaintiffs' cause of action against each set of the defendants is. All that it states is that the plaintiffs obtained the rights of a mortgagee in possession for Rs. 1,500 from Mt. Nekan and had to obtain possession on payment of Rs. 500 to the previous mortgagees. From this it would appear that the previous mortgage was also with possession. The value for the suit for purpose of jurisdiction and Court-fee was stated to be Rs. 500 and a decree for possession by redemption on payment of Rs. 500 was claimed against all the defendants. Sher Khan and Amir Khan defendants did not appear at the trial and allowed this suit to proceed ex parte against them. Muhammad Khan, Fazal Khan, sons of Allahyar Khan and Attar Khan defendants pleaded that they were in possession of the property in suit because they had in their capacity as reversioners, redeemed the mortgage from the prior mortgagees. It seems that Sher Khan and Amir Khan were the prior mortgagees. This suit has been dismissed by the Courts below on the ground that it was barred by virtue of O. 9, R. 9 which provides that where a suit is dismissed under R. 8 the plaintiffs shall be precluded from bringing a fresh suit in respect of the same cause of action.

The learned counsel for the appellants contends before me that the suit was not based on the same cause of action. The counsel for the respondents on the other hand contends that in addition to O. 9,

R. 9, S. 10 of the Civil P. C., and O. 23, R. 1, would operate as a bar to the trial of the present suit. Though neither of the provisions of the Civil P. C. mentioned above strictly speaking apply to the present case still I agree with the conclusion of the Courts below that the present suit is in fact a suit to obtain possession by the plaintiffs of the land in suit on the basis of the mortgage-deed executed in their favour by Mt. Nekan, that ostensibly the suit is for redemption of a mortgage but really it is a suit to establish the validity of tha mortgage in their favour. The reliefs claimed in the suits appear to be different but in reality both the suits are practically the same. I also think that though the plaintiff did not actually withdraw the first suit under the provision of O. 23. R. 1, still his conduct in absenting himself purposely on the 9th July does amount practically to the withdrawal of the suit and therefore, the principle of that rule applies to the present case. I have already stated that both the suits of the plaintiffs were misconceived, the plaints were vague, the grounds of the liability of the defendants were not stated and proper reliefs were not claimed.

Under these circumstances I consider that the decree of the District Judge is substantially correct. I must, therefore, dismiss this appeal. But I leave the parties to bear their own costs throughout.

Appeal dismissed.

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* A. I. R. 1926 Lahore 563

JAI LAL, J

Aziz Din—Defendant—Petitioner.

v.

Moti Ram and *others*—Plaintiff and Defendants—Respondents.

Civil Revision No. 672 of 1924, Decided on 19th May 1926, from the decree of the Sub-J., Simla, D/- 26th June 1924.

* *Civil P. C., Sch. 2, para. 17—One pleader appearing for another—Reference by him to arbitration without vakalatnama is invalid—Civil P. C., O. 3, R. 4.*

Pleader appearing for another pleader, cannot make a valid reference to arbitration on behalf of the latter's client, without a vakalatnama authorizing him to do so. [P 564, C 1]

Jagan Nath Aggarwal—for Petitioner.

Parkash Chandra for *Amar Nath Monga*—for Respondents.

Judgment.—A suit for recovery of Rs. 634-14-0 was instituted by Moti Ram, plaintiff against Aziz-ud-din defendant petitioner and others. Proceedings were ex parte against one of the defendants, but Aziz-ud-din contested the claim. He appointed Mr. Harish Chandra, vakil, to represent him in Court. It appears that on the date fixed for recording the evidence of the parties, Mr. Harish Chandra could not appear and Mr. Shanker Nath, vakil, appeared for him for Aziz-ud-din, defendant. On that date the dispute was referred to arbitration. A written application praying for the reference to arbitration was presented in Court in the absence of the defendant Aziz-ud-din, but it was signed by Mr. Shanker Nath on his behalf. The reference was made without the express consent of Aziz-ud-din. On receipt of the appointment order, the arbitrator served a notice on Aziz-ud-din to appear before him and to prosecute the arbitration proceedings. He appeared before the arbitrator and stated that he had no knowledge of the reference to arbitration and would decide what action he should take after consulting his counsel. Thereafter he never appeared before the arbitrator, but sent a notice to him that he was not bound by the reference. The arbitrator gave his award which was filed in Court. The petitioner raised objections to the validity of the award. The Subordinate Judge has disallowed all the objections and has given a decree in accordance with the award.

This decree is attacked before me on two grounds : (1). That the reference to arbitration was not valid as Mr. Shanker Nath was not competent to refer the dispute to arbitration ; and (2) that the proceedings in Court being ex parte against some of the defendants, no valid reference could be made at the instance of some of the parties to the suit. Some authorities were cited in support of the second contention, but I do not think it necessary to give any finding on this question in view of my conclusions on the first ground on which the award is attacked. An examination of the power-of-attorney given by the petitioner to Mr. Harish Chandra shows that he was

authorized to refer the matter to arbitration and also to appoint another pleader to represent the petitioner conferring upon him all or some of the powers that he himself had under his power-of-attorney. Now O. 3, R. 4 of the Civil P. C. provides that the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf, and further that such appointment and its acceptance by the pleader shall be filed in Court.

It is admitted that Mr. Harish Chandra did not give any authority in writing to Mr. Shanker Nath to represent his client. Under these provisions, therefore, the latter could not appear on behalf of the petitioner. S. 18 of Ch. XIII of the Rules and Orders of this Court (Vol. V), however, provides that a vakil may appear in place of an advocate or another vakil without vakalatnama, but this provision is subject to the restriction inter alia, that a vakil so appearing shall not compromise or refer a case to arbitration. It thus appears that though Mr. Shanker Nath was competent to appear under the instructions of Mr. Harish Chandra on behalf of the petitioner, he was not competent to refer the dispute to arbitration. The counsel for the respondents contended that Mr. Shanker Nath should be deemed to have possessed all the powers which were conferred on Mr. Harish Chandra by the power-of-attorney granted by the petitioner and further that the defendant by appearing before the arbitrator acquiesced in the reference and is not, therefore, entitled now to object. I have already held that the first contention is wrong because Mr. Shanker Nath did not appear by virtue of any written authority given by Mr. Harish Chandra and that he appeared by virtue of the rule already quoted which expressly excludes the power to refer to arbitration. There is no force in the second contention also because the facts already mentioned clearly show that Aziz-ud-din never confirmed expressly or by his conduct the action of Mr. Shanker Nath in referring the dispute to arbitration.

The result is that I accept this petition and remit the case to the learned Sub-Judge with directions to proceed with it in accordance with law, the reference to arbitration being set aside. Under the peculiar circumstances of the case, I leave the parties to bear their own costs incurrred subsequent to the reference to arbitration.

Case remitted.

A. I. R. 1926 Lahore 564

CAMPBELL AND ZAFAR ALI, JJ.

Kishen Singh and *others*—Defendant—Appellants.

v.

Moti Singh—Plaintiff—Respondents.

First Appeal No. 1440 of 1920, Decided on 24th March 1926.

Civil P. C., O. 41, R. 33—One of several appellants dying—Appeal abating, legal representatives not being brought on record—Appeal can be accepted in favour of all.

Where one of the appellants dies and in consequence of his legal representatives not being brought on the record the appeal abates, the Court can accept the appeal in favour of all the appellants including the legal representatives not brought on record. [P 565, C 1]

Gullu Ram and *Fakir Chand*—for Appellants.

Tek Chand and *Badri Dass*—for Respondent.

Judgment.—The suit was by Sodhi Moti Singh for possession of certain land and house which he alleged had been mortgaged to his father Sodhi Narendra Singh by Sodhi Kishen Singh, defendant. Sodhi Kishan Singh pleaded that the plaintiff was not his father's heir that he had been disinherited and that Sodhi Narendra Singh's all self-acquired property including the property in suit had been bequeathed to one Wazir Singh. Wazir Singh was then impleaded as a defendant and issues were struck of which we are concerned with the first two : (1) Did the plaintiff's father voluntarily and in full senses execute the registered Will dated 8th April 1908, whereby he disinherited the plaintiff from all self-acquired property which was thereby bequeathed to Defendant No. 2 and (2) if so, did the plaintiff's father acquire the mortgage rights in suit from the income of the ancestral estate and, therefore, the same should be considered to be ancestral property.

When Sodhi Narendra Singh died, his son Sodhi Moti Singh took possession of all his property and subsequently Wazir Singh instituted a suit (No. 33 of 1915) for possession of the self-acquired property left to him by the Will of the 8th April 1908. That suit was pending at the same time as the one with which we are dealing and all the parties to the present suit agreed that they would not produce any evidence on the above issues and that the questions would be decided on the evidence given in Wazir Singh's suit for possession. Both suits were before the same learned Sub-Judge and he decided the suit in which Wazir Singh was the plaintiff against him with the result that the present suit was decreed in favour of the plaintiff Moti Singh.

The defendants have appealed that Sodhi Kishen Singh died during the pendency of the appeal on the 12th August 1922 and his appeal has abated since the application to substitute his legal representatives was made some 15 days after the expiry of limitation. No application for setting aside the abatement has been presented to us.

Wazir Singh's appeal remains for disposal and together with it has come before us his appeal in the other suit (No. 1439 of 1920) : *Wazir Singh* v. *Sodhi Moti Singh* (1). In that appeal we have reversed the decision of the trial Court and have held that the Will in favour of Wazir Singh bequeathing property including the mortgagee rights now in question to Wazir Singh was valid. It has been conceded that the decision in that appeal settles the fate of the present appeal in favour of Wazir Singh. Although Kishen Singh's appeal has abated we have decided to exercise our powers under O. 41, R. 33 and to dismiss the suit against all the defendants. We accept the appeal and order that the suit be dismissed.

The plaintiff-respondent must pay the costs of Wazir Singh in this Court. Kishen Singh's representatives are not appellants and hence they must pay their own costs in the lower Court. The plaintiff-respondent also must pay his own costs there. It has been urged before us that the plaintiff should not be called upon to pay Wazir Singh's costs in the lower Court, because he did not make Wazir Singh a defendant and because Wazir Singh did little or nothing to defend this particular suit and for a time proceedings were exparte against him. In our view Wazir Singh was a necessary party who has properly joined as such and ordinarily he was entitled to have his costs from the unsuccessful plaintiff. The trial Court's decree, however, has awarded the defendants the large sum of Rs. 424 as counsel's fee. We do not consider that Wazir Singh has earned this in the present suit, since practically all the proceedings were taken in the other suit.

We direct that the plaintiff shall pay the costs of Wazir Singh in the trial Court, but that the sum recoverable as Counsel's fee shall be Rs. 82 only.

Appeal accepted.

(1) A. I. R. 1926 Lah. 495.

A. I. R. 1926 Lahore 565

ADDISON, J.

Makhan—Defendant—Petitioner.

v.

Harnam Singh — Plaintiff—Respondent.

Civil Revision Petition No. 87 of 1926, Decided on 15th May 1926, from a decree of the 4th Class Sub- J., Phalia, D/- 21st December 1925.

Custom (Punjab)—Manure deposited on plaintiff's land—Plaintiff not in physical possession—Manure does not become plaintiff's property.

Vacant sites in abadi are frequently used for purposes of deposit of manure, etc., and it is always presumed that such acts are permissive and do not endanger the owner's title. That being the case, it cannot be said that certain manure became the plaintiff's, because it was deposited on a vacant site of which he was not in physical possession, [P. 566, C. 1]

Zafarullah Khan for *M. A. K. Janjua*—for Petitioner.

Badri Nath for *Mehar Chand*—for Respondent.

Judgment.—The plaintiff sued the defendant for recovery of Rs. 30, the price of manure removed by the latter from a vacant site in the abadi which the plaintiff claimed as his own and which the defendant also claimed to be his. The Judge, Small Cause Court, has held for the purpose of his decision

that the site belongs to the plaintiff and that, as in the case of vacant land possession is presumed to follow title, the plaintiff must be held to be in possession of this vacant site as the ownership of the site was with the plaintiff. He further held that the defendant had no right to remove manure from it. He accordingly decreed the claim for Rs. 30 with costs. Against this decision this revision petition has been filed.

I am not prepared in this revision to go into the question of title, but it is obvious from the judgment that the Judge has not held anywhere that the manure belonged to the plaintiff. In fact he could not have done so, for the evidence of the plaintiff's own witnesses shows that the people in general used to deposit their manure on this vacant site in the abadi, ahd that it was not the plaintiff's manure at all. On behalf of the respondent, it was argued that the manure became his by the fact that people deposited it upon his site. This does not seem to me to follow. Plaintiff is in fact not in physical possession of the site which is a vacant one inside the abadi. For pnrposes of adverse possession the deposit of manure upon it would not give any right to the people putting it there as against the plaintiff. In this country vacant sites like the one in question are frequently used for such purposes and it is always presumed that such acts are permissive and do not endanger the owner's title. That being the case, it cannot be said that the manure became the plaintiff's, because it was deposited on a vacant site of which he was not in physical possession. The plaintiff, therefore, failed to prove that the manure belonged to him.

As the Court below has come to a decision contrary to law I accept this revision aud dismiss the plaintiff's suit for the reasons given above. The petitioner will have his costs here. Parties will bear their own costs in the Court below.

Revision accepted.

A. I. R. 1926 Lahore 566

ADDISON, J.

Bhagwan Das — Judgment-debtor—Petitioner.

v.

Mt. Chetan Bai—Decree-holder—Respondent.

Civil Revision Petition No. 171 of 1926, Decided on 22nd May 1926, from an order of the Senior Sub-J., Jhang, D/- 12th November 1925.

(a) *Hindu Law—Joint family—Possession of joint property is not presumed.*

There is no presumption that a joint family possesses a joint estate or property. [P 566, C 2]

(b) *Civil P. C., S. 115—Finding not based on evidence is revisable.*

A Court acts with material irregularity in the exercise of its jurisdiction in coming to a finding not based on the evidence on record. [P 568, C 2]

Sardha Ram for *M. L. Puri*—for Petitioner.

Bihari Lal—for Respondent.

Judgment.—The only question involved in this civil revision is whether the pay of Bhagwan Das employed as a clerk in the Chief Auditor's Office, North-Western Railway, is liable to attachment in execution of a decree against the joint family property, because he got a special education out of the joint family funds. He is not personally liable otherwise. The executing Court held that he was an ordinary clerk without a special education and refused to attach his pay. In the grounds of appeal to the Senior Subordinate Judge, it was stated that Bhagwan Das was a B. A., and that it should be held that he had received this special education from the joint family funds. The appellate Court held that he was a B. A., and that this was a special education which helped to exhaust the joint family estate. It, therefore, accepted the appeal and directed attachment of his pay.

In revision it is urged before me that there was no evidence either that he was a B. A., or that he received his special education from the joint family estate or funds. This is undoubtedly correct, so that it must be held that the appellate Court acted with material irregularity in the exercise of its jurisdiction in coming to the finding that it did. There is no presumption in Hindu Law that a joint family possesses a joint estate or property.

I accept this revision petition and set aside the orders of both the Courts below. I further direct the executing Court to go de novo into the question raised, namely, whether he is a B. A., and whether he received this education from the joint family estate or funds, and further whether such an education is in this instance a special one. There will be no costs here. Other costs will abide the event. The attachment must be removed in the meantime.

Application allowed.

A. I. R. 1926 Lahore 567 (1)

BROADWAY, J.

Sardul Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 188 of 1926, Decided on 30th April 1926, from the order of the Addl. Dist. Mag., Amritsar, D/- 19th January 1926.

Criminal P. C., S. 505—Examination on commission in absence of parties is most unsatisfactory.

Examination of a witness on commission but in the absence of both complainant and accused is most unsatisfactory in criminal cases.

[P. 567, C. 1]

G. C. Narang—for Petitioner.

M. Sleem for *Govt Advocate* and *Bishen Narain*—for Respondent.

Order.—The evidence of Mt. Shiv Devi is said to be of great importance. She was examined on commission but in the absence of both complainant and accused. This is most unsatisfactory. I direct that she be examined in the presence of the accused as well as the complainant both of whom will be entitled to put questions to her. The District Magistrate, Lahore, will depute a Magistrate to carry out this order. Return to be made within a month.

Order accordingly.

A. I. R. 1926 Lahore 567 (2)

JAI LAL, J.

Uttam Singh and *others*—Plaintiffs—Appellants.

v.

Chuhra and *others*—Defendants—Respondents.

Second Appeal No. 368 of 1926, Decided on 14th May 1926. from a decree of the Dist. J., Ludhiana, D/- 4th November 1925.

Practice—Pleadings—Relief—Suit for possession—Parties found to be joint owners—Decree for joint possession should be granted.

Where in a suit for possession it is found that parties are joint owners of the land, the proper course is to pass a decree for joint possession and not to dismiss the suit and not to refer the parties to Revenue Officer for partition.

[P. 568, C. 1]

Fakir Chand and *Man Singh*—for Appellant.

Rama Nand—for Respondents.

Judgment.—Both the partles of this litigation draw their title through Taru, who was a proprietor in the village. On 2nd January 1895 he sold about 20 bighas of land with a share in the shamilat deh in favour of the defendants. The plaintiff's title is based on a sale-deed dated the 1st March 1909 executed by the heirs of Taru. They purchased the remaining land of Taru with the share in shamilat deh. It appears that at the time of both these sales, the land in suit was submerged in river. The local custom is that all such land is recorded as shamilat deh during its submersion in river. On its re-appearance the person in whose possession it was before submersion is entitled to take possession of it as before.

The land in suit re-appeared a few years ago. Both the parties claimed to be exclusive owners thereof. The District Judge has held that neither party has proved his exclusive possession of the land, but that as both the parties were entitled in a share in the shamilat deh in proportion of their holdings under their respective deeds, and as at the time of both the sale-deeds the land in suit was shamilat deh, therefore, both are entitled to share in it in the proportion of their respective holdings. The learned District Judge, however, dismissed the plaintiffs' suit and stated that both the parties were entitled to a pro rata share in the land in dispute

and that the proper course for them is to apply to the Revenue Authorities for partition of the land.

The counsel for the appellants contends that the view of the District Judge that the defendants were entitled to any share in the shamilat deh was erroneous and was based on the sale-deed, which was produced by the defendants before the learned District Judge and was not proved. There is no force in this contention, as the sale deed being more than 30 years old, and having been produced from proper custody, no proof thereof was needed. Moreover, Ex. P-5 proves the defendant's contention that the sale in their favour is with the share in the shamilat deh. There is, however, force in the contention of the learned counsel for the appellants that on his finding the learned District Judge should have given a decree for joint possession of the land in suit. The suit was for possession of the land, the Court was unable on its finding to give the plaintiffs' exclusive possession, but there was no reason why they should not have been given joint possession of the property in suit to the extent of their pro rata share therein. I accept the appeal to that extent and grant the plaintiffs a decree for joint possession of their pro rata share in the land in dispute.

I leave the parties to bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 568

JAI LAL, J.

Shah Muhammad — Defendant—Appellant.

v.

Muhammad Said and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 260 of 1926, Decided on 7th May 1926, from a decree of the Dist. J., Ludhiana, D/- 19th November 1925.

Punjab Tenancy Act (1887), *S.* 73 (3)—*Suit for possession by lessee never in posssesion as tenant —Suit is trtable by civil Court,*

The Punjab Tenancy Act bars the jurisdiction of the civil Courts in cases only where the relationship of landlord and tenant has come into operation.

A person never in possession as a tenant under a lease is not a tenant. [P. 569, C. 1]

Muhammad Tufail—for Appellant.

Balwant Rai—for Respondent.

Judgment.—The plaintiff Muhammad Said obtained a lease of the land in suit from one Mt. Noor Begam. It appears that this land was not in possession of Mt. Noor Begam at the time of lease but in possession of one Imam Din who claimed to hold it adversely to Mt. Noor Begam. In order to enable Muhammad Said to sue for possession of the land, a power-of-attorney was granted to him by Mt. Noor Begam. Muhammad Said instituted a suit against Imam Din and obtained possession of the land from him. The receipt for possession is signed by him in his capacity as agent for Mt. Noor Begam. There is a possibility that Muhammad Said did not actually receive possession from Imam Din because it appears that later he filed a complaint against Imam Din, Shah Muhammad and others under S. 447 of the Indian Penal Code alleging that he had been dispossessed by the accused. This complaint was dismissed. During the pendency of this complaint Mt. Noor Begam sold the land to Shah Muhammad and Imam Din, in order to make the title to Shah Muhammad perfect, gifted his right to Shah Muhammad. The suit out of which this second appeal has arisen was instituted by Muhammad Said to obtain possession of the land leased te him by Mt. Noor Begam. In the plaint he alleged that though a lease was executed, he was never given possession of the land in suit. At the trial he alleged that he did obtain possession from Imam Din, but that was in his capacity as an agent for Mt. Noor Begam.

An objection was raised that the suit was not cognizable by the civil Courts but by the revenue Courts and that the lease relied upon by the plaintiff was an unconscionable transaction effected by Mt. Noor Begam under the undue influence of the plaintiff, and further that Shah Muhmmad was a bona fide purchaser for consideration. All these matters have been decided against the defendants and consequently this appeal.

All tbe conclusions of the District Judge are findings of fact except as

regards jurisdiction, and they cannot, therefore, be agitated in this Court. Though the matter is not free from difficulty I agree with the learned District Judge that the suit was cognizable by the civil Courts. The expression "tenant" is defined in the Punjab Tenancy Act and it means a person who "holds" land under another. It cannot be stated in this case that the plaintiff 'held' land under Mt. Noor Begam because admittedly he never held possession as a tenant of the land leased to him. The Punjab Tenacy Act bars the jurisdiction of the civil Courts in cases only, where the relationship of landlord and tenant has come into operation. *Joti* v. *Maya* (1) is an authority in favour of this view.

I consequently dismiss this appeal with costs.

Appeal dismissed.

(1) [1891] 44 P. R. 1891 (F. B.).

A. I. R. 1926 Lahore 569

JAI LAL, J.

Dayal Singh and *others*—Appellants.

v.

Kartaru and *others*—Respondents.

Second Appeal No. 81 of 1926, Decided on 19th May 1926, from a decree of the Addl. Dist. J., Amritsar, D/- 2nd October 1925.

(a) *Custom (Punjab) — Alienation — Alienee must prove legal necessity for debt due to him as antecedent debt, but not as to debt due to third person.*

Where the amount is alleged to be due to the alienee as an antecedent debt, it is his duty to prove legal necessity in respect thereof. But where the debt is due to a third person, the alienee cannot be called upon to prove the necessity for the original loan. [570, C. 1, 2]

(b) *Custom (Punjab)—Alienation—Registration expenses and household expenses paid before Sub-Registrar are for legal necessity.*

Registration expenses and cash paid before the Sub-Registrar for household expenses ought to be allowed as legal necessity. [P. 570, C. 1]

Fakir Chand—for Appellants.

Bishen Nath for *Anant Ram*—for Respondents.

Judgment.—One Narain Singh mortgaged his land to Indar Singh, Dayal Singh and Sunder Singh by three mortgage-deeds as follows: (1) On the 14th March 1922 for Rs. 2,000; (2) on the 6th October 1922 for Rs. 500, and (3) on the 25th November 1922 for Rs. 1,500. The minor sons of the mortgagor instituted a suit out of which this second appeal has arisen for a declaration that the mortgages being without consideration and necessity shall not affect their reversionary rights.

The trial Court held that the first mortgage-deed has been proved for full consideration and necessity and that the second mortgage-deed was without necessity to the extent of Rs. 200 and the third mortgage-deed to the extent of Rs. 1,100. The Additional District Judge on appeal held that no necessity had been proved in the case of the last two mortgages and that out of Rs. 2,000 mentioned in the first mortgage-deed Rs. 374 only had been proved to be for consideration and necessity. The mortgagees have preferred this appeal. The main points urged on behalf of the appellants are (1) that the suit being by the minor sons of the morogagor is collusive and that the real plaintiff is the mortgagor himself (2) that most of the items whch constituted the consideration for the deeds were antecedent debts and that some of them were spent for the purchase of buffaloes by the mortgagor and further that the view of the District Judge that the purchase of milch cattle is not a legal necessity is erroneous.

As regards the first point, the District Judge has held that the suit is not collusive and that it is the mother of the minors who is safeguarding their interests against the extravagant father. The history of these mortgages supports the conclusions of the District Judge and I see no reason to differ from him.

As regards the consideration of the first mortgage-deed, an item of Rs. 750 had been disallowed. This was payable to Munshi Ram creditor on account of a promissory note dated the 1st July 1919 the principal amount being Rs. 500. This item has been disallowed by the District Judge on the ground that Munshi Ram himself has been intimately connected with the mortgagees in all the transactions and that, therefore, the money alleged to be paid by the mortgagees on account of this promissory note to Munshi Ram was, as a matter of fact, returned to them, when the sale

of some land was subsequently effected by Narain Singh in favour of Munshi Ram. I do not understand the District Judge to hold that the promissory note of the 1st July 1919 was a fabrication. I have not been able to follow his reasoning, when he holds that Munshi Ram is the real mortgagee in this case in violation of the provisions of the Land Alienation Act. There is no evidence in support of this finding. It appears that subsequent to the mortgages, Narain Singh sold some land to Munshi Ram with the permission of the Collector under the Land Alienation Act and Rs. 3,200 out of the sale price was kept with Munshi Ram for payment to the mortgagees. This does not necessarily show that Munshi Ram himself was the real mortgagee. Having regard to the date of the promissory note, I hold that the view of the District Judge is erroneous.

Another item of Rs. 100 alleged to have been paid to one Wadhawa Singh has been disallowed. Wadhawa Singh admitted the receipt of this amount. The District Judge holds that it is not explained in the receipt why this loan was incurred by the alienor. He, therefore, disallowed this item as without necessity. But this amount being due to a third person and having been proved to be paid to him must be allowed. Another item of Rs. 725 has been disallowed. It is alleged to be payable to Dayal Singh, mortgagee, on a promissory note dated the 10th November 1919. The District Judge has rightly held that it has not been proved that this amount was incurred for legal necessity and as the amount was alleged to be due to one of the mortgagees as an antecedent debt, it was the duty of the defendants to prove legal necessity in respect thereof. The next two items of Rs. 50 each for registration expenses and cash paid before the Sub-Registrar for household expenses ought to have been allowed as legal necessity. The result is that out of this item of Rs. 2,000, Rs. 725 had been rightly disallowed and the rest, i. e. Rs. 1,275 must be deemed to be for legal necessity.

As regards the second mortgage-deed, I think the District Judge is right in holding that no necessity has been proved. As regards the third mortgage deed, Rs. 300 were paid to one Ganda Singh on a promisary note dated the 14th September 1922. The District Judge has disallowed this on the ground that this debt was incurred about two months before the execution of the mortgage-deed and that, therefore, there was no necessity for the mortgagor to incur this debt. It is not definitely established that Ganda Singh was a nominee of either Munshi Ram or the mortgagee. The debt being due to a third person, the alienee could not be called upon to prove the necessity for the original loan. I think this item has been wrongly disallowed by the District Judge. I agree with the District Judge as to the rest of the consideration of this deed.

The result is that I accept this appeal and hold that the first mortgage-deed has been proved to be for consideration and necessity to the extent of Rs. 1,275 and the third mortgage-deed to the extent of Rs, 300 and I vary the decree of the District judge accordingly.

The parties will bear their own costs in this Court.

Decree varied.

A. I. R. 1926 Lahore 570

CAMPBELL J.

Emperor—Petitioner.

v.

Muhammad Amin—Accused—Respondent.

Criminal Revision No. 237 of 1926, Decided on 17th May 1926, reported by the Dist. Mag., Attock, on 4th February 1926.

Criminal P. C., S. 562—Conviction for cheating —No attempt for restitution—Accused though young should not be treated under S. 562.

Where the accused is convicted of cheating and does not make any attempt at restitution and is literate and well able to appreciate his action and its consequences. although he is a young man, he should not be treated under S. 562. [P. 571, C. 1]

M. A. Ghani for *M. M. Tofait*—for Respondent.

Facts.—Sheikh Muhammad Amin, aged 20 years, literate, has been found guilty under S. 420, Indian Penal Code, of cheating complainants by taking with him three thans of cloth valued at Rs. 74-5-0 on the pretext of showing them to his womenfolk for approval. In fact he made off with the goods and it was

three months before his arrest was secured. The Magistrate has released him under S. 562, Criminal P. C.

Grounds.—The convict having profited to the extent of nearly Rs. 75 and made no restitution whatever, complainants cannot be satisfied with the sentence. Although accused is a young man and it is regrettable that he has committed this offence, nevertheless his mind appears to have been more than a little guilty because :

(*a*) he was literate and, therefore, well able to appreciate his action and its consequences ;

(*b*) the crime appears to have been carefully planned. The use of S. 562, therefore, appears to me not to be appropriate. The case is, therefore, submitted to their Lordships.

Order.—I agree with the learned District Magistrate that the order under S. 562 is inappropriate. The accused has been represented before me by a learned advocate who is unable to say that any attempt at restitution has been made. I alter the sentence to one of six months' rigorous imprisonment with a fine of Rs. 100 and in default of payment of fine three months' further rigorous imprisonment. Out of the fine, if realized, Rs. 80 will be paid as compensation to the complainant.

Sentence enhanced.

A. I. R. 1926 Lahore 571

ADDISON, J.

Rahman—Plaintiff—Petitioner.

v.

Ahmad Din—Defendant—Respondent.

Civil Revision Petition No. 778 of 1925, Decided on 15th May 1926, from the order of the Dist. J., Shahpur, D/- 18th August 1925.

Civil P. C., O. 9, R. 8—Failure to amend plaint and to pay costs of adjournment does not justify dismissal of suit—Civil P. C., O. 17, R. 3.

Failure to amend plaint and to pay costs of adjournment does not justify dismissal of the suit under O. 9, R. 8 nor can such dismissal be considered as one under O. 17, R. 3 when there is no judgment on merits. Revision lies on such a dismissal as it is a material irregularity.

[P 571 C 2]

Abdul Ghani for *Jalal-ud-Din*—for Petitioner.

Zafrullah Khan—for Respondent.

Judgment.—This suit was instituted on the 13th January 1923 for recovery of Rs. 716-14-0. Issues were framed. Evidence was finished and the case was fixed for arguments on the 2nd June 1924, on which day it was dismissed in default. An application was put in the same day for restoration and it was restored on the 18th August 1924. The trial Court then passed an order on the 9th October 1924 to the effect that certain facts were not clear from the plaint and that it should accordingly be amended. It was amended and put in on the 31st October 1924 and the defendant filed a reply to the amended plaint on the 15th November 1924. On this date the trial Court again said that the plaint was still not clear and it awarded Rs. 6 costs to the defendant and ordered the plaint to be further amended by the 2nd December 1924. On that date the plaint had not been further amended and the trial Court thereupon passed an order to the effect that it dismissed the suit under O. 9, R. 8, Civil P. C., for that reason and also because the costs fixed were not paid. As the suit had been dismissed under O. 9, R. 8, Civil P. C., the plaintiff applied under O. 9, R. 9, for its restoration. The trial Court then passed an order that such an application did not lie as the suit had been dismissed in the presence of the plaintiff. On appeal to the District Judge he held that the plaintiff's suit was dismissed under O. 17, R. 3, Civil P. C., and he accordingly dismissed the appeal.

Against these orders this revision petition has been admitted to a hearing. It was admitted before me that the trial Court had no jurisdiction to dismiss the suit under O, 9, R. 8, Civil P. C., and that it also could not be held to have been dismissed under O. 17, R. 3, Civil P. C., as there should have been a judgment on the merits in that case. The Courts below have thus acted with material irregularity in the exercise of their jurisdiction. I accordingly accept the petition and setting aside the orders of both the Courts below direct the trial Court to proceed to judgment on the merits of the case. The costs incurred here will abide the event.

Case remanded.

A. I. R. 1926 Lahore 572 (1)

ZAFAR ALI AND ADDISON, JJ.

Chanda Singh—Plaintiff—Appellant.

v.

Secretary of State for India—Defendant—Respondent.

Second Appeal No. 1272 of 1922, Decided on 4th May 1926, from a decree of the Addl. Dist. J., Ferozepore, D/- 21st February 1922.

(a) *Railways Act, S. 77—Notice to Traffic Manager is sufficient.*

A notice to the Traffic Manager is sufficient for the purpose of S. 77 : *A. I. R.* 1926 *Lah.* 253, *Foll.* [P. 572, C. 2]

(b) *Limitation Act, S. 14—Traffic Manager wrongly sued—Time occupied in such suit cannot be deducted in a suit against Secretary of State.*

In computing the period of limitation for a suit against the Secretary of State, time spent in conducting a suit wrongly filed against Traffic Manager instead of against Secretary of State cannot be deducted. [P. 572, C. 2]

Rama Nand—for Appellant.

C. H. Cardon Noad—for Respondent.

Judgment.—The plaintiff appellant was the consignee of certain goods despatched by rail, of which some were lost in transit and some were damaged, and he sued to recover compensation thereof. The cause of action arose in April 1917 when the goods were delivered. He instituted a suit against the Manager of the Railway in May 1918. The plaint was rejected for two reasons, i. e., (1) that the Manager could not be sued and (2) that the suit could not proceed without notice to the Collector.

The present suit against the Secretary of State was lodged on the 6th April 1920. The trial Court dismissed the suit holding that notice of the claim given by the plaintiff to the Traffic Manager did not fulfil the requirements of S. 77 of the Indian Railways Act which required notice to the Agent, and that the suit was barred by limitation because it was governed by Art. 30 or 31 of the Limitation Act and not by Art. 115 which was relied on by the plaintiff. The learned District Judge dismissed the appeal holding that there was no proper notice under S. 77 but gave no finding on the question of the limitation. In *Devi Ditta Mal* v. *Secretary of State* (1) a Full Bench of this Court had recently held that notice to the Manager is sufficient for the purpose of S. 77. The suit was therefore, not liable to dismissal on that ground. But we are of opinion that it was clearly barred by limitation. Counsel for the appellant argues that in computing the period of limitation, he is entitled to exclude the time spent in suing the Manager. We do not agree because the Manager could not be sued, and the suit against the Secretary of State cannot be deemed to have been instituted until he was made a party. The suit thus being obviously barred by limitation it will serve no useful purpose to remand the case to the District Judge for recording a finding on the question of limitation.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1926 Lah. 253.

A. I. R. 1926 Lahore 572 (2)

COLDSTREAM, J.

Gurcharan Singh and *another*—Appellants.

v.

Teja Singh and *others*—Respondents.

Miscellaneous Second Appeal No. 71 of 1926, Decided on 4th May 1926, from the order of the Addl. Dist. J., Lahore, D/- 6th October 1925.

Punjab Limitation Act (Punj. 1 of 1920), Sch. Art. 1, secondly (a)—Attestation is original attestation.

A widow made an oral gift of her deceased husband's property. The gift was recorded by a mutation order sanctioned by the Assistant Collector on the 28th December 1916. On the 3rd March 1917 the Collector passed an order authorizing the Assistant Collector to review his sanctioning order and on the 6th March 1917 the latter recorded an order refusing to sanction the mutation. The widow and the donee appealed, and on the 27th September 1917 the Commissioner reversed the order dated the 3rd March 1917 and restored the orignal order of the Assistant Collector dated the 28th December 1916.

Held : that the time for declaratory suit began to run from the original attestation and subsequent executive action by the revenue authorities could not suspend plaintiff's rights. : 35 *Cal.* 209 ; 23 *All* 152 (*P. C.*) and 33 *All.* 264 (*P. C.*), *Dist.* [P.572, C.2, P.573, C. 1, P. 574, C. 1]

Badri Das—for Appellants.

Mehr Chand Mahajan—for Respondents.

Judgment.—Sardarni Harnam Kaur, widow of Sardar Gajinda Singh made an oral gift of her deceased husband's

property, in favour of Gurcharan Singh. The gift was recorded by a mutation order sanctioned by the Assistant Collector on the 28th December 1916. On the 3rd March 1917 the Collector passed an order authorizing the Assistant Collector to review his sanctioning order and on the 6th March 1917 the latter recorded an order refusing to sanction the mutation. Sardarni Harnam Kaur and the donee appealed and on the 27th September 1917 the Commissioner reversed the order dated the 3rd March 1917 and restored the original order of the Assistant Collector dated the 28th December 1916.

On the 28th of August 1923 the present respondents Teja Singh, etc, filed a declaratory suit contesting the alienation. The Senior Subordinate Judge, dismissed the suit holding that under Article 1 of the Schedule to the Punjab Limitation (Custom) Act, 1920, the suit was barred by limitation. Teja Singh, etc., appealed and the Additional District Judge accepted the appeal holding that limitation did not run against the plaintiffs during the period that the Assistant Collector's original order sanctioning mutation remained set aside by the Collector, during which period the plaintiffs had no cause of action. He supported this conclusion by reference to *Lakhar Chandar Sen* v. *Madhusudan Sen* (1), the decision in which was confirmed by the Privy Council *Nritya Moni Dassi* v. *Lakhan Chandra Sen* (2), and on the ground of equity, observing that any other view would lead to difficulty. He remanded the case. Against this order the present second appeal has been filed by Gurcharan Singh, the donee, on whose behalf it is contended by Mr. Badri Das that the suit is clearly barred by the provisions of Article 1 of the Punjab Limitation (Custom) Act, 1920.

In reply Mr. Mehr Chand, who admits that the law of limitation applicable is Article 1 ; secondly (a) in the schedule to the Punjab Act urges that date of attestation in the article referred to can be interpreted to mean the final adjudication settling whether a mutation is to remain or not, i. e., that the word "attested" must be read to mean "finally attested". He reiterates the argument relied on by the lower appellate Court, that on the view taken by the trial Court, no time at all would have been left for suing had the Commissioner's order been delayed six years and he cites the rulings, *Ashfaq Husain* v. *Gouri Sahai* (3) and *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (4).

In my opinion this appeal should succeed. The ruling cited by the lower appellate Court and the respondent's counsel relate to cases on quite different footings from that on which this case stands. The Calcutta ruling *Lakhan Chandar* v. *Madhusudhan* (1) deals with a case in which clearly the plaintiff's right of action was suspended whilst the plaintiffs were bona fide litigating for their rights in a Court of justice : see *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (2). In the present case the mutation was not the cause of action. That cause was the gift ; and the attestation order, which was not an order extinguishing or creating the right of action, did not affect the validity of the gift. The Punjab Act adopts the date of the attestation as a convenient and responsible starting point for limitation no doubt on the assumption that knowledge on the part of the party affected must be assumed when mutation proceedings are effected, but the Act does not create any presumption of right in respect of the cause of action. The decision in *Bhup Indar* v. *Bijai Bahadur* (4) dealt with the question of the meaning of "decree" and held for the purpose of the matter in dispute, decree meant "operative or final decree." There was no question there of limitation, nor is there in the case before us any question of operative order settling the rights of parties. In *Ashfaq Hussain* v. *Gauri Sahai* (3) again while the dispute was over the question of limitation the matter decided was the meaning of "decree" that is "an adjudication of rights."

In the present case the mutation proceedings were not litigation, nor do I see why the plaintiffs' rights were ever suspended. The cause of action was

(1) [1908] 35 Cal. 209=7 C. L. J. 59=12 C. W. N. 326.
(2) [1916] 43 Cal. 660=33 I. C. 452=30 M. L. J. 529 (P. C.)
(3) [1911] 33 All. 264=9 I. C. 975=38 I. A. 37 (P. C.).
(4) [1901] 23 All. 152=27 I. A. 209=2 Bom. L. R. 978 (P. C.).

the alleged gift. Of that gift the plaintiffs had presumably knowledge at time of the original attestation. Limitation then began to run against them. Subsequent executive action by the revenue authorities could not suspend their rights.

I do not think we are concerned with what might have happened had the Commissioner's order been long delayed. If the possibility of delay in such cases is likely to lead to absurd results the events can only point this out to the legislature. No doubt, if words in a statute are capable of two meanings and one is absurd or manifestly unjust the Courts will accept the other if it is consistent with the wording, reasonable and just. But here the words in the Punjab Act are not ambiguous. As already remarked it is apparent, that the date of attestation of a mutation has been adopted for the purpose of limitation as the date on which knowledge may at latest be presumed. Had the Legislature intended that "attested" at the end of secondly (a) in Article 1 in the Schedule to the Punjab Act meant "finally attested' it would surely have made this clear.

I see no necessity on grounds of law or equity to interpret the word as meaning not "attested" but finally and irrevocably attested.

The result is that I accept the appeal, and setting aside the order appealed against dismiss the suit with costs throughout.

Appeal accepted.

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* A. I. R. 1926 Lahore 574

DALIP SINGH, J.

Harnam Singh and *others*—Plaintiffs—Appellants.

v.

Abdullah and *another*—Defendants—Respondents.

Miscellaneous First Appeal No. 348 of 1926, Decided on 17th May 1926, from an order of the Addl. Dist. J., Amritsar, D/- 26th October 1925.

* *Civil P. C., O. 41, R. 17—Remand for further enquiry and report on a fixed date—Appellant absenting on date fixed for enquiry—Appeal cannot be dismissed for default before date fixed for report.*

Where the appellate Court remands a case for further enquiry and fixes a date for the return of the report, it cannot dismiss the appeal in default before that date for non-appearance of the appellant in the lower Court on a date fixed by it for enquiry. [P. 574, C. 2]

Ram Das Seth—for Appellants.

Mohsin Shah—for Respondents.

Judgment.—The learned District Judge on appeal from the order of the Subordinate Judge, First Class, in this case remanded the case for further enquiry and for return of report on the 15th August 1925. He directed the parties to appear before the Subordinate Judge, First Class, on th 29th June 1925. On the 29th June 1925 the plaintiffs were not present and the Subordinate Judge returned the case to the Additional District Judge directing the defendant to appear on the 7th July 1925. On the 7th July 1925, the case was adjourned to the 9th of July 1925. On the 9th July the defendants-respondents were present, but the plaintiffs appellants being absent the case was dismissed for default under O. 41, R. 17. On the 15th August 1925, the plaintiffs-appellants put in an application for restoration of the appeal, but the learned Additional District Judge dismissed this application. The plaintiffs have appealed and their contention is that when the learned Additional District Judge had fixed the 15th of August 1925, for the return of report, he could not dismiss the case before that date merely because the piaintiffs-appellants failed to appear before the Subordinate Judge, First Class, on the 29th June 1925 as directed. It seems to me that this contention must prevail. The plaintiffs-appellants may have forfeited their chance of producing fresh evidence in support of their case, but this did not allow the learned Additional District Judge to dismiss the appeal in default before the 15th August at the earliest, that being the date fixed for the return of the report.

It is clear that on the 15th August 1925, the plaintiffs were present in Court and I, therefore, accept the appeal and direct the learned Additional District Judge to restore the appeal and dispose of it in accordance with law. There will be no order as to costs.

Appeal accepted.

A. I. R. 1926 Lahore 575 (1)

CAMPBELL, J.

Emperor—Complainant—Petitioner.

v.

Shamira—Convict—Respondent.

Criminal Revision No. 251 of 1926, Decided on 17th May 1926, from an order of the S. J., Montgomery, D/- 1st December 1925.

Criminal P. C., S. 438—Magistrate empowered under S. 30 trying a case which he is not competent to try—Sessions Judge finding it, should report.

A Magistrate empowered under S. 30 is not legally competent to try either the offence of murder or the offence of culpable homicide not amounting to murder punishable under the first part of S. 304, I. P. C., and therefore where a Sessions Judge is of opinion that a Magistrate so empowered has in fact tried a case which he is not competent to try, he should send the case to the High Court for an order that the accused be committed for trial to the Court of Session on a charge which he was not competent to try : 1 *P. R.* 1893 *Cr.* (*F. B.*), *Foll.* [P. 575, C. 2]

Ram Lal—for Petitioner.

Judgment.—In this case Shamira was convicted by a Magistrate of the First Class exercising the powers under S. 30, Criminal P. C., of an offence under S. 304-II of the Indian Penal Code and was sentenced to two years rigorous imprisonment and a fine of Rs. 200. Shamira appealed to the learned Sessions Judge who held that the appellant's offence was a more serious one than that of which he had been convicted. The learned Sessions Judge said that it was difficult to agree with the lower Court that the offence was one falling under the second clause of S. 304 of the Indian Panal Code, that it was absurd to hold that the appellant only knew that he was likely to cause death or such bodily injury as was likely to cause death and that his act indicated an intention to cause not death but such bodily injury as the offender knew to be likely to cause death or sufficient in the ordinary course of nature to cause death. The learned Sessions Judge further observed that the sentence of two years' imprisonment erred on the side of leniency, but that he did not think it necessary to take any action in the matter on the revision side.

The learned Sessions Jndge was plainly of the opinion that the offence was one either under S. 302 or under S. 304, Part 1 of the Penal Code. It has been ruled in *Mangal Singh* v. *Empress* (1) that a Magistrate empowered under S. 30 is not legally competent to try either the effence of murder or the offence of culpable homicide not amounting to murder punishable under the first part of S. 304 of the Indian Penal Code. Since the learned Sessions Judge's opinion was what it was, he should have sent the case up to this Court for an order that the appellant be committed for trial to the Court of Sessions on a charge under S. 302 of the Indian Penal Code.

I accept the petition for revision and order that the conviction and sentence be set aside and that Shamira be committed by the trial Magistrate to the Court of Sessions on a charge under S. 302 of the Indian Penal Code. This order is passed in consequence of the opinion expressed by the learned Sessions Judge and not of any opinion formed by me.

Petition accepted.

(1) [1893] 1 P. R. 1893 Cr. (F. B.).

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* A. I. R. 1926 Lahore 575 (2)

ZAFAR ALI AND ADDISON, JJ.

Secretary of State for India—Defendant—Appellant.

v.

Firm Har Kishan Das—Kura Mal—Plaintiff—Respondent.

Second Appeal No. 13 of 1923, Decided on 7th December 1925, from the decree of the Dist. J., Hissar, D/- 2nd October 1923.

* *Railways Act, S. 72—Consignee refusing to take delivery, goods being damaged—Railway selling goods by auction being perishable—Consignee can recover only the price fetched minus demurrage.*

The liablility of a railway as a carrier to the consignee after the arrival of the goods is not the same as that of a warehouseman or a bailee for hire, and, therefore, where a consignee refuses to take delivery of goods which have not become valueless on the ground that they are damaged, and the railway sells the goods by auction, the consignee is entitled only to the price fetched at the auction sale minus any demurrage due to the Railway Company. In such a case the proper remedy of the consignee is to

take delivery of the damaged goods and claim damages from the Railway Company : *Mitchell* v. *Lancashire Yorkshire Railway Company*, 10 *Q. B.* 256, *Dist.* ; 42 *All.* 655 and *A. I. R.* 1922 *All.* 514, *Foll.* [P. 577, C. 1, 2]

C. H. Carden Noad—for Appellant.

Tek Chand—for Respondent.

Zafar Ali, J.—This second appeal arises out of an action for value of the goods despatched to the plaintiff by rail but which he did not take delivery of on the ground that they were spoilt by wet. The facts are briefly as below :

Three consignments comprising 172 bags of *ata* were booked at a railway station on three consecutive dates, but all arrived together at their destination—the railway station at Hissar—on the 3rd July 1920 and were stacked there in the open air for want of room in the goods-shed. The plaintiff who was the consignee of all these bags failed to appear and claim them earlier than the 10th July, and on that date he refused to accept delivery saying that the *ata* was damaged by the rain that had fallen that very day. *Ata* is a perishable article and does not keep long specially in the hot weather. As the plaintiff would not take delivery the railway authorities ultimately sold the bags by auction on the 1st December 1920. By that time the *ata* must have considerably deteriorated and the price that it fetched was Rs. 855 only. As against this sum the railway administration claimed Rs. 793-3 as demurrage.

According to the plaintiff's own evidence the bags constituting the upper layer of the stack only were wetted, but the extent of injury to them and their number were not proved. The trial Court, therefore, held that though some injury was done its extent was not proved and that the plaintiff was bound to accept delivery and could subsequently sue to recover damages if any. On these findings it disallowed the plaintiff's claim for value of the goods and granted him a decree for the price for which the bags had been sold minus the sum payable on account of demurrage.

On appeal the learned District Judge held that the plaintiff was not bound to take delivery. In his opinion

> the proper course would have been to have the bags opened and surveyed by some reliable man and to see how much damage had been done

and he observed that

> the result was that plaintiff did not take delivery and goods which could not have deteriorated very much in value on 10th July 1920 were so rotten when they were sold on 1st December 1920 that they could not fetch more than Rs. 855 or nearly one-third of their price.

That being his view he allowed the plaintiff's claim for the value of the goods minus the sums payable on account of freight and demurrage up to 10th July only.

Now the two most important questions in the case were :

(1) What was the amount of damage caused by the rain on the 10th July ?

(2) Whether the plaintiff was justified in refusing delivery on that date ?

On the first question there is no evidence and with regard to the second the learned counsel for the plaintiff-respondent can cite no authority to show that the plaintiff, instead of accepting delivery and claiming compensation for the damage if any, was entitled to refuse delivery and claim the value of the goods. As already stated the plaintiff's evidence was that only some of the bags were wetted. This being so he had no valid excuse for refusing delivery of even those bags which had not been wetted. With regard to the bags that were wetted he was only entitled to sue for the loss that he might have suffered in consequence of the *ata* of these bags having become wet. That loss would not have been considerable, and the consignee could not refuse delivery because the goods had not become valueless. In *B. N. W. Ry. Co.* v. *Mul Chand* (1) a Division Bench of the Allahabad High Court held by reference to *Chapman* v. *Great Western Ry. Co.* (2) that

> the consignee of goods sent by rail is bound to take delivery thereof within a reasonable time. If by his own laches he omits to do so, he cannot hold the railway company liable for any loss or damage which may accrue. Different considerations would arise if there were any evidence to show an agreement on the part of the railway company to act as warehousemen ; but the mere fact of the company charging demurrage would not necessarily give rise to such an implication.

In *Sri Gangaji Cotton Mills Co. Ltd.* v. *E. I. Ry. Co.* (3) certain bales of cotton were damaged in transit and the railway officials offered to pay compen-

(1) [1920] 42 All. 655=58 I. C. 1000=18 A. L. J. 764.

(2) [1880] 5 Q. B. D. 278=44 J. P. 363=28 W. R. 566=49 L. J. Q. B. 420.

(3) A. I. R. 1922 All. 514=44 All. 763.

sation at certain rates, but the consignee refused to accept that offer and refused to remove the goods and these were ultimately sold by the railway authorities. It was held that the railway company were acting within their right in selling the goods when the consignee would not take delivery. In the present case if the consignee had taken delivery on any date between the 3rd and 10th July no damage would have occurred. Further it is clear that as remarked by the District Judge the *ata* must have deteriorated and become unfit for human consumption by the time that it was sold by auction. The railway authorities could not proceed to sell the bags at once and it was entirely the result of the plaintiff's unjustifiable refusal to accept delivery that the *ata* deteriorated and lost considerably in value. Even the bags that were wetted would have, if taken to the market within a few days after the rain, fetched a price not much below the normal. Counsel for the plaintiff cites *Mitchell* v. *Lancashire Yorkshire Ry. Co.* (4) which appears to be a parallel case, but is as a matter of fact quite distinguishable. In that case the railway company concerned gave notice to the consignee after the arrival of the goods that

> they (goods) are now held by the company not as carriers, but as warehousemen

and it was held that as warehousemen for hire the company were liable to the consignee for the damage caused in consequence of their omission to take reasonable care of the goods. But it is not the business of the railway administration in the present case to work as a warehouseman or a bailee for hire. Its proper function is that of a public carrier and it is only in connexion with the performance of its duty as a carrier that it is held responsible as a bailee. The duty as a carrier is discharged on the arrival of the goods at their destination and it is not in the line of the railway administration to keep the goods after that as a warehouseman or a bailee for hire. The consignee on the other hand is expected to take delivery within a time fixed by the rules and if he neglects to do so the railway administration can claim demurrage and not hire. That being so, its liability to the consignee after the arrival of the goods is not the same as that of a warehouseman or a bailee for hire.

Granting that the railway administration in the present case was liable to compensate the consignee for the injury to his goods the extent of that injury not having been established there was no material on the record for appraising the damage and, therefore, he could not be awarded anything by way of compensation.

In view of all that has been stated above we accept the appeal and reversing the judgment and decree of the District Judge we restore that of the trial Court. The plaintiff shall pay the defendant's costs throughout.

Appeal accepted.

(4) [1875] 10 Q. B. 256=23 W. R. 853=44 L. J. Q. B. 107.

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* A. I. R. 1926 Lahore 577

JAI LAL, J.

Joint Hindu Family of Uttam Chand and *Dittu Ram*—Plaintiffs—Petitioners.

v.

Goraya Mal—Defendant—Rsspondent

Civil Revision Petition No. 737 of 1925, Decided on 13th May 1926, from an order of the Sub.-J., 4th Cl., Khanewal, D/- 21st April 1925.

* *Civil P. C., O. 9, Rr. 8 and 12—Person ordered by Court to be added as plaintiff—Failure of such person to appear does not justify dismissal of original plaintiff's suit.*

Where a person has been added as plaintiff by the Court, his non-appearance in pursuance of its orders should not entail the consequence of the dismissal of the original plaintiff's suit who really denied the right of the added plaintiff to be joined in the suit as a plaintiff. [P. 578, C. 1]

L. C. Mehra—for Petitioner.

Bishen Nath—for Respondent.

Judgment.—The petitioners instituted a suit in the Court of the Subordinate Judge, Khanewal. It appears that on the objection of the defendant one Remal Mal was added as a plaintiff. It doet not appear whether this was done with the consent of Remal Mal. Remal Mal was then ordered by the Court to appear personally. He failed to comply with this order. The Judge, thereupon dismissed the suit under O. 9, Rr. 8 and 12 of the Civil P. C. The present petition is for the revision of that order.

It is contended on behalf of the petitioner that Remal Mal having been added as plaintiff by the Court, his non-appearance in pursuance of its orders should not have entailed the consequence of the dismissal of the plaintiff's suit who really denied the right of Remal Mal to be joined in the suit as a plaintiff. The order of the Court which is sought to be revised is obviously erroneous and cannot be supported on any ground. The learned counsel for the respondent says that he does not support it. I accept this petition, set aside the order of the Subordinate Judge, dated the 21st April 1925, remit the case to him and direct him to restore it to its original number and to proceed with it in accordance with law. No order as to costs in this Court.

Petition accepted.

A. I. R. 1926 Lahore 578

HARRISON AND DALIP SINGH, JJ.

Jiwan Das—Defendant—Appellant.

v.

Sher Muhammad Khan—Plaintiff—Respondent.

Second Appeal No. 1352 of 1922, Decided on 8th May 1926, from a decree of the Dist. J., Shahpur, D/- 3rd March 1922.

Jurisdiction—Civil and revenue Court—Liability under lease—Contract of lease substituted by agreement changing parties' relation into creditor and debtor—Suit for the claim lies in civil Court—Punjab Tenancy Act (16 *of* 1887), *S.* 77.

Where the liability arises out of the existence of the original lease and the relation of landlord and tenant between the parties, but the old contract of lease is terminated and superseded and a new contract substituted by an agreement whereby the relation becomes that of creditor and debtor a suit can be instituted in the civil Court. [P. 579, C. 1]

Nanak Chand—for Appellant.

Badri Das—for Respondent.

Judgment.—Two separate suits were brought by Khan Bahadur Malik Sher Muhammad Khan against two persons Jiwan Das and Diwan Chand to recover definite sums of money. Both suits have been decreed and both the judgment-debtors have appealed. The appeal of Diwan Chand has been compromised and that of Jiwan Das alone remains.

The facts are simple enough. Three men, of whom Jiwan Das was one, jointly took a lease for a large area of land for a period of seven years from the plaintiff. After three harvests had been reaped, the lease was ended by mutual consent. A document was executed by the defendant Jiwan Das in which he acknowledged unconditionally his liability to pay a sum of Rs. 1,849-14-3. Another document was also executed in favour of the plaintiff. The suit was originally instituted on the basis of the acknowledgment. It was subsequently withdrawn with permission to bring a fresh suit, and a fresh plaint was presented upon the other document. This was never amended, but the plaintiff was permitted to proceed as if his suit had been in the original form. Issues were framed accordingly and no objection was raised on this point before the District Judge, the parties having understood throughout the basis on which the litigation was proceeding. We do not allow the objection now raised on this point.

It was held by both the lower Courts that the suit was competent, that there had been a novation of contract, that the suit was not barred by limitation and a decree was accordingly given. On second appeal, the only points for us to decide are whether the suit was cognizable by a civil Court and whether it was within time. Mr. Nanak Chand contends that once there has been the relation of landlord and tenant between the parties and money has become due as rent, no subsequent transaction can alter the nature of the debt and make it the subject-matter of a suit cognizable by a civil Court. Mr. Badri Das, on the other hand, contends that this is not one of those difficult cases, on the border line, where there can be any doubt regarding jurisdiction. He explains that originally the three tenants were jointly and severally liable and in accordance with the terms of the lease Rs. 500 earnest money had to be paid in advance and accounted for at the end of seven years on the termination of the lease. The result of the agreement come to was : (1) the lease was ended ; (2) the liability was apportioned ; and (3) the earnest money which had not been paid was added to the liability and divided between the three original tenants.

He contends, and, in our opinion, rightly that this cannot be held to

amount to anything short of a complete novation of contract creating an entirely new liability. Although it is true that the liability arose out of the existence of the original lease and the relation of landlord and tenant between the parties, the old contract having been terminated and superseded and a new contract substituted, the relation became that of creditor and debtor and the suit was rightly instituted in the civil Court.

As to limitation, it is urged by Mr. Nanak Chand that Art. 64 does not apply and that if Art. 64 does not apply, it is for the other side to show that the suit is within limitation in virtue of another article. The wording of Art. 64 is far from simple and there has been a distinct conflict of opinion between the various High Courts as to the exact meaning of the words "accounts stated between them." It is unnecessary for us to go into this question here and now as, in our opinion, if Art. 64 does not apply, there can be no doubt that Art. 120 will; for no other article has even been suggested.

Having decided both points against the appellant we dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 579

JAI LAL, J.

Hardasmal Khubchand Kerpalani—Defendant—Appellant.

v.

Jagan Nath-Jauhrimal — Plaintiffs—Respondents.

Miscellaneous First Appeal No. 87 of 1926, Decided on 12th May 1926, from an order of the Jr. Sub-J.. Rawalpindi, D/- 28th October 1925.

Civil P. C., O. 9, R. 6—Service by registered post—Defendant acknowledging such service—Ex parte proceedings should not be taken—Civil P. C., O. 5, R. 10, Proviso by Lahore High Court.

No ex-parte proceedings, either on the basis of service through registered post in the first instance or on the ground that the defendant admits the receipt of the summons by registered post by sending a letter, should be taken.

[P. 580, C. 1]

Moti Sagar—for Appellant.

R. J. Rustomji—for Respondents.

Judgment.—This is an appeal from an order dated the 28th October 1925 passed by the Subordinate Judge of Rawalpandi refusing to set aside an ex-parte decree passed by him on the 6th August 1925. The suit was fixed for hearing on the 11th July 1925. The defendant resided in Tando Adam a place in Sind. Summonses were ordered to be sent by post and in the ordinary way. Those sent by post were received by the defendant on the 29th June 1925. Those sent in the ordinary way were served upon him on the 8th July 1925. On the 6th July 1925 the defendant wrote to the Court a letter in which he raised some objections to the jurisdiction of the Court to entertain the suit and also on the merits of the plaintiff's claim and also asked for the postponement of the case. This letter was received by the Court on the 10th July 1925, but no reply was received by the defendant till the 22nd July. The reply of the Court was that no notice could be taken of such application. The Subordinate Judge was obviously right in refusing to take notice of the defendant's letter, but I consider that he should have returned it, if he desired to do so, soon after its receipt. Summonses sent in the ordinary way were served upon the defendant on the 8th July and were returned by a Subordinate Judge of Shahdadpur to the Subordinate Judge of Rawalpindi on the 11th July when the Subordinate Judge decided to proceed ex parte against the defendant.

On the 23rd July the defendant sent a reply prepaid telegram to the Subordinate Judge asking him the date fixed for the hearing of his case. No reply having been received by him he started for Rawalpindi on the 26th July. On arrival at Rawalpindi he found that the Courts were closed till the 3rd August, In the meanwhile the Subordinate Judge had recorded ex-parte evidence of the plaintiff on the 22nd and 23rd July and had fixed the 6th August for judgment. The Court was to re-open on the 3rd August, but the Judge was on leave till the 6th August. It appears that the defendant prepared an application to be presented in Court on the 3rd August asking that the ex-parte preceedings be set aside, but owing to the absence of the Judge this application could not be presented on the 3rd. An application was pre-

sented on the 6th, the appellant alleges. at 10-30 but according to the Judge at 11, Before the application was presented the learned Judge had announced his order passing an ex-parte decree.

From the above, two facts are clearly established, that the Court decided to take ex-parte proceedings against the defendant without the receipt of report of the service of the summons sent to the defendant in the ordinary way. It took such proceedings either on the basis of the service effected through the registered post or on the basis of the letter written by the defendant admitting having received the summons by registered post. Now a proviso to O. 5, R. 10 has been added by this Court which provides that summonses under registered cover may be sent in the first instance but no ex-parte proceedings shall be taken thereon if the defendant does not appear after receipt of such summonses. No substituted service was ordered in this case.

Another fact that appears from the above is that though the defendant was ill advised in asking for a postponement of the case by addressing a letter to the Judge by post, still he was anxious to defend the suit and on being told by the Court that no notice could be taken of his letter took immediate steps to defend the suit. The absence of the defendant, therefore, was not intentional in this case and the service of summons on which the Court decided to proceed ex parte against him was not such a service on which the Ccurt could so proceed. Summonses cannot, therefore, be held to have been duly served on the defendant when ex-parte proceedings were taken against him.

On the above findings, I do not think it necessary to consider a further point that was argued before me by the learned counsel on both sides which is, whether or not this Court has discretion to set aside an ex-parte decree in cases where the summonses have been duly served and the defendant is unable to prove that he was prevented from appearing in Court to defend the suit for a sufficient cause. I accept this appeal, set aside the ex-parte decree passed against the defendant and remit the case to the trial Court with directions to reinstate the suit in its original number and to proceed with its trial in accordance with law. I, however, order that the defendant will pay to the plaintiff Rs. 50 as the costs of proceedings relating to the setting aside of the ex-parte decree and further that he will give security to the satisfaction of the Subordinate Judge that he will duly perform any decree that may be passed against him. The order setting aside the ex-parte decree is conditional on the compliance by the defendant of my order as to security and costs within a month from to-day.

Case remitted.

A. I. R. 1926 Lahore 580

SHADI LAL, C. J., AND COLDSTREAM, J.

Jiwan Das and *others*—Appellants.

v.

Lorind Chand—Respondent.

Second Appeal No. 1685 of 1922, Decided on 12th May 1926, from a decree of the Dist. J., Jhang, D/- 21st April 1922.

Evidence Act, Ss. 101 *and* 103 — *Vendor and purchaser—Agreement for sale with one but sale to another — Burden of proving bona fides lies on vendee—Specific Relief Act, S.* 27 (*b*).

Where a person enters into an agreement to sell his property to one person but subsequently sells it to another person, it is for the vendee to prove that he is a transferee in good faith and without notice of the original contract.

[P. 581, C. 1]

Ram Chand Manchand — for Appellant.

Lal Chand and *Devi Dayal* — for Respondents.

Judgment.—On the 6th April 1920, Ram Lal entered into a contract with the plaintiff Lorind Chand by which he agreed to sell the latter the land in dispute in consideration of receiving funds to carry on a suit which he desired to bring with respect to the property, including the land in dispute, alienated by Mt. Atma Devi the widow of his collateral Ganpat. On the 7th April he brought the contemplated action and obtained in December a decree for pre-emption on payment of Rs. 1,370. It appears that Ram Lal did not perform his contract with Lorind Chand, but sold the land to Jiwan Das and his brothers in February 1921.

Lorind Chand has brought the action, out of which this second appeal arises, for

the recovery of the land and his claim has been decreed by the Courts below. Jiwan Das and his brothers seek to impeach the decree on the ground that they were transferees in good faith without notice of the original contract, but the learned District Judge has pronounced his opinion against them and his finding being one of fact cannot be impugned in second appeal. It is clear, and indeed it is admitted by the learned counsel for the appellants, that the burden lay upon his clients to prove their allegation that they were transferees without notice, and that the ground of appeal suggesting that the onus lay on the plaintiff is based upon a misapprehension of law. The learned counsel for the appellants, however, argues that the contract of the 6th April 1920 was champertous and should not be enforced by the Courts. No such plea was raised by them either in the trial Court or in the Court of first appeal, and they cannot be allowed to invoke a new defence in the Court of second appeal.

The judgment of the learned District Judge is not open to any valid objection and must be affirmed. The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 581

ZAFAR ALI, J.

Manak Chand and *others*—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 296 of 1926, Decided on 8th May 1926, from an order of the S. J., Multan, D/- 15th and 19th January 1926.

Criminal P. C., S. 35 — Act rendering accused liable under Penal Code. S. 353, and converting them into unlawful assembly is the same—Separate sentences are illegal.

Separate sentences under S. 353/147, Penal Code, cannot be passed when the act which converts the accused into an unlawful assembly is the same as renders them liable to punishment under Penal Code S. 353. [P 581 C 2]

Ram Chand Manchanda — for Petitioners.

Judgment.—Every one of the petitioners has been convicted under Ss. 353 and 147, Indian Penal Code, and has been sentenced to a fine of Rs. 200 for either offence. One Roshan Lal having met a violent death, the police wanted to send his body for post-mortem examination, but some friends of the deceased removed the body to the cremation ground and burnt it there. According to the learned Sessions Judge it was

> clearly established that the corpse of Roshan Lal was burnt in defiance of the order of the Sub-Inspector and that he and the police were assaulted while trying to stop the deceased's friends and relations from disposing of the corpse.

and he maintained the convictions and sentences of the petitioners under Ss. 353 and 147, Indian Penal Code. It is contended (1) that the Sessions Judge has failed to make it clear how the petitioners constituted an unlawful assembly and what was the common object of that assembly and (2) that separate sentences under S. 353/147, Indian Penal Code, were illegal, because the act which converted the petitioners into an unlawful assembly was the same as rendered them liable to punishment under S. 353, Indian Penal Code. As regards (2) he relies on *Bhagwan Singh* v. *Empress* (1) and *Mangal Singh* v. *Emperor* (2).

There is no force in the first contention. Though it is not stated in so many words the finding of the Sessions Judge is to the effect that the petitioners' common object was to prevent the police by use of criminal force from taking possession of the corpse. But the second contention is well founded, and I am of opinion that separate sentences could not be passed. I, therefore, accept the petition so far as to remit one of the two fines so that each petitioner will pay a fine of Rs. 200 only under Ss. 353 and 147, Indian Penal Code. The fines, under the second sentence, if already realized, will be refunded.

Petition partly accepted.

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(1) [1901] 4 P.R. 1901 Cr.=52 P.L.R. 1901 (F.B.).

(2) [1915] 31 P.R. 1916 Cr.=38 I.C. 756.

* A. I. R. 1926 Lahore 582

CAMPBELL AND ADDISON, JJ.

Buta Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 35 of 1926, Decided on 12th April 1926, from the order of the S. J., Ferozepore, D/- 30th November 1925.

* (a) *Evidence Act, S. 33—Evidence of witnesses before a Judge having no jurisdiction cannot be used.*

A proceeding before a Judge or Magistrate who has no jurisdiction is coram non judice and the evidence of witnesses given in such a proceeding cannot be used under S. 33 on a retrial before a competent Court. [P. 582, C. 2]

* (b) *Criminal P.C., S. 188—Proceedings before obtaining a certificate are void.*

The proceedings of a Magistrate committing an accused person to the Sessions Court, before a certificate under S. 188 fs obtained, are void and illegal and the commitment may be quashed: *A. I. R.* 1925 *Lah.* 185, *Foll.* [P 582, C. 2]

* (c) *Evidence—Circumstantial evidence must be exhaustive but every incident short of actual commission need not be proved by posstive evidence.*

Though circumstantial evidence must be exhaustive, that does not mean that every incident short of the actual commission of the offence must be proved by positive evidence but that what is required is so high a degree of probability that a prudent man would feel justified in holding that the accused committed the crime: 32 *P. R.* 1916 *Cr., Appl.* [P. 584, C. 2]

Pindi Das—for Appellant.

C. H. Carden Noad—for Respondent.

Addison, J.—On the 31st July 1922, Buta Singh of village Manga in the Lahore District and Karam Singh of village Matta in Faridkot State were sentenced to death by the Sessions Judge of Ferozepore for the murder of Attarpuri of village Gholia Kalan in the Ferozepore District on the night of the 21st-22nd August 1921. On appeal to this Court they were discharged on the 16th December 1922 on the ground that the proceedings were without jurisdiction as the murder had been committed within the boundaries of the Native State of Kalsia. It was suggested that Karam Singh should be handed over to the Kalsia authorities and this was done. He has been tried in that State and sentenced to transportation for life. With regard to Buta Singh who is a native Indian subject it was left to the police to take action under S. 188, Criminal P. C. The certificate required by the first proviso to S. 188, Criminal P. C., has been obtained and Buta Singh has again been tried and sentenced to death for the same murder by the Sessions Judge of Ferozepore on the 30th November 1925. The long delay in trying him for the second time has not been explained. He has appealed and the sentence is before us for confirmation.

Since the first trial certain witnessess have died or have disappeared and their statements have been transferred to their present record ostensibly under the provisions of S. 33 of the Evidence Act. In this way the statements of Sucha Singh, Kalu, Kala Singh, Baga Singh, Nazir and Dhara Singh, (P. Ws. 39, 40, 41, 42 and 43 and D. W. 2) recorded by the Sessions Judge, at the first trial have been used as evidence at this trial while the statement of Baga Sanyasi (P. W. 57), recorded by the first Magistrate who committed the case, has also been used. This was against law. The first trial was not, a judicial proceeding as there is a final order by this Court ruling it to have been without jurisdiction. It was held in *Regina* v. *Rami Reddi* (1) that a proceeding before a Judge or Magistrate who had no jurisdiction was coram non judice and that the evidence of witnesses given in such a proceeding could not be used under S. 33 of the Evidence Act on a re-trial before a competent Court. So far as the statement recorded in the committing Court is concerned, it was made clear in *Ram Charan* v. *The Crown* (2) that the proceedings of a Magistrate committing an accused person to the Sessions Court before a certificate under S. 188, Criminal P. C. was obtained were void and illegal and the committment was quashed. We hold that the statement of the witnesses named above could not be transferred and used against the appellant at the retrial.

The first ground of appeal that the second trial was without jurisdiction was given up and has no force. We have carefully considered the admissible and relevant portion of the record through which we have been taken by the learned counsel for the appellant and we see no reason to disagree with the finding of the learned Sessions Judge and the four

(1) [1881] 3 Mad. 48.

(2) A. I. R. 1925 Lah. 185=5 Lah. 416.

assessors who helped him at the trial. There is ample evidence that Karam Singh used frequently to visit Attarpuri and went to stay with him at Gholia on the 20th August 1921 accompanied by the present appellant who was not known to the people residing in the locality but who has been satisfactorily identified by them. Mt. Daropadi, widow of the deceased, has stated that the appellant did come once before with Karam Singh, but there is only her evidence on this point. At the time with which we are dealing Gajindhar Pal, the brother of Mt. Daropadi, who was then a boy aged 10 or 11 years, was staying with her. On the 21st August Attarpuri accompanied by Karam Singh and the appellant went to Chirak in Kalsia State in order to drink and were seen by many people there. The case for the prosecution is that Attarpuri was killed near the canal on the way home.

Both Mt. Daropadi and her brother have stated that the appellant and Karam Singh came back alone at night to Attarpuri's dera outside Gholia and compelled the woman to accompany them. The boy, her brother, was also taken as that was considered most convenient at the time. The appellant and his companion said that the deceased was lying drunk near the canal and they asked Mt. Daropadi to help to bring him back. When they reached the canal they threatened Mt. Daropdi and her brother and took them to a railway station from where they went by train to Raewind. After that they were taken to village Phalara and they were kept in the fields of one Lal Singh who was well known to Buta Singh. In the absence of their abductors they saw in one of their purses the ring and earings of the decesaed. The boy has also deposed that on the journey he identified the deceased's dhoti, pagri and shoes in a bundle which the appellant and Karam Singh were carrying. The boy was a nuisance and according to him and his sister it was suggested that he should be killed, but as Mt. Daropadi pleaded for his life, Karam Singh, who committed this murder in order to obtain her, refused to allow this.

Thereafter Karam Singh took the boy back to Raewind station and bought two tickets. He himself got down at the next station of Rajajang. The boy, seeing this followed him though the ticket given to him was for Moga fourteen stations on. The Station Master's attention was attracted to the boy leaving the train as it was moving out of the station and he caught hold of him for this reason. Karam Singh asked the Station Master to let the boy go and when the Station Master was examining the tickets ran away. The boy then told the Station Master what had happend and the latter had the boy's statement recorded by an Honorary Magistrate. This statement is Ex. P. U., dated the 26th August 1921, and it gives very briefly all the essential facts. Karam Singh was named and described. His companion was stated to be Buta Singh from the Manjha. It is impossible to believe that the boy would have been tutored at the time he made that statement.

On the 22nd August 1921, when it was discovered at Gholia that the dera of the deceased was deserted, the father of the deceased went to Bagha Purana police station, but the police refused to record a report until the body was found. The relatives of the deceased came to know that there was a headless trunk in the canal some few days later and at 3 p. m. on the 24th August 1921 Gajindarpuri, brother of the deceased, made a very full report at the police station though the companion of Karam Singh was not named in it. The body was taken out on the 24th August and was identified to be that of Attarpuri by reason of certain marks. On the 26th August 1921 the head was also found in the canal and it was identified. The medical evidence establishes that there were two injuries on the skull and a contusion over the left eyeball. Besides cutting of the head the murderers had removed the penis and testicles. Karam Singh was not arrested till the 31st October 1921 while Buta Singh was arrested on the 11th November 1921 at Phalara. The latter was only caught after a fight in which he used a chhavi and he was himself injured.

There is no doubt that Karam Singh wished to obtain possession of Mt. Daropdi whom he had frequently seen when he used to visit the deceased. It has also to be remembered that all three were drunk and this helps to explain the brutality of the murder. It would not

be difficult for Karam Singh to get the help of Buta Singh.

It was argued that Karam Singh would have given the boy a ticket to Moga station which is within ten miles or so of Gholia, if he and the appellants had committed the murder. This does not follow. He did not want to kill him though he wanted to be rid of him. If the boy had gone beyond Moga to Ludhiana, he would not have been far from his home in Hoshiarpur. In any case both Karam Singh and Buta Singh in all probability considered that they were safe. They knew that there were no eyewitnesses and they thought that the body would never be found. In these circumstances, it cannot be said that they even dreamt that they were running any risk in giving the boy a ticket to Moga or any other station, this being looked upon as the easiest method of getting him out of the way.

Another argument put forward was that one witness Gajindarpuri, brother of the deceased, stated in cross-examination that he saw that the appellant had marks of smallpox on his face, while nothing was said about this in the first information report made by him. It is not mentioned whether the marks were pronounced or not, but as the learned Sessions Judge has not alluded to this ciacumstance, it must be taken they were in no way conspicuous. This also is a small matter in face of the overwhelming testimony of all the witnesses including the boy and his sister that it was Buta Singh, appellant, who was the companion of Karam Singh and no reason was suggested why they should have implicated him falsely.

The appellant Buta Singh explained that two companions of his who were co-accused with him in a case in Lahore were first suspected of the murder but were released by the police, and that though he was present when the Sub-Inspector of Police came to his village the latter took no action against him, He attributed his arrest to his enemy Kala Singh who instigated the Sub-Inspector of Police to implicate him in the case. The defence evidence produced, however, does not establish his allegations and no weight can be attached to them.

It has been proved that Attarpuri was murdered, that the appellant was one of two persons last seen in his company in Chirak, that he and Karam Singh returned to Attarpuri's dera and took away Mt. Daropdai and her brother, that they went to Raewind and thence to Phalara, that thereafter Karam Singh took the brother of Mt. Daropdi to Raewind and got rid of him at Rajajang, that the appellant kept in hiding for a long period and made a determined resistance to his capture and that the boy Gajindar Pal at once implicated Buta Singh and mentioned that he and Karam Singh had the deceased's clothes and ornaments. These facts are incompatible with the innocence of the appellant. It was held in *Thakar Das* v. *The Crown* (3) that though circumstantial evidence must be exhaustive, that did not mean that every incident short of the actual commission of the offence must be proved by positive evidence, but that what was required was so high a degree of probability that a prudent man would feel justified in holding that the accused committed the crime. This applies to the case of the appellant and we have no hesitation in maintaining his conviction, under S. 302, I. P. C. and in holding that he was one of the murderers of Attarpuri.

We are of opinion, however, that the capital sentence should not be imposed as this is his second trial for an offence committed in August 1921, i.e., four and a half years ago. We accept the appeal to the extent of reducing the sentence to transportation for life.

Sentence reduced.

(3) [1916] 32 P. R. Cr. 1916=38 I. C. 759 =18 Cr. L. J. 375.

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* A. I. R. 1926 Lahore 584

JAI LAL, J.

Ganga Sahi—Plaintiff—Petitioner.

v.

Karim Bakhsh and *another*—Defendants—Respondents.

Civil Revision Petition No. 753 o 1925, Decided on 7th May 1926, from the decree of the Sub-J., 2nd Cl., Sialkot, D/- 18th December 1925.

* *Civil P. C., Sch. 2, Para. 16—Objection to award filed—Court is not bound to fix a date for evidence suo motu.*

It is not the duty of the Court suo motu to fix a date for evidence in support of the objections to an award filed in Court. It is for the parties to move the Court if they want to produce evidence. [P 585 C 2]

Fakir Chand—for Petitioner.

Zafar Ullah Khan—for Respondents.

Judgment.—A suit was instituted in the Court of the Subordinate Judge, Second Class, Sialkot, for dissolution of partnership and for rendition of accounts. The parties referred their disputes to the arbitration of Mr. Inayat Ullah, Honorary Magistrate. After some proceedings had taken place before the arbitrator, he fixed the 1st November 1925 as the date of hearing of the evidence of all the parties concerned and expressly ordered that on that date all the parties must come prepared with their evidence because the award was to be given by the 4th November. On the 29th October 1925, the plaintiff presented an application in Court complaining of the conduct of the arbitrator and prayed that the order of reference to arbitration be set aside. It was not mentioned in the application under what section it was made. An order was written on the back of this application of the 29th October, that it should be put up on the 4th November with the record. On the 2nd November 1925, a report was recorded by somebody that the record was with the arbitrator. Between these two orders is an order by the Subordinate Judge dated the 17th November to the effect that the application cannot be entertained and that it was not put up before him on the 29th October, nor did he pass any orders about it. It may be mentioned that the order of the 29th October does not appear to be signed by the Judge.

The plaintiff appeared before the arbitrator on the 1st and stated that he had presented an application to the Subordinate Judge and had been told that it would be heard on the 4th November and that, therefore, he was not prepared to produce any accounts before the arbitrator. He declined to disclose the contents of the application. Other parties were present on that day and asked the arbitrator to proceed with the case. Consequently the arbitrator proceeded with arbitration proceedings and made his award on the 3rd November 1925, and presented it in Court on the 4th November. By this award the arbitrator gave a decree for Rs. 3,523-7-0, against the plaintiff in favour of the defendant. The Court gave the parties time to file their objections and fixed the 16th November for their hearing. The plaintiff filed objections on the 10th November in which he objected to the action of the arbitrator in giving a decree to the defendant against the plaintiff. He further alleged that the arbitrator was not entitled to proceed with the arbitration proceedings in fact of the application made by the plaintiff on the 29th October on which the Court had ordered that the same be put up with the record on the 4th November. A further objection was taken that the arbitrator had erred in not giving a further date to the plaintiff to produce his evidence and that the arbitrator had not sent with his award a certain cheque reference to which had been made in the award. On the 16th November, the Subordinate Judge recorded an order that counsel for parties were present and that the arguments would be heard the next day. On the 17th November arguments were heard and the case adjourned for judgment on the 18th. On the 18th the learned Judge gave a decree in favour of the defendant against the plaintiff in terms of the award.

This is an application by the plaintiff for revision of the order of the Subordinate Judge. It is contended that the learned Subordinate Judge acted with material irregularity in not giving the plaintiff-petitioner an opportunity to substantiate his allegation made in his objections filed on the 10th November by the production of evidence, but it does not appear from the record that any application written or oral was made to the Judge by the plaintiff for an opportunity to produce evidence. On the other hand it appears that in pursuance of the order of the Court, counsel for the petitioner argued the case on the 17th on the existing record without any demur. The learned counsel for the petitioner contends before me that it was the duty of the Subordinate Judge suo motu to have fixed a date for evidence. I do not agree. It is for the parties to move the Court if they want to produce evidence. In the absence of an express prayer, especially when the Court passed an order that it

would hear arguments, it is to be assumed that the parties did not desire to produce any evidence. The learned counsel then contended that the arbitrator included an amount in his award which was not the subject-matter of the suit. A reference to his objections shows that this point was not raised in the lower Court. I am unable to entertain it here.

In my opinion the plaintiff has made out no case for the exercise of the revisional jurisdiction of this Court. I dismiss this petition with costs.

Petition dismissed.

A. I. R. 1926 Lahore 586 (1)

JAI LAL, J.

Jan Muhammad—Appellant.

v.

Nizam Din and *others*—Respondents.

Miscellaneous First Appeal No. 710 of 1926, Decided on 9th June 1926, from an order of the Dist. J., Ferozepore, D/- 25th February 1926.

Lunacy Act (4 *of* 1912), *S.* 62—*Factum of lunacy being contested Court should not base its conclusion on personal observation alone but follow the procedure in S.* 62.

Where the factum of lunacy is contested, it is the more necessary that the Court should not base its conclusion on its personal observation alone, but the procedure provided in S. 62 et seq should be followed. [P 586 C 2]

Nand Lal—for Appellant.

Muhammad Din Jan—for Respondents.

Order.—This judgment will dispose of Appeals Nos. 710 and 711 of 1926. One Amin Muhammad had, as a result of inquisition held under the provisions of the Indian Lunacy Act of 1912, been found to be of unsound mind, and unfit to manage his property. The respondent Nizam Din, his paternal uncle, has been appointed as the manager of his property. The two appeals are by Jan Muhammad, a maternal uncle of the alleged lunatic, and Mt. Gama, his wife, respectively. Both claim a preferential right to be appointed as manager of the property.

In the grounds of appeal of Mt. Gama, the factum of lunacy and consequent disability of Amin Muhammad is contested. The learned District Judge. in his order of the 16th December 1925, came to the conclusions that Amin Muhammad was far below the average in intelligence and was not fit to manage his property 'unaided.' He appeared to be 'an imbecile.' This conclusion of the learned District Judge was based on conversation which he held with Amin Muhammad. In my opinion the learned District Judge should have followed the procedure provided in S. 62 et seq of the Indian Lunacy Act. The factum of lunacy having been contested before him, it was all the more necessary that he should not have based his conclusion on his personal observation alone. On the present record it is impossible for me to judge the correctness or otherwise of the conclusion of the District Judge. I must, therefore, remand the case to the District Judge under O. 42, R. 25, Civil P. C., with directions to proceed with an inquisition as to the lunacy of Amin Muhammad and his alleged inability to manage his property as provided in Ss. 62 to 66 of the Indian Lunacy Act, 1912, to record such evidence as may be produced by the parties and to return the same with his opinion thereon within three months from this date.

On receipt of the report the parties will be allowed ten days to file objections.

Case remanded.

A. I. R. 1926 Lahore 586 (2)

SHADI LAL, C. J., AND COLDSTREAM, J.

Ghulam Muhammad and *another*—Appellants.

v.

Mt. Jaggo and *another*—Respondents.

Second Appeal No. 1540 of 1922, Decided on 6th May 1926, from a decree of the Dist. J., Mianwali, D/- 4th March 1922.

Registration Act, S. 17 (1) (*b*)—*Compromise petition affecting title to immoveable property worth more than Rs.* 100 *filed in Revenue Court—Registration is compulsory.*

There is no authority for the proposition that a document which would otherwise require registration need not be registered if it is thrown into the form of a petition presented to a revenue Court.

A compromise petition filed before a revenue Court during mutation proceedings and purporting to create or declare title to immovable property of the value of more than Rs. 100 comes within the purview of S. 17 (1) (*b*). [P 587 C 2]

M. S. Bhagat and *Gobind Ram Khanna*—for Appellants.

S. R. Laul—for Respondent.

Judgment.—In December 1920, Hassan, a Jat of the village Kundian in the Mianwali District, died leaving him surviving two widows, Mt. Jaggo and Mt. Ghulam Fatima. Mutation in respect of his estate was effected by the Assistant Collector in favour of the widows, but Mt. Ghulam Fatima died shortly afterwards, and consequently Mt. Jaggo became the sole owner of the property. The collaterals of Hassan preferred an appeal to the Collector against the order of mutation. During the pendency of the appeal both the parties presented an application to the Collector embodying the terms of a compromise arrived at between them. According to this compromise the major portion of the estate was allotted to the collaterals and a small holding of only 40 kanals was left to the widow for her maintenance.

The Courts below have concurred in holding that the document required compulsory registration, and the correctness of this finding has been impeached before us. After hearing arguments advanced by the learned counsel for the appellants, we are of opinion that the document purports to create or declare title to immovable property of the value of more than Rs. 100 and comes within the purview of S. 17 (1) (*b*) of the Indian Registration Act. The learned counsel puts forward the usual contention that the document itself does not create or declare any title to immovable property but contains merely a recital of an accomplished fact. This contention is, in our opinion, not well founded. Every transaction of sale, mortgage or other alienation is always preceded by an oral contract, but when the terms of the contract have been embodied in a document that document must be regarded as the only evidence of the transaction. We agree with the Courts below that the document required compulsory registration, and it is clear that it does not come within the terms of the exception contained in S. 17, sub-S. (2), Cl. (vi), which exempts a decree or an order of a Court from the operation of the rule relating to compulsory registration. There can be no doubt that a Collector is only a revenue Officer and cannot be deemed to be a Court. Nor is there any authority for the proposition that a document which would otherwise require registration need not be registered if it is thrown into the form of a petition presented to a Court. For the aforesaid reasons we uphold the decree of the District Judge and dismiss the appeal with costs,

Appeal dismissed.

A. I. R. 1926 Lahore 587

ADDISON, J.

Kishan Das — Judgment-debtor—Appellant.

v.

Narain Dutt—Decree-holder—Respondant.

Miscellaneous First Appeal No. 2907 of 1925, Decided on 6th May 1926, from an order of the Senior Sub-J., Amritsar, D/- 13th August 1925.

Civil P. C., O. 21, R. 90—Mistake in dimensions in sale proclamation is material irregularity but by itself not sufficient to set aside sale.

A mistake in the dimensions of the property is a material irregularity, but this by itself is not sufficient to set aside the sale. It must be held further that there has been substantial injury to the judgment-debtor by reason of this irregularity. [P. 588, C. 1]

M. L. Puri—for Appellant.

Balwant Rai for *Badri Das*—for Respondent.

Judgment.—An auction sale of a house with its site was fixed for the 22nd May 1925 at the spot. On that day there were four bids, the last one of Rs. 4,500 having been made by the decree-holder. The report was that the price was too low and ultimately the 28th May 1925, was fixed for the continuation of the auction. On the 28th May 1925 there were eleven bids starting at Rs. 3,000 and ending with Rs. 6,000 bid by the decree-holder. The judgment-debtor objected to the sale being sanctioned on the grounds that it was finished before the time fixed and that the correct dimensions were not recorded in the proclamation of sale. The executing Court has held that the sale went on from 10 A. M. to 4 P. M. and that the error in the dimensions did not matter as the correct boundaries were given and the auction was conducted at the spot, while there was nothing to show that this error caused the price offered to be too small. The sale was

accordingly confirmed. Against this order, first appeal has been filed.

It was admitted before me that the sale went on till 4 p. m. and that there was no irregularity in this respect. It was also admitted that the sale could be adjourned from the 22nd May 1925 to the 28th May 1925 and that this was proper. It was contended, however, that the mistake in the dimension was a material irregularity and that it should be held that this mistake was the cause of such a low price being offered. The dimensions given were 45×15 feet whereas the correct dimensions were 50 × 22 feet. The boundaries, however, were correctly entered and the auction was held at the spot. I am, however, of opinion that it must be held that this error in the dimensions was a material irregularity: see the notes at the bottom of page 638 and top of page 639 of the Mulla's Code of Civil Procedure.

This by itself is not sufficient to set aside the sale. It must be held further that there has been substantial injury to the jndgment-debtor by reason of this irregularity. Now, in execution of the same decree the same property was auctioned a little more than a year before, namely, on the 3rd March 1924. On that occasion also the boundaries were given incorrectly in the same manner as they were given at the second auction. On that occasion the highest bid was of Rs. 10,900 in spite of the wrong dimensions being given. This sale was set aside at the instance of the judgment-debtor, so that he is himself to blame in most part for what has happened now, as frequently when a sale has once been set aside, at subsequent auctions much smaller bids are made. On the occasion of the second auction bidding went on for the whole day at the spot and the highest bid that could be secured was that of the decree-holder amounting to Rs. 6,000. It seems to me that it must be held that as the correct boundaries were given and as the auction was conducted at the spot and as the giving of incorrect dimensions did not affect the price on the 3rd March 1924, it must be held that the incorrect dimensions did not affect in any way the bids made or bring it about that a smaller bid was offered than would otherwise have been done. This being the case, under the provisions of O. 21, R. 90 of the Civil P. C. the sale cannot be set aside.

I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 588

DALIP SINGH, J.

Alliance Bank of Simla, Limited—Decree-holder—Appellant.

v.

Miss I. Lowrie — Judgment-debtor—Respondent.

Miscellaneous First Appeal No. 473 of 1926, Decided on 10th May 1926, from an order of the Senior Sub-J., Simla, D/- 18th December 1925.

Civil P. C., O. 21, R. 92—Inadequacy of price is no ground.

The Court cannot set aside a sale under the provisions of O. 21, R. 92, on the ground of inadequacy of sale price. [P. 588, C. 2]

Muhammad Amin Khan—for Appellant.

M. Sleem—for Respondent.

Judgment.—In execution of a decree obtained by the appellant, Alliance Bank of Simla, Limited, through the liquidators, against the property of J. W. Lowrie of Lowrie's Hotel, Simla, known as Lowries de Villa, was sold on the 31st August 1925. Certain objections were taken by the judgment-debtor to the sale and were all disposed of against him except one objection, namely, that the sale price was inadequate and, therefore, on the judgment-debtor's paying in Rs. 6,500 by way of compensation to the decree-holder, the sale was set aside and re-sale was ordered during the season in June 1926. The judgment-debtor paid in Rs. 6,500 to counsel for the decree-holder and the Court thereupon set aside the sale of the mortgaged property and directed fresh sale. The decree-holder has appealed from this order.

It is obvious that the Court could not set aside the sale under the provisions of O. 21, R. 92 on the ground taken by the judgment-debtor. Counsel for the judgment-debtor has, however, contended that as a matter of fact the order was a consent order. To prove this he has drawn attention to an order of the Court, dated

16th October 1925. The order states that the counsel for the decree-holder is willing to have a re-sale provided the judgment-debtor pays a substantial sum towards the interest due on the decree. The order goes on to state that the judgment-debtor admits that he is unable to do so. The case was adjourned to the 6th November to allow the decree-holder to produce a copy of the judgment of the High Court and to give the judgment-debtor an opportunity of paying in the amount so that a fresh sale might be held. On the 6th November the Court passed an order that under the circumstances it was of opinion that the judgment-debtor should be allowed another opportunity to get a better price and further time up to 18th December was given to the judgment-debtor to deposit Rs. 6,500 by way of compensation to the decree-holder. It was provided that if the judgment-debtor deposited the money, the present sale would be cancelled and a re-sale would be ordered ; and if the money was not paid, the sale would be confirmed in favour of the decree-holder.

On the 18th December the judgment-debtor accordingly, as stated above, paid Rs. 6,500 to counsel for the decree-holder in compliance with the order of the Court and the sale was then set aside. Even if by any stretch of interpretation the order of the 16th October could have been passed in pursuance of a compromise, it is clear that the order of the 6th November 1925 was not in accordance with any compromise, nor was the sum of Rs. 6,500 ever agreed to be accepted by the decree-holder. The fact that his counsel seems to have accepted the sum without protest cannot, in my opinion, be construed to mean a tacit or implied consent to the order of the Court, dated the 6th November 1925.

It is next argued by the counsel for the judgment-debtor, that the decree-holder was only given leave to bid at the specific auction by the order, dated 27th of February 1925. I do not consider that the order can be interpreted in that way, nor is there anything to show that there was any reason why the leave given to the decree-holder to bid should have been confined to the 20th or 22nd. I, therefore, overrule this objection also.

It is, therefore, unnecessary to decide any of the other points raised by the appellant in this appeal. I accept the appeal, set aside the order of the Senior Subordinate Judge and confirm the sale. The appllant will have his costs throughout.

Order set aside.

A. I. R. 1926 Lahore 589

JAI LAL, J.

Bishambar Nath Jaithy — Plaintiff—Petitioner.

v.

Municipal Committee, Delhi—Defendant—Respondent.

Civil Misc. Petitions Nos. 183 of 1926, and 74 of 1926, Decided on 17th May 1926, for issue of a temporary injunction.

Civil P. C., O. 39, R. 2—Plaintiff must prove prima facie case—Merits of the case need not be gone into — Balance of convenience should be considered.

The rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a prima facie case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to pre-judging the case on its merits. All that the Court has to see is that on the face of it the person applying for an injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defects. The balance of convenience also has to be looked to. [P 590, C 1].

Raj Krishan—for Petitioner.

Mehr Chand Mahajan and *Bishen Narain*—for Respondent.

Order.—The petitioner built a house within the limits of the Delhi Municipality. The Municipal Committee found that he had encroached upon a street. The plaintiff was, therefore, ordered to remove the encroachment. He instituted a suit in the Court of the Subordinate Judge, First Class Delhi, praying for the issue of a prepetual injunction against the Municipal Committee restraining them from causing the alleged encroachment to be removed. The suit has been dismissed by the Subordinate Judge and a first appeal has been filed and admitted for hearing in this Court. The petitioner has presented this application for issue of a temporary injunction under O. 39, R. 2, Civil P. C., to the Municipal Committee of Delhi restraining them from demolishing the building till the final decision of the appeal by this Court.

This application is opposed on behalf of the Committee and it is contended that the plaintiff's suit having been dismissed and the trial Court having found against him on all the issues framed by it, there is no ground for issue of a temporary injunction. It is contended that before such an injunction can be issued, the Court must satisfy itself that the plaintiff has a prima facie case. On behalf of the petitioner it was urged that if a temporary injunction prayed for is not issued by this Court and the building in dispute is demolished by the Municipal Committee in the meantime, the whole object of this appeal will be frustrated. I have given my careful consideration to the arguments of the learned counsel on both sides and I am of opinion that this is a fit case for the issue of a temporary injunction. There are some authorities which lay down the rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a prima facie case. I do not understand those authorities to hold that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to pre-judging the case on its merits. All that the Court has to see is that on the face of it the person applying for an injunction has a case, which needs consideration and which is not bound to fail by virtue of some apparent defects. It has not been alleged or shown that the existence of the building is causing any serious injuries to the Municipal Committee or to the public which must be immediately remedied. The building has existed during the last four years and if I decline to issue an injunction prayed for and the Municipal Committee of Delhi carry out their resolution to have the building demolished, the result will be that any decision given on appeal in favour of the petitioner would be useless. The balance of convenience is, therefore, in favour of the petitioner.

I accept this petition and grant a temporary injunction restraining the Municipal Committee of Delhi from demolishing the building in dispute till the final decision of the appeal by this Court.

No order as to costs incurred by the parties in this Court.

Petition accepted.

A. I. R. 1926 Lahore 590

SHADI LAL, C. J., AND JAI LAL, J.

Muhammad Aslam Khan — Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1206 of 1925, Decided on 18th May 1926, from the order of the S. J., Lahore, D/- 23rd November 1925.

Criminal P. C., S. 288—Statements of witnesses recorded in the presence of accused — Accused declining to cross-examine—Accused cross-examining on a subsequent date—Statements are duly recorded and can be treated as evidence at the trial.

An enquiry before commitment was held in the hospital where the accused was an indoor patient. Witnesses for prosecution were examined, but the accused declined to cross-examine them on the ground that he was not in a proper condition to examine them. These witnesses were therefore again tendered for cross-examination on an adjourned date and were cross-examined on behalf of accused. They went back on their previous statements and supported the defence.

Held: that the statements of the witnesses as recorded on the first hearing, on behalf of the prosecution, were duly recorded within the meaning of S. 288, and when transferred could legally be treated as evidence in the Sessions trial.

[P. 591, C. 2, P. 592, C. 1]

C. Bewan Petman, Kishen Chand and *Pindi Das Subharwal*—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—The appellant Mohammad Aslam, has been found guilty by the Sessions Judge of Lahore of an offence of murder for having caused injuries with revolver shots to one Muhammad Hussain on the 2nd of August 1925, as a result of which the latter died in the hospital on the 9th August. His appeal is before us, and we have also to consider the question of confirmation of the sentence of death passed upon him by the Sessions Judge. The case for the prosecution is as follows:

On the 30th July 1925 the appellant's house was searched by Lala Sohan Lal, Excise Inspector of Lahore, on information given by Muhammad Hussain and another. The females of Muhammad Aslam's family lived in this house. As a result of the search 103 packets of cocaine were found in a dharmsala which adjoins the house. These are alleged to have been traced to the possession of the appellant. Muhammad Aslam was consequently annoyed with Mohammad Hussain.

On the 1st August the appellant went to the baithak of the deceased in Chauk Wazir Khan and asked him whether it was a fact that he had informed the Excise authorities against him. On receiving an answer in the affirmative he went away. The next day, i. e., the 2nd August 1925, the deceased was at his baithak at about 10-45 when the appellant called him from the street and asked him to come down. The deceased was going down by the stairs when the appellant fired at him with a revolver. The deceased was hit and immediately turned back and ran up to his baithak, but was followed by the accused who fired more shots at the deceased hitting him at the back. Both reached the baithak where more shots were fired by the appellant. Barkat, Budhu, alias Budh Parkash, and Muhammad Hussain Sain were present at the baithak at that time The first two immediately ran down the stairs to the street, but Muhammad Hussain Sain remained behind. The deceased fell on the ground. The appellant then shot himself causing a wound on the right side of the chest 1-1/2 inches below the right nipple. Muhammad Hussain Sain grappled with him, snatched the revolver from his hand and threw it on the road in the Chauk. At this time both the appellant and Muhammad Hussain Sain were on the balcony facing the Chauk of Wazir Khan Mosque. The deceased in the meantime slipped out of the baithak and went and reported the incident at the police station. Several men, who have appeared as witnesses on behalf of the prosecution, were attracted to the scene of the crime on hearing the noise of the revolver shots and saw Muhammad Hussain Sain grapple with the appellant, take the revolver from him and throw it down on the street. Muhammad Ashiq, constable of the Railway police happened to be passing near the locality; he went up to the baithak and found the appellant secured by Muhammad Hussain Sain. Hs went down to the Chauk picked up the revolver, returned to the baithak and took the appellant towards the police station. In the meantime two constables arrived from the kotwali and took the appellant to the police station in a tonga, Khan Bahadur Mian Ghulam Rasul, Deputy Superintendent of Police, also arrived on the scene immediately afterwards, took charge of the revolver and also took Barkat, Muhammad Hussain Sain, Budh Parkash and Abul Rahman with him to the thana as they stated that they had witnessed the incident. The revolver contained five empty and one loaded cartridges. In the meantime Muhammad Hussain, the injured person, had been sent to the hospital. Before going to the hospital he, deceased made the first information report at the kotwali which was recorded at 11 a. m. and in which he briefly mentioned the above facts.

On the same day, at 11-45 a. m., his statement was recorded at the hospital by Munshi Insha Ullah, a Megistrate of the Second Class, in which the deceased again stated the facts already mentioned. The case was investigated by the Honorary Deputy Superintendent of Police, Agha Khalik Dad Khan, and all the alleged eyewitnesses were examined at a very early stage of the investigation which was completed on the 5th August. Apparently the investigating officer suspected that attempts were being made on behalf of the appellant to win over the eyewitnesses. He therefore sent up the case for trial under S. 307 of the Indian Penal Code and requested Lala Shankar Das, Magistrate, 1st Class, to hold the trial in the hospital where both the deceased and the accused were in-door patients. Consequently Lala Shankar Das went to the hospital on the 5th August and in the presence of the appellant recorded the statements of the eight witnesses produced on behalf of the prosecution. These witnesses included Barkat, Chiragh Din, Miraj Din and others who all supported the story of the prosecution. The case then adjourned to the 12th of August for recording the statements of the remaining witnesses for the prosecution. In the meantime Muhammad Hussain, the injured person, died on the 9th August. The proceedings before the Magistrate were therefore continued as a judicial enquiry with a view to commit the accused for trial to the Court of the Sessions Judge.

It appears that on the 5th August the appellant declined to cross-examine the prosecution witnesses alleging that he was not in a proper condition to do so or to follow their evidence properly. These witnesses were therefore again tendered for cross-examination on the 12th August

and were cross-examined on behalf of the appellant. They all went back on their previous statement and supported the version of the appellant. The remaining evidence for the prosecution was recorded and the appellant was committed for trial. Before the Sessions Judge all the eyewitnesses supported the version of the appellant. The statements made by Barkat, Chirag Din, and Miraj Din, were transferred under S. 288 of the Criminal P. C. to the Sessions file on the 16th November 1925 but on an objection by the counsel of the accused the Sessions Judge, by his order of the 17th November 1925, decided not to use the statements of the eight witnesses who were examined by Lala Shankar Das on the 5th August 1925 as evidence in the case under S. 288 because in his opinion they had not been recorded by the Magistrate under S. 164 of the Criminal P. C., i. e., for purposes of corroborating or contradicting the evidence of the witnesses given at the trial. Before us counsel for the appellant strenuously contended that none of the statements made before Lala Shankar Das, on the 5th August, could be used as evidence at the trial. Counsel for the Crown, on the other hand, sought to make use of all the statements under S. 288 of the Criminal P. C. We will discuss this aspect of the case later. At this stage it will be convenient to state the defence version of this incident.

The accused admitted at the trial that his house was raided by the Excise Officers on the 30th July 1925 and that they entered into his zenana in his absence. He denied that he suspected Muhammad Hussain, the deceased as the informer of the Excise Officers and added as follows :

I came to the shop of Muhammad Din, fruit seller, and intended to purchase mangoes from him. I was testing a mango and settling the price with him. Hussain Khan came as I was eating the mango. He exchanged salutations with me. He put his arm in my arm and told me to go with him, as he wanted to talk to me. He went upstairs to his baithak and I went with him. We sat in Barkat's baithak. He talked of a woman to me. There was a quarrel over it. He abused me first. I told him to take to senses ; he had called me to his baithak like friend and was treating me in an indecent manner. He told me to keep quiet. I also abused him, as he did not refrain from abusing me. I gave him a slap. He got up and told me that he would knock out my Pathanship. He went out I followed him. I stopped at the door. He turned. He had a pistol. Two other peosons were sitting in the baithak. They too got up. He told them to keep back as he was about to shoot at me. I caught hold of his wrist and tried to wrench the pistol from him. He gave me a kick in my chest. My grip on his wrist was loosened a little and he fired a shot which struck me. After that I distorted his wrist with a redoubled force three or four shots were fired. I became unconscious and my grip was lossened. I do not know how Muhammad Hussain was shot.

The suggestion of the appellant, therefore, is that the deceased received his injuries when he, the appellant, was attemping to wrench the pistol from him. The question, therefore, that we have to determine is whether the deceased was assaulted by the appellant as alleged by him or whether it was the deceased who first assulated the convict and shot him and then received the injuries when the latter grappled with him in order to deprive him of the possession of the pistol. It is necessary to remark that the number and nature of the injuries on the person of the deceased are important matters to be considered when determining the truth or otherwise of the two versions which are before us. The medical evidence shows that the deceased had one bullet wound mid auxilary line opposite the 8th rib, one bullet wound on the back left side of the chest opposite the 7th rib just to the left of the middle line a superficial graze immediately below and internal to left nipple, and, lastly, a graze on the middle of inner side of right upper arm. In the opinion of the doctor injury No. 1 must have been caused by a bullet shot from the side and injury No. 2 from a bullet shot from the back, and injuries Nos. 3 and 4 were caused by the same bullet. We are unable to understand how injury No. 2 could have been caused in the manner suggested by the appellant. It is further difficult to imagine how a person holding a pistol or a revolver in his right hand could cause injury No. 4 by a bullet when another person is twisting his harm and attempting to wrench the revolver from his hand. The injuries on the deceased are, in our opinion, consistent with that of the convict. It also appears from the evidence of Lieutenant Fitz Gerald, who was examined by the Sessions Judge as an expert that the weapon from which the bullets were fired at the deceased was within a foot of his body and that the weapon with which the bullet was fired on the convict was close up to the body. This evidence also lends a very strong corroboration to prosecution case.

The direct evidence in this case consists of the statements of the eye-witnesses to the incident. As we have already observed, at the trial all these witnesses supported the defence theory, but the statements of their witnesses made before the Committing Magistrate were transfered to the Sessions file under S. 288 of the Criminal P. C. Those statements support the prosecution version. The Sessions Judge has held that they were not duly recorded, and therefore he has not relied upon them as evidence in the case. He has held that, when those statements were made, the appellant was too weak to be able to cross-examine the witnesses, that he was not warned that the trial was to commence on the 5th August, that he was not given time to obtain advice of the counsel and, therefore, that he was not in a fit condition to understand what was going on. The Magistrate, Lala Shankar Das, was examined as a witness at the trial and he stated that he was satisfied that the appellant was in a fit condition to listen to the evidence of witnesses, otherwise he would not have proceeded with the trial. It appears that before the trial began the House Surgeon was asked by a police officer as to the condition of the appellant and stated that he (the accused) was "all right." It was after this that the trial of the case began. The following appears in the evidence of the House Surgeon Dr. Muhammad Nawaz :

A man in plain clothes asked me how Muhammad Aslam was that day. I thought he was asking me in an official capacity. He asked me whether Muhammad Aslam could make a statement. I said he could. It was never told to me that Muhammad Aslam was to be tried. Had I known that eight witnesses were to be examined before him and that he was to be asked to cross-examine them on 5th August, I would have said that Muhammad Aslam was not in a condition to undergo that trial. Muhammad Aslam was in a very bad condition.

It is difficult to reconcile the first part of the statement with the last. In cross-examination this witness admitted that he saw Muhammad Aslam often after the 2nd August and never saw him unconscious and that if a witness had made a five minute statement Muhammad Aslam would have been in a position to cross-examine him. No request was made by the appellant for the postponement of the trial or for an opportunity to be given to him to engage a counsel. Two or three of his friends were looking after him and were sitting close to him at the time of the trial. They did not make any such request. On the 12th of August, the next date of hearing of the case, the witnesses were cross-examined by the counsel who had been engaged by the accused.

The learned counsel for the appellant has cited the following cases in support of his contention that the statements of the witnesses were not duly taken by the Magistrate on the 5th August 1925.

(*a*) *Queen Empress* v. *Sagal Samba Sajao* (1). In this case the accused was not allowed by the committing Magistrate to cross-examine the witness examined by him at the judicial inquiry prior to commitment, and it was held that such statements could not be deemed to have been duly taken. (*b*) *Alimuddin* v. *Queen Empress* (2). In this case the statments were made in the absence of the accused and it was, therefore, held that they could not be transferred to the Sessions file and read as evidence under S. 288 of the Code of Criminal Procedure. (*c*) *Phannidra Nath Mitra* v. *Emperor* (3). The accused was unrepresented by counsel when the witnesses for the prosecution were examined and did not, therefore, cross-examine them. The Magistrate decided to commit him for trial to the High Court. Later an application was made for an opportunity to cross-examine the witnesses which was refused by the Magistrate. The High Court declined to quash the commitment holding that the accused had no right to cross-examine the witnesses at that stage. This authority appears to be against the contention of the appellant and supports the learned Public Prosecutor. In the case before us, as we have already stated, an opportunity was given to cross-examine the witnesses on the 5th August but was not availed of and the witnesses were actually cross-examined on the 12th of August.

Under the circumstances we are of opinion that the statements of the witnesses who were examined on the 5th August were duly recorded within the meaning of S. 288 of the Criminal P. C. and such of them as were transferred by

(1) [1894] 21 Cal. 642.
(2) [1896] 23 Cal. 361.
(3) [1909] 36 Cal. 48=1 I. C. 469=12 C. W. N. 1014.

the Sessions Judge to his record under that section can legally be treated as evidence in this case. We have already cited that the depositions of Barkat, Chiragh Din and Miraj Din were transferred to the Sessions file on the 16th November, and it was not until the 17th of November, that the trial Judge decided not to use them as evidence in the case. The statements of the remaining witnesses who were examined on the 5th August by the committing Magistrate are on the record, but the Sessions Judge has not transferred them under S. 288, Criminal P. C. We are not disposed at this stage to interfere with the discretion exercised by the Sessions Judge in not transferring those statements though we consider the reasons given by him were not correct. We also accede to the contention of the learned counsel for the appellant that the statements of three witnesses mentioned above should be transferred to the Sessions file in their entirety, that is to say, the examination-in-chief of the 5th of August as well as the cross-examination of the 12th of August.

Another contention raised on behalf of the appellant was that apart from the statement of Barkat made before the committing Magistrate which was subsequently retracted and the statement of the deceased there was no evidence as to the existence of any motive on the part of the appellant to kill the deceased. It was contended that both these statements were inadmissible but we have already held that Barkat's statement is admissible. As regards the statement of the deceased Muhammad Hussain it is contended that S. 32 (1) of the Indian Evidence Act is an exception to the general rule that evidence in all cases should be direct and should therefore, be limited in its application to cases which are expressly covered by it and that it permits the admission of only that part of the statement of the deceased which relates to the cause of the death or to any of the circumstances of the transaction which resulted in his death. The argument of the learned counsel is that the visit of the convict to the deceased on the 1st of August and the conversation between the two on that occasion as described in the following extract from the statement of the deceased madi before the Magistrate on the 2nd of August did not relate to the circumstances of the transaction which resulted in his death :

> On Wednesday last I reported against Aslam for having cocaine in his possession. On Thursday Aslam was arrested. Yesterday at 4 p. m. Aslam came to me at my baithak in Chauk Wazir Khan and asked me 'Have you given information against me" I replied 'yes, I have'. " At that time Sheikh Baroat Ali, harness maker was sitting with me. Aslam went away after sitting for 5 or 7 minutes.

The inference that the prosecution seek to draw from this statement is that Aslam had the knowledge that Muhammad Hussain was instrumental in having his house searched, resented the treatment meted out to him and desired to punish the informer. Now, so far as the fact of Muhammad Hussain having given information to the Excise authorities is concerned, it is established by the evidence of Lala Sohan Lal, Excise Inspector. But as to the appellant's knowledge of it there is no evidence beyond the statements of the deceased and Barkat. In view of our decision that Barkat's statement is admissible as evidence against the convict, we do not think it necessary to express any opinion as to the admissibility of this part of the statement of Muhammad Hussain. Moreover under the circumstances of the case the question of motive is not very material.

Another contention of the learned counsel for the appellant is that five shots were fired from the revolver and that only three bullets have been accounted for, two in the person of the deceased and one in that of the appellant. The remaining two bullets should have been either in the stairs or in the room above where, according to the statement of Muhammad Hussain, deceased, more shots were fired by the convict. It is further urged that, if the story for the prosecution is true, there should have been marks on the walls, in the stairs or in the room above of the bullets which missed their aim and did not enter the body of either the appellant or the deceased. We observe that Lieutenant Fitz Gerald was definitely of opinion that at least one mark on the wall of the stairs was of a bullet fired from below and was a ricochet, i. e., a glancing shot. This mark is mentioned as No. 4 in the statement of the witness at p. 35 of the printed paper-book. In our opinion the argument of the learned

counsel does not affect the case one way or the other because admittedly five shots were fired and three of the bullets have been accounted for. Whether some of the shots were fired in the stairs as alleged by the prosecution or all the shots were fired in the room above as alleged by the defence, it is clear that only three bullets have been found and that the remaining two have not been traced. The disappearance of the two bullets is consistent with either theory. Lieutenant Fitz Genrald states that :

> the bullet that may have made mark 'No. 4 might have broken up into fragments if it hit a further obstruction or it may have disappeared through the staircase window. A ricocheting bullet takes a very erratic flight.

Thus the fact that two of the bullets have not been discovered does not militate against the prosecution version.

One significant circumstance in the case is that all those who immediately arrived at the scene of the crime noticed that the appellant was in a more serious condition than the deceased, still he and not the deceased was mentioned by them to be the offender. It is difficult to believe Muhammad Hussain Sain when he says that though he saw the deceased shooting the appellant, yet he grappled with the appellant, wrenched the pistol from his hand, threw it into the bazar and kept him under arrest till the arrival of help. The conduct of this witness is a clear indication of the fact that it was the appellant who shot the deceased and then attempted to kill himself. No reason whatsoever has been shown why the police and all the eyewitnesses should have immediately accused the appellant as the murderer and tried to screen the deceased if the latter was really the guilty person. The statement of Ata Muhammad, constable, to the effect that he met the convict in the street, had some conversation with him and went a few paces before he heard a pistol shot and saw smoke coming out of a window corroborates the prosecution version and belies the version of the accused that after bargaining for mangoes he went to the baithak of the deceased at his invitation, talked with him about a woman and then had a quarrel as a result of which the deceased went in, brought the pistol and shot him. All this must have taken considerably more time than the interval between Ata Muhammad separating from the prisoner and hearing the pistol shots.

On a careful consideration of the whole case the conclusions are that the statements of the witnesses were duly taken by Lala Shankar Das, the committing Magistrate, on the 5th of August and the 12th of August ; that the depositions of Barkat, Chiragh Din and Miraj Din were duly transferred to the Sessions file under S. 288 of the Criminal Procedure Code and are, therefore, evidence in this case ; that the depositions made on the 5th of August contain the true version of the affair corroborated as they are by the dying declaration of the deceased by the medical evidence and the evidence of Lieutenant Fitz Gerald ; that the statements made by these witnesses subsequently in cross-examination and at the trial were false and were probably due to the fact that they had been won over ; and that the motive for the crime as alleged by the prosecution is proved by the statement of Barkat.

We are further of opinion that even if the statements of Barkat, Chiragh Din and Miraj Din are excluded and that that part of the statement of the deceased which relates to the visit of the appellant to him on the 1st July 1925 is held to be inadmissible still there is sufficient evidence on the record to establish the guilt of the convict. His own statement and the remaining statement of the deceased read with the evidence of Lieutenant Fitz Gerald as to the distance from which the respective injuries on the persons of both were caused coupled with the medical evidence as to the nature and location of the injuries on each and the circumstances already mentioned established, in our opinion, the case for the prosecution.

We feel no doubt as to the guilt of the appellant and uphold the conviction under S. 302 of the Indian Penal Code. The case is one of a deliberate murder and the only appropriate sentence to the culprit is that of death. We accordingly confirm the sentence and dismiss the appeal.

Appeal dismissed.

* A. I. R. 1926 Lahore 596

JAI LAL, J.

Firm Gobind Ram-Bughi Mal — Plaintiffs—Appellants.

v.

Secretary of State for India—Defendant—Respondent.

Second Appeal No. 704 of 1926, Decided on 17th June 1926, from the decree of the Dist, J., Ambala, D/- 14th December 1925.

* *Railways Act, S. 72, Risk Note B—"Loss" means loss by the carrier as well as loss to owner—Railway need not prove loss in a suit for compensation for non-delivery.*

The words "loss, destruction or deterioration" used in the Risk Notes are not used in a different sense to that in which they are used in Chap. 7 of the Act. The same meaning should be assigned to them as in the Act itself. "Loss" includes loss by the carrier as well as loss to the owner, and, therefore, it necessarily follows that any suit whether it be for misdelivery of the goods or for their non-delivery is a suit for loss of goods to the owner and therefore the loss of the goods is necessarily alleged in the pleadings of the plaintiff and under the circumstances it is not necessary for the defendant even to allege the loss of the goods, much less to prove it by independent evidence: *A. I. R.* 1921 *Lah.* 1 (*F.B.*) and *H. C. Smith Ltd.* v. *Great Western Railway Company*, (1922) 1 *A. C.* 178, *Foll.*; *A. I. R.* 1923 *Lah.* 609, *Dist.* [P 597 C 1, 2]

Shamair Chand—for Appellant.

Carden Noad—for Respondent.

Judgment.—The plaintiffs were the consignees of 150 tins of ghee booked from Phaphund Railway Station on the East Indian Railway to Patiala a station on the North Western Railway. Only 131 tins were delivered to them at Patiala. The remaining 19 tins have not been delivered to them yet. A suit was instituted against the East Indian Railway Company and the Secretary of State for India in Council for the recovery of Rs. 840, the value of 19 tins of ghee, which were not delivered to the plaintiffs. The suit was dismissed against the East Indian Railway Company by the trial Court but was decreed against the Secretary of State for India in Council.

On appeal by the Secretary of State the District Judge Ambala, dismissed the suit holding that the consignment having been booked at special reduced rate under what is called the risk note B the North Western Railway Administration was absolved from liability unless the plaintiff proved wilful neglect on the part of the Railway Administration or theft by or wilful neglect of its servants and that there was no proof of this.

The only point urged before me on this second appeal is that before the plaintiff could be called upon to prove wilful neglect or theft it was necessary for the Railway Administration to prove the loss of the goods and that the mere allegation or admission of loss was not sufficient. A number of authorities of different High Courts were cited by counsel for the appellant in support of his contention. All such authorities support his contention. Previously the view contained in them generally prevailed, but since the decision of the case of *Smith* v. *G. W. Railway Company* (1) by the House of Lords the weight of authority has been the other way. Two authorities of this Court were also cited by counsel. I will not discuss the authorities of the other High Courts but will examine in brief the cases decided by this Court.

In Second Appeal No. 2681 of 1922, *G. I. P. Ry. Co. Ltd.* v. *Firm Messrs. Panna Lal Gopalji* (2), Mr. Justice Moti Sagar held that when goods are consigned under a risk note under which the Railway Administration is absolved from liability for loss unless it is due to the wilful neglect of its servants, the Railway Administration cannot escape liability by merely admitting the loss and that they must lead evidence to show that the goods were lost. The learned Judge cited a number of authorities in support of his view, but in my opinion this view is opposed to the case of *Hill Sawyers and Company* v. *Secretary of State* (3). In that case the majority of the Judges who composed the Full Bench held that the word 'loss' as used in Chap. 7 of the Indian Railways Act includes loss by the carrier and also to the owner. The case related to the misdelivery of the motor car by the Railway Administration. The following remarks were made by Scott-Smith, J. at page 141 of the Report :

The word loss has also a wider sense and o ten means pecuniary loss or privation of an article to the owner. In the present case the plaintiffs have certainly lost their motor-car and this loss has been caused by the misdelivery of the article bailed. If any layman not used to legal terminology were asked what the present suit was for

(1) [1922] 1 A. C. 178.
(2) A. I. R. 1923 Lah. 609.
(3) A. I. R. 1921 Lah. 1 (F. B.)=2 Lah. 133.

he would surely say it was one for compensation for the loss of a motor car.

Finally at page 144 the same learned Judge expressed himself as follows :

> Having regard to these authorities and bearing in mind its well recognized meaning I hold that the word 'loss' in Chap. 7 of the Indian Railways Act includes loss to the owner of goods made over to a Railway Administration which have been misdelivered and so have been lost to the person entitled thereto.

LeRossignal, J. concurred in this view. It may be remarked that the interpretation of the word "loss" has been the subject of discussion in several cases both in England and in this country and divergent opinions have been expressed by the learned Judges. The matter is however concluded by the judgment of the Full Bench so far as this province is concerned at any rate till the question is re-examined by a bigger Court. This case was cited before Mr. Justice Moti Sagar, but he distinguished it by remarking that the Full Bench case related to misdelivery and the case before him related to non-delivery and that non-delivery or conversion did not stand on the same footing as misdelivery and further that in the Full Bench case protection was not claimed under a Risk Note but under certain sections of the Act itself. He doubted whether the word 'loss' as used in the Risk Note included loss by non-delivery or conversion. With great respect I see no distinction in the two cases.

The ordinary liability of a Railway Administration for loss, destruction or deterioration of goods delivered to them for carriage is defined in Chap. 7 of the Indian Railways Act. The Risk Notes introduced under the authority of the Governor-General in Council have been prepared in order to enable the Railway Administration to contract themselves out of such liability for the loss, destruction or deterioration of goods. In my opinion it cannot, therefore, be contended that the words, 'loss,' destructions or deterioration used in the Risk Notes are used in a different sense to that in which they are used in Chap. 7 of the Act. The same meaning should be assigned to them as in the Act itself. The word "loss" having been defined by a Full Bench of this Court to include loss by the carrier as well as loss to the owner, it necessarily follows that any suit whether it be for misdelivery of the goods or for their non-delivery is a suit for the loss of the goods to the owner and, therefore, the loss of the goods is necessarily alleged in the pleadings of the plaintiffs. Under the circumstances it was not necessary for the defendant even to allege the loss of the goods much less to prove it by independent evidence.

In the case of *E. I. Ry. Co, Ltd., Calcutta* v. *Firm Mohan Lal-Panna Lal* (4), Mr. Justice Zafar Ali held that a Railway Company seeking shelter behind a Risk Note in Form A or B for the non-delivery of the whole or a part of a consignment must show, in the first instance, that the goods have been lost, before the person claiming compensation for their loss can be called upon to prove that the loss was due to the wilful neglect of the Railway or of its servants. The learned Judge in holding this view followed a number of cases that had been previously decided. But all such cases were before the decision of the case of *H. C. Smith Ltd.* v. *Great Western Ry. Co.* (1), decided by the House of Lords in 1922.

In the case of *G. I. P. Ry.* v. *Datti Ram* (5) it was held that in order to be successful in an action against the Railway Company for damages for the loss of goods consigned, based on a contract under Risk Note B, the onus of proving that the loss is due to one of the exceptions under which the defendant is responsible lies on the plaintiff. It was further held that contract under Risk note B forms a complete special contract between the parties, and the plaintiff, therefore, cannot go behind his special contract and sue the Railway Administration for damages for non-delivery. At page 124 of the Report it was held that though there were authorities in which it has been held that it is not sufficient for the Railway Adminstration to admit the loss and that it must adduce evidence to prove such loss, but that all such decisions were given prior to the case of *Smith* v. *Great Western Railway Company* (1) and that the proposition that the Railway Administration should adduce evidence to prove loss cannot be supported and further that it was open to the Railway Company to admit the loss and to require from the plaintiff

(4) A. I. R. 1923 Lah. 432.
(5) A. I. R. 1926 Patna 148=5 Pat. 118.

the proof of circumstances which make the Railway liable under the Risk Note.

The same view was taken by Campbell, J. in the case of *Jaggan Nath Baij Nath* v. *Secretary of State* (6).

The judgment of his Lordship the Chief Justice in the case of *Hira Singh Pritam Singh* v. *Secretary of State* (7) is to the same effect.

In my opinion, therefore, apart from *Smith* v. *Great Western Railway Company* (1) having regard to the meaning of the word 'loss' as defined in the Full Bench case of *Hill, Sawyers and Co.* v. *Secretary of State* (3), which must be taken as conclusive so far as this Court is concerned, the plaintiff's suit in this case was for compensation for the 'loss' of the goods consigned by him and that it was not necessary for the Railway Administration to allege or to prove loss of the goods: and further that even if the plaintiff's case were not expressly for the loss of goods it was open to the Railway Administration to admit the loss and to require from the plaintiff the proof of circumstances which made the Railway liable under the Risk Note. This being the only point urged before me on behalf of the appellant the consequence of the opinion held by me is that this appeal must be dismissed with costs, and I order accordingly.

Appeal dismissed.

(6) S. A. No. 2557 of 1925.
(7) A. I. R. 1926 Lah. 40.

A. I. R. 1926 Lahore 598

SHADI LAL, C. J., AND COLDSTREAM, J.

Khadim Hussain—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 265 of 1926, Decided on 3rd June 1926, from an order of the S. J., Gujranwala, D/- 24th February 1926.

Penal Code, S. 300, Excep. 1—Grave and sudden provocation must be sufficient to upset man of ordinary sense.

The provocation contemplated by S. 300, Excep. 1, must be such as will upset, not merely a hot-tempered or hyper-sensitive person, but one of ordinary sense and calmness. [P 599 C 1]

Ghulam Mohy-ud-din — for Appellant.

Judgment.—In this case one Khadim Husain, a Sayyad of the village Ali in the District of Gujrat, has been convicted of the murder of three persons, namely, his uncle Jalal Shah, the latter's wife, Mt. Rasulan and daughter, Mt. Fatima Bibi, and has been sentenced under S. 302 of the Indian Penal Code, to the penalty of death.

The evidence on the record shows that Mt. Fatima Bibi, who was one of the victims of the tragedy, was married to one Hazoor Shah, but that their married life was not a happy one. It is common ground that she deserted her husband and came back to live with her parents. It appears that one Bahadur Shah, who is a Head Constable in the Police force, used to pay periodical visits to Jalal Shah's house, and that he was suspected of having contracted a liaison with the girl. The prisoner resented the visits of Bahadur Shah and asked his uncle not to allow him to come and live in the house. The uncle did not like this interference on the part of the nephew and told him to mind his own business. Now, there is ample evidence on the record, and indeed it is admitted by the convict, that on the morning of the 1st September 1925, he picked up a chopper from his house and went to the adjoining house of Jalal Shah. There he found Mt. Rasulan lying on the charpoy in the courtyard and inflicted upon her several blows with the weapon and killed her on the spot. The blade of the chopper became loose in the course of the attack and fell down on the ground. The culprit thereupon went back to his own house and brought a dagger with which he attacked Mt. Fatima Bibi and killed her then and there. He then proceeded to the shop of Ahmad Din Mochi where Jalal Shah was sitting and inflicted upon the latter numerous blows which resulted in his death instantaneously. The offender was subsequently arrested by one Allah Ditta, and it is beyond dispute that he was, at that time, wearing garments upon which the Imperial Serologist found human blood. The accused has all along admitted that he killed the three persons in the manner described above, but he seeks to reduce the offence to one of culpable homicide not amounting to murder.

Now, it is true that the amorous relations of Mt. Fatima Bibi with Bahadur Shah were calculated to bring disgrace on

the family ; but we are unable to hold that the offender had received any grave and sudden provocation such as is contemplated by Exception 1 to S. 300 of the Indian Penal Code. It must be remembered that Bahadur Shah had left the house of Jalal Shah on the 30th August 1925, two days before the tragedy, and it is not suggested that any of the victims had done anything during those two days which could be regarded as a grave provocation. It is alleged that the girl was singing on the fateful morning, love songs which reminded the accused of her immoral relations with Bahadur Shah. We cannot, however, accede to the contention that the mere singing of songs should be held to be a grave provocation as contemplated by law. It may be that the prisoner had been brooding over the disgrace caused to the family by the frequent visits of Bahadur Shah, but the law requires that the provocation must be such as will upset, not merely a hot-tempered or hyper-sensitive person, but one of ordinary sense and calmness. This requirement has not been fulfilled in the present case. Moreover, it must be remembered that the prisoner was only a cousin of the girl who was apparently sui juris, and that in the presence of her parents he had no right to interfere with her liberty of action. Nor had he the slightest justification for attacking Jalal Shah or his wife.

The guilt of the appellant does not admit of any doubt, and it is clear that the sentence of death is the only appropriate punishment to be inflicted in a case of this description. Confirming, therefore, the sentence we dismiss the appeal,

Appeal dismissed.

A. I. R. 1926 Lahore 599

ADDISON, J.

Hafiz and *others*—Plaintiff—Appellants.

v.

Jiwan and *others*—Defendants—Respondents.

Second Appeal No. 3067 of 1925, Decided on 4th May 1926, from a decree of the Dist. J., Rawalpindi, D/- 14th August 1925.

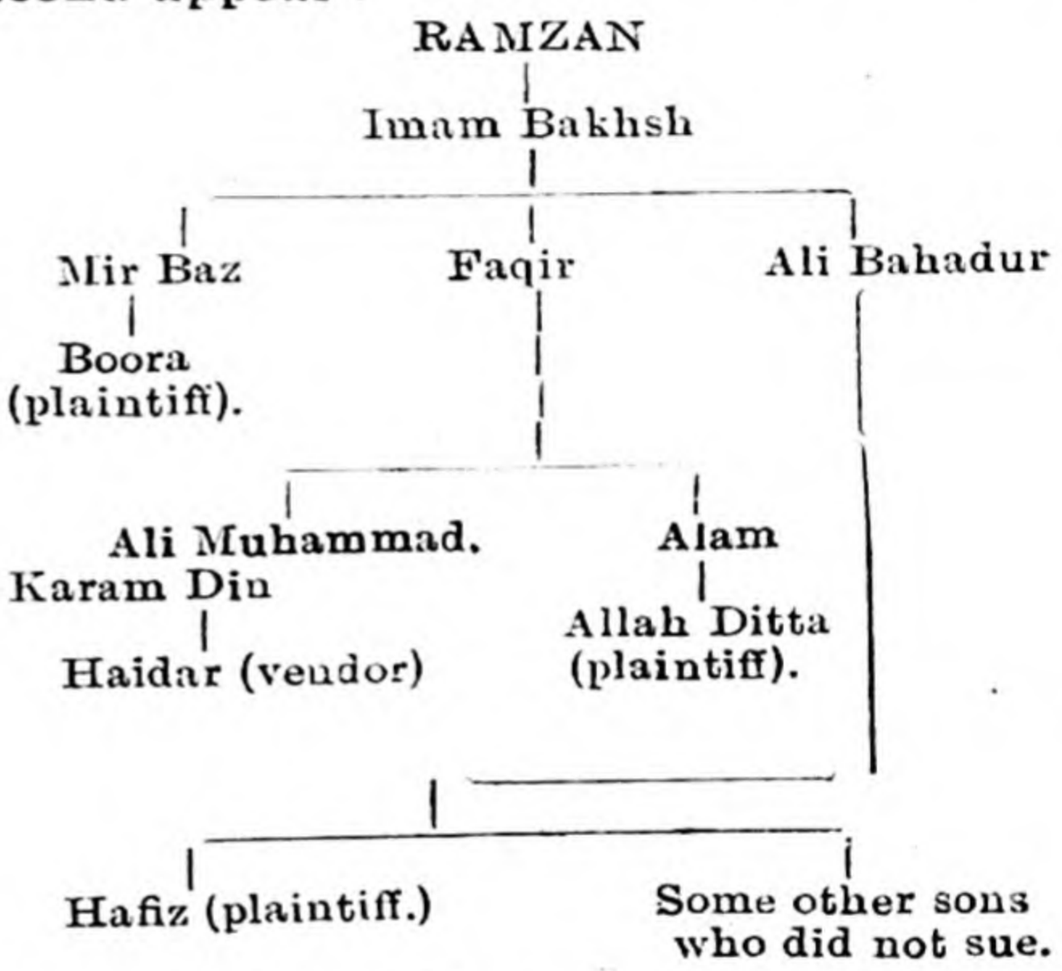
Punjab Limitation (Custom) Act (1 of 1920), Art. 2 (b)—Declaratory decree already obtained—Suit for possession must be brought within 3 years from the death of alienor when he leaves no widow—Presence of nearer reversioners does not save time.

In the case of an alienation of ancestral immovable property, a suit for possession on the ground that the alienation is not binding on the plaintiff, must be brought within 3 years from the death of the alienor where a declaratory decree has already been obtained and the alienor has not left a widow surviving him. The fact, that the plaintiff had no right to sue because some of the nearer reversioners were alive, will not stop time from running against him ; 26 *P. R.* 1911, *Dist.* [P 600 C 1 & 2]

Malik Ram Lal—for Appellants.

Muhammad Alam—for Respondents.

Judgment.—The following pedigree table is necessary for the purpose of this second appeal :



The land in suit was sold by Haidar to Shams Din who resold it to Jiwan in 1909. Faqir (see pedigree-table) instituted a suit in 1910 for a declaration that his reversionary rights would not be affected by the sale. He obtained a decree on compromise on the 22nd December 1910 to the effect that upon the death of Haidar he could get back the land on payment of Rs. 820. Haidar died on the 22nd January 1916. Under Punjab Act (I of 1920), Art. 2 (b) of the Schedule, a suit for possession of the land should have been instituted within three years of Haidar's death, but by virtue of the saving Cl. (6) this time was extended to one year after the coming into force of the Act. This means that the suit for possession should have been instituted at the latest on the 2nd May 1921. Faqir was alive then and did not sue up to the time of his death on 1st

September 1921 ; neither did his son Alam sue up to the time of his death on the 17th May 1922, but Alam's son Allah Ditta is one of the three plaintiffs who have sued. He is a minor. The suit was instituted on the 19th August 1922.

Both the Courts below have held that the suit is barred by limitation. Against this decision this second appeal has been filed.

It was admitted before me that the suit so far as Boora and Hafiz are concerned has been properly dismissed as being barred by time and that they are not entitled to the benefit of the Amended Soldiers' Litigation Act. This is clearly the case and requires no further discussion. This means that the question which has to be decided is, whether the suit is barred by time so far as Allah Ditta is concerned. It has to be noted that his major brother Ali Muhammad has not sued, so that if the appeal succeeds, the decree would only be for possession of 1/6th of the land on payment of the sum of money fixed in the declaratory decree.

The argument of the learned counsel for the appellant was that Allah Ditta had a right to sue independently of his father and grandfather and that it did not matter that both his father and grandfather did not sue within limitation. It was further contended that the minority of Allah Ditta did not affect the question and that even if he had been a major he could sue within three years of the date of his father's death though his father and grandfather had allowed the suit so far as they were concerned to become time-barred. It was admitted that if this contention was correct a descendant could sue 200 years after the death of the vendor, provided his ancestors had not already obtained possession. It seems to me that this is an impossible argument and that it is not supported by *Sundar* v. *Salig Ram* (1) which has properly been distinguished by the learned District Judge. If this argument were to prevail the son could still sue even though his father's suit had been dismissed. But there is nothing in the Act which leads to this absurd conclusion. A suit for possession must be filed within three years from the date on which the right to sue accrues. The right to sue in this case accrued when Haidar died. It would have been different if his widow had been alive. It would then have accrued on her death. That is the meaning of the Act. I, therefore, hold that no suit could be filed after the 21st May 1921 which was the last possible date for filing a suit in the present case. Of course, it would have been different if on the last-mentioned date Allah Ditta's father and grandfather had been both dead and Allah Ditta had been a minor then. In such a case time would have been extended to him in the usual way. There is no force in this second appeal which I dismiss with costs.

Appeal dismissed.

(1) [1911] 26 P. R. 1911=34 P. L. R. 1911=9 I. C. 300=33 P W. R. 1911.

A. I. R. 1926 Lahore 600

HARRISON AND DALIP SINGH, JJ.

Suleman—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 61 of 1926, Decided on 29th April 1926, from the order of the Dist. Mag. Attock, D/-5th December 1925.

Penal Code, S. 441—"*Intention to annoy.*"

A person entering another's house after having taken all precautions to avoid discovery cannot be said to have entered with intent to cause annoyance to the persons in possession : 12 *P. R.* 1906 *Cr.* (*F. B.*), *Expl* ; 17 *P. R.* 1908, *Dissented from.* [P. 601, C. 1]

Amolak Ram—for Petitioner.

R. C, Soni—for the Crown.

Judgment.—The facts of this case are given in the order of Campbell, J., by which it was referred to a Division Bench for decision and it will be sufficient to quote the following :

The petitioner is a village Kamin (barber) and—Mt. Amiran, aged 19 years, is the unmarried daughter of Ghaus Muhammad, an Arain Zamindar. Ghaus Muhammad was obliged to leave his daughter alone in his house one night and he asked the girl's uncle Fateh Khan to sleep in the house and look after her. Fateh Khan arrived about mid-night and found the petitioner on the premises. There was undoubtedly an intrigue between the girl and the petitioner.

Clearly S. 451 does not apply because Amiran was not a married woman and was over the age of consent. The question is whether there was an offence under S. 448 in such circumstances. In my opinion there is a conflict between Mr. Justice Chatterji's decision in 17 *P. R.* 1908 and

Mr. Justice Martineau's decision printed as *Asa Ram* v. *Emperor* (1). In the former case reference was made to *Ram Saran Singh* v. *Emperor* (2) and it was ruled that when an accused person had entered another's house with the intention of having sexual intercourse with the widowed sister of the owner, such illicit intercourse was bound to cause great annoyance to the brother and that a man must be said to intend the inevitable consequences of his act.

The learned counsel for the Crown has contended before us that the facts of this case bring it within the scope of the Full Bench decision in *Ram Saran Singh* v. *Emperor* (2), and they certainly do if we accept the view taken in 17 *P. R.* 1908; with that decision however, we are unable to agree for it appears to us that the reasoning depends upon a mistaken view as to the interchangeability of the words "inevitable" and "possible." It is laid down in the Full Bench decision there where the inevitable consequence of a certain act is clear it must be presumed that the person doing the act had a secondary intention of bringing about that consequence. This is a very different thing from saying that a man must be taken to intend any consequence which may result however remotely from his conduct. In this case the accused was carrying on a clandestine intrigue with Mt. Amiran and his conduct proves that the last contingency that he expected or anticipated or intended was discovery, and he took the natural and obvious precaution to avoid such discovery. Had he intended to be discovered he would have gone on an ordinary night when the father was at home and would have made sufficient noise to attract his attention. Instead of doing so he chose the night when he knew, presumably on information received from the girl, that the father would be absent. He paid his visit and before he could get away he was caught by the uncle. Any man carrying on an intrigue must realize the possibility of its being discovered. At the same time he presumably takes every precaution as in this case to avoid such discovery and it cannot be said by any sort of distortion of the meaning of the word 'intention' that he either intends or expects that his conduct will cause annoyance by being made public. On the other hand had there been any certainty of the father of the girl discovering what had happened, as was the case in *Ram Saran Singh* v. *Emperor* (2) the position would have been quite different and the intent inferable from the known certainty of annoyance would have to be taken into account. We do not follow the view expressed in the judgment of the District Magistrate nor do we think that there is any force in the argument which appears to have influenced him and which is detailed in the concluding portion of his judgment.

We accept the application for revision and acquit Suleman.

We wish to call attention to the advisibility of reconsidering the majority judgment in *Ram Saran Singh* v. *Emperor* (2) whenever occasion shall arise.

Application accepted.

(1) A. I. R. 1925 Lah. 23=5 Lah. 389.
(2) [1906] 12 P. R. (1906) Cr. (F. B.).

A. I. R. 1926 Lahore 601

SHADI LAL, C. J., AND COLDSTREAM, J.

Sajjan Singh—Plaintiff—Appellant.

v.

Attar Singh and *others*—Defendants—Respondents.

Second Appeal No. 2231 of 1922, Decided on 22nd May 1926, from the decree of the Dist. J., Ferozepore, D/- 6th June 1922.

Transfer of Property Act, S. 60—Partial redemption is allowed when mortgagee acquires portion of mortgaged property.

The general rule is that a mortgage being an indivisible security, the mortgagor cannot redeem piecemeal but this rule is subject to several exceptions. One of the exceptions is to the effect that a partial redemption is allowed when the mortgagee himself acquires a portion of the mortgaged property, or in other words, when the same person acquires the rights of ownership and the interest of the mortgagee in a portion of the mortgaged property.

A mortgagor or puisne mortgagee cannot claim to redeem the shares of other co-mortgagors aginst the will of the mortgagee. [P 602 C 1]

Durga Das—for Appellant.

Niaz Muhammad—for Respondents.

Judgment.—The facts of this case may be shortly stated. The defendant Attar Singh and three other persons were co-owners of a holding which they mortgaged in order to secure a loan. Subsequently Attar Singh, who owned one-sixth share in the estate, paid the entire debt due to the mortgagee, with

the result that he became full owner of his one-sixth share and mortgagee of the remaining five-sixth share. In 1920, Mt. Gulabi, who held a half share in the property, created a mortgage in favour of the plaintiff, Sajjan Singh, who has brought the present suit for the redemption of the land. The Court of first instance decreed the claim, but the learned District Judge has dismissed the suit on the ground that the plaintiff cannot be allowed to split up the mortgage transaction.

Now, the general rule is that a mortgage being an indivisible security, the mortgagor cannot redeem piecemeal but this rule is subject to several exceptions. One of the exceptions is to the effect that a partial redemption is allowed when the mortgagee himself acquires a portion of the mortgaged property, or in other words, when the same person acquires the rights of ownership and the interest of the mortgagee in a portion of the mortgaged property. Now in the present case the integrity of the mortgage-security has been destroyed by the circumstances that Attar Singh is the mortgagee, not of the whole of the property, but of only five-sixths thereof, and he cannot, therefore, avail himself of the rule against partial redemption. It is, however, unnecessary to pronounce any final opinion upon this issue, because the plaintiff is willing to redeem the whole of the property, and it is the mortgagee who offers resistance to his claim. It is clear that a mortgagor or a puisne mortgagee cannot claim to redeem the shares of the other co-mortgagors against the will of the mortgagee.

We must, therefore, hold that the plaintiff is entitled to redeem a moiety of the land which belonged to his predecessor-in-interest, Mt. Gulabi. The result is that we accept the appeal and setting aside the decree of the District Judge we restore that of the Court of first instance with costs throughout. A preliminary decree in terms of O. 34, R. 7, shall be drawn up.

Appeal accepted.

A. I. R. 1926 Lahore 602

ZAFAR ALI, J.

Dara Singh and *others*—Defendants—Appellants.

v.

Managal Singh —Plaintiff —Respondent.

Second Appeal No. 2783 of 1925, Decided on 26th May 1926, from a decree of the Addl. Dist. J., Lahore, D/- 31st August 1925.

(a) *Custom (Punjab)— Alienation— Necessity —Purchase of bullocks and cart is necessity for an agriculturist.*

In alienation for the purchase of bullocks and a cart is an alienation for necessity in the case of an agriculturist. [P. 603, C. 1]

(b) *Custom—(Punjab)—Alienation—Alienee is not responsible for misapplication of money.*

Alienee is not responsible for the actual application of the money if he satisfied himself that money was required for a necessary purpose. [P. 603, C. 1].

Dev Raj Sawhney—for Appellants.

Anant Ram for *Brij Lal*—for Respondent.

Judgment.—When Narain Singh, Defendant No. 1, mortgaged his haveli to Defendant No. 2 for Rs. 700 under a registered deed, dated the 22nd April 1918, he had no son, but had nephews who could impugn the alienation. A son was, however, born to Narain Singh later, and the suit from which this second appeal arises was brought on his behalf for a declaration on the usual grounds that the mortgage would be inoperative against his reversionary rights. The trial Court found that the haveli was ancestral and that the alienation was binding on the plaintiff to the extent of Rs. 400 only. As regards this decision, the defendant-mortgagee appealed and the plaintiff filed cross-objections with the result that the defendant-mortgagee's appeal was dismissed and the plaintiff-respondent's cross-objections were accepted and the mortgage was declared entirely inoperative as against the plaintiff.

Counsel for the defendant-appellant contends in this Court :

1. That the learned District Judge has misread the evidence about the property being ancestral ;

that he has overlooked the principle that the alienee is not bound to see to the application of the money lent and

3. that the trial Court as well as the District Judge failed to record a finding on one of the questions that had been put in issue, i. e. whether the suit was collusive.

There is no force in contentions Nos. 1 and 3. The oral evidence on the record shows that the haveli was ancestral and both the Courts below believing that evidence came to the conclusion that it was. That finding of fact, therefore, cannot be interfered with in second appeal.

As regards No. 3 it should be presumed that the point was given up in the trial Court because that Court has not discussed it at all in its judgment. This presumption receives support from the fact that the point was not raised in the grounds of appeal to the District Judge and apparently it was not urged before him because he too makes no reference to it. The appellant therefore, cannot be allowed to raise it at this stage. Thus the only contention that requires consideration is No. (2) and it was upon this point that the appeal was admitted.

Out of Rs. 700, Rs. 400 was paid to the mortgagor before the Sub-Registrar and for the balance, i. e., Rs. 300, the mortgagee gave him a bond. No necessity was mentioned in the deed of mortgage for this sum of Rs. 300 nor could there be any, because the mortgagor could afford to leave it with the alienee for future payment. As regards Rs. 400 it was stated in the deed that the mortgagor required it to buy bullocks and a cart. This was a necessary purpose for an agriculturist, and even if the mortgagor failed to apply the money to that purpose the alienee cannot be held responsible for it, as there is nothing to indicate that he had any reason to suppose that Rs. 400 were not needed for the purpose stated by the mortgagor. This debt of Rs. 400 should, therefore, be deemed to have been incurred for a valid necessity.

The result is that I accept the appeal and restore the decree of the trial Court. The parties shall bear their own costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 603

FFORDE AND CAMPBELL, J.

Mt. Sahibzadi Begam— Plaintiff—Appellant.

v.

Muhammad Umar and *others*—Defendants—Respondents.

Second Appeal No. 1514 of 1922, Decided on 17th May 1926. from the decree of the Dist. J., Delhi, D/- 27th February 1922.

(a) *Civil P. C., S. 11—Plea of res judicata may also be invoked under general principles of law.*

The plea of res judicata is not confined to the provisions of S. 11, but may be invoked under general principles of law : *A. I. R.* 1921 *P. C.* 11 and *A. I. R.* 1922 *P. C.* 80, *Foll.* [P. 604, C. 1]

(b) *Civil P. C., S. 11—Suppression of facts in previous suit—Same facts cannot be used again to defeat the claim of others.*

A party, having acquired an interest in some of the property upon a suppression of the fact that there are other persons with a superior right to it, cannot, in a subsequent suit, use that fact to defeat a claim for partition of another portion of the same estate. [P. 604, C. 1]

M. Sleem—for Appellant.

Ghulam Muhammad—for Respondents.

Fforde, J.—The facts out of which this appeal has arisen are shortly as follows :

In 1913 Muhammad Umar sued the plaintiff in the present suit, Sahibzadi Begum, for his share in certain land, the property of one Mt. Abadi Begum deceased. In that suit Muhammad Umar's brothers and sisters were joined as parties. The result of that suit was that Muhammad Umar was given a decree for 2/27th of Mt. Abadi Begum's landed property and the Court held that Sahibzadi Begum was entitled to a 2/3rd's interest in that property.

Mt. Sahibzadi Begum brought the present suit for partition of a 2/3rd share in certain houses also forming part of the estate of the above-named deceased of which Muhammad Umar had taken possession and she has named Muhammad Umar and the other parties to the previous litigation as defendants. Muhammad Umar now raises the defence inter alia, that Mt. Sahibzadi Begum is not entitled to a 2/3rds interest in these houses, as there are two other persons, namely, Mt. Nazir Begum and Mt. Wazir Begum, who, under

Muhammadan Law, are the sole heirs of that lady. If this plea had been raised in Muhammad Umar's original suit he would have been defeated, and, in my opinion, in view of that fact that in that previous litigation neither party referred to these two women as having a claim to the succession to Mt. Abadi Begam's property, neither is now entitled to raise that issue in the present proceedings.

The trial Court held that so far as the plea of res judicata is concerned that plea could not be sustained under the provisions of S. 11 of the Civil P. C., as the present suit was not triable by the Munsif who tried the previous suit.

The lower appellate Court has held that the question as to the right of succession to Mt. Abadi Begum's estate is not res judicata, but on the question as to the competency of the first Court to try this suit it has come to no decision.

This latter question, however, in my opinion, need be considered in view of the decision I have arrived at on the other point. The plea of res judicata is not confined to the provisions of S. 11 of the Civil P. C., but may be invoked under general principles of law. For this proposition I would refer to a decision of their Lordships of the Privy Council in *Huck* v. *Administrator General of Bengal* (1) and to the concluding passages in the judgment of Lord Buckmaster in *Ramchandra Rao* v. *Ramchandra Rao* (2).

Had the question of the superior claim of Mt. Nazir Begum and Mt. Wazir Begum been raised in the previous suit Muhammad Umar could not have succeeded in establishing his claim to a portion of Mt. Abadi Begum's property. Having acquired an interest in some of the property upon a suppression of the fact that there were other persons with a superior right to it, he cannot now use that fact to defeat a claim for partition of the same estate. As between Mt. Sahibzadi Begum and Muhammad Umar the question of the right of succession to the property of Mt. Abadi Begum cannot, in my opinion be retried, no matter what new evidence or new arguments the parties may now have available.

I would, therefore, accept the appeal and remand the case to the trial Court under O. 41, R. 23 for trial of issues 1, 3, 4 and 5. The Court-fee on the memorandum of appeal must be refunded.

Campbell, J.—I concur The houses now in suit did not form part of the subject matter of the previous suit of 1913 since apparently after the death of Mt. Abadi Begum her brother's daughter (the present plaintiff) took possession of the land and the defendants her sister's children, of the houses. Hence Muhammad Umar's claim in 1913 against the present plaintiff actually was for a share in the land only.

At the same time the question of the respective rights of the present parties as heirs of Mt. Abadi Begum was clearly and directly in issue in that former suit. The issue framed and tried was whether according to Muhammadan Law Defendant No. 1 (i. e., the present plaintiff) alone is entitled to succeed to Mt. Abadi Begum and in the trial both parties deliberately ignored the existence of Mt. Nazir Begum and Mt. Wazir Begum.

I agree with my learned brother that under general principles of law the previous decison should be held to be a final decision, as between these two parties of their rights in the estate of Mt. Abadi Begum and that one of them should not now be permitted to question it on the strength of a fact which he knowingly suppressed at the time of the former trial.

Appeal allowed.

(1) A. I. R. 1921 P. C. 11=48 Cal. 499.
(2) A. I. R. 1922 P. C. 80=45 Mad. 320.

A. I. R. 1926 Lahore 604

BROADWAY AND JAI LAL, JJ.

Chuni Ram-Kanhiya Lal—Plaintiff—Appellant.

v.

Bhagwan Das and *another* — Defendants—Respondents.

First Appeal No. 461 of 1925, Decided on 29th March 1926, from the decree of the Senior Sub-J., Multan, D/- 20th December 1924.

Civil P. C., O. 20, R. 11—Postponement of payment of decretal amount can be ordered for sufficient reasons—Chance of defendant succeeding in another pending suit against plaintiff—Suits arising under different transactions — Reason for postponing is not sufficient.

A Court has power to pass the order postponing payment of the amount decreed in

plaintiff's favour, but this discretionary power must be exercised judicially. Where there is litigation pending between the same parties in which it is possible that the defendants might succeed in obtaining a decree for payment of money against the plaintiff and that if that event happens these decrees can be set off one against the other, but it is also found that the suits relate to independent transactions :

Held : that the order postponing payment cannot be said to be one passed for "sufficient reason" within R. 11. [P 605, C 2]

Badri Das—for Appellant.

Sheo Narain and *Raghu Nath Sahai*—for Respondents.

Broadway, J.—The plaintiff in this case sued the defendants for a sum of Rs. 5,905-14-0 alleging the same to be due on account of principal and interest under a loan made to the defendants. The defendants set up a plea that this money had been received by them in connexion with a partnership between the parties in certain wheat transactions. The defendants have instituted a suit against the plaintiff for rendition of accounts and for a balance due, of something like Rs. 11,000.

The trial Judge held that the money claimed in this suit was advanced by the plaintiff as a loan and not as security in connexion with any partnership transaction whatever and further held that an equitable set off in favour of the defendants could not be allowed. At the same time when granting the plaintiff a decree for the amount claimed he postponed the payment of the amount decreed till such time as the defendants' suit then pending in the High Court should be finally decided.

Against this order postponing payment of the sum decreed the plaintiff has preferred this appeal. It appears that the defendants have also preferred an appeal in this case complaining of the amount decreed in favour of the plaintiff. Those appeals will take some two or three years before they are heard and Mr. Badri Das for the appellants in this case has urged that it is unfair and inequitable to make his client wait for his money for such a long period, especially when in passing the order of postponement the Court below has taken no steps to protect the plaintiff's interest.

Mr. Sheo Narain on behalf of the defendants-respondents has urged that the order passed by the Court below is one that is recognized in law and that the circumstances of the case are such that it should be allowed to stand. At the same time he expressed his client's willingness to furnish security not only for the principal but for any interest that might be ordered from the date of decree to the date of realization.

Now, undoubtedly the trial Court had power to pass the order postponing payment of the amount decreed : vide O. 20, R. 11, Civil Procedure Code, but there can be no doubt that this discretionary power must be exercised judicially and there seems to be no sufficient reason for the postponement. The learned Senior Subordinate Judge has not given any reason for the order although the reason may be gathered from his judgment. As far as I can see this reason is that there is litigation pending between the same parties in which it is possible that the present defendants-respondents might succeed in obtaining a decree for payment of money against the plaintiff-appellant and that if that event happens these decrees can be set off one against the other. As, however, the finding of the Court below is very clear and definite that the money now decreed had been lent to the defendants by the plaintiff wholly apart from any other transaction I do not think that it can be said that the order postponing payment is one passed for "sufficient reason."

I would, therefore, accept this appeal and set aside so much of the decree as directs that

> execution of the decree excepting costs, shall not be taken out until the defendants' suit now pending in the High Court is finally decided.

Parties to pay their own costs in this Court.

Jai Lal, J.—I agree.

Appeal accepted.

A. I. R. 1926 Lahore 605

JAI LAL, J.

Rikhi Kesh—Plaintiff—Appellant.

v.

Mela Ram—Defendant—Respondent.

Misc. First Appeal No. 548 of 1926, Decided on 14th May 1926, from an order of the Senior Sub-J., Amritsar, D/- 8th February 1926.

Execution — Costs—Civil P. C., S. 35 and O. 41.

Execution of decree as to costs awarded in preliminary decree in partition suit need not be stayed till the passing of final decree. [P 606 C 1]

D. C. Ralli for *Dev Raj Sawhney*—for Appellant.

Moti Sagar and *Har Prashad*—for Respondent.

Judgment. — A preliminary decree for partition was granted by the Senior Subordinate Judge, Amritsar. The plaintiff was ordered to pay two-thirds of the defendant's costs. The latter has filed an appeal against the preliminary decree. Further proceedings in the case have been stayed by the orders of this Court, but the question of execution of the decree, so far as it related to the payment of costs by the plaintiff to the defendant was left open. The learned Judge (Dalip Singh, J.) remarked that he did not see any reason why execution of costs should be stayed, but the counsel for the plaintiff contended before him that the costs of a preliminary decree could not be executed till the final decree. The learned Judge remarked that if that was so, and he did decide the point, there was no reason why there should be an order of stay.

This is an application for stay of execution of the decree as to costs. No authority has been cited in support of the contention that the execution of costs in a decree such as the present cannot proceed till the final decree has been passed. I consider that no sufficient ground has been shown for stay of execution. I, however, order that the amount paid by or recovered from the judgment-debtor should not be paid over to the decree-holder unless the latter furnishes security to the satisfaction of the Executing Court that he will make restitution in respect of the same, if so ordered by a competent Court with interest at the rate of Rs. 9 per cent. per annum from the date of the receipt by him till the restitution thereof.

Order accordingly.

A. I. R. 1926 Lahore 606

SHADI LAL, C. J., AND COLDSTREAM, J.

Shankar Das-Joti Prashad—Plaintiffs—Appellants.

v,

Bhana Ram-Sheo Dial—Defendants—Respondents.

Second Appeal No. 1489 of 1922, Decided on 7th May 1926, from the decree of the Dist. J., Ambala, D/- 16th March 1922.

Contract Act, S. 83—Part payment made—Railway receipt for the goods sold endorsed to vendee—Goods burnt in transit—Vendee is to bear the loss.

On the 6th May 1918 the defendants entered into a contract for the sale of 814 tins of kerosene oil to the plaintiffs, and received Rupees 1,000 in part payment of the price. The vendors were not, at that time, in possession of the goods which had been despatched to them from Calcutta on the 25th April 1918. They had, however, received the railway receipt and endorsed that receipt in favour of the plaintiffs. The goods never reached their destination and were burnt on or about the 12th May while they were in transit.

Held: that the vendees have to bear the loss arising from the destruction of the goods, as the property in the goods had passed to the buyers and therefore the vendors cennot be called upon to refund the price. [P 606 C 2, P 607 C 1]

Tek Chand and *Shamair Chand*—for Appellants.

Moti Sagar and *Gobind Ram*—for Respondents,

Shadi Lal, C. J.—The facts of this case as admitted before the learned District Judge may be shortly stated: On the 6th May 1918, the defendants entered into a contract for the sale of 814 tins of kerosine oil to the plaintiffs, and received Rs. 1,000 in part payment of the price. The vendors were not, at that time, in possession of the goods which had been despatched to them from Calcutta on the 25th April 1918. They had, however, received the railway receipt and endorsed that receipt in favour of the plaintiffs. It appears that the goods never reached their destination and were burnt on or about the 12th May while they were in transit.

The question arises as to whether the vendors or the vendees have to bear the loss arising from the destruction of the goods. The decision of the question depends upon whether the property in the goods had passed to the buyers. Now, there can be no doubt that the

goods were in existence on the date of the contract, and that the sale related to ascertained goods. The whole of the consignment, as represented by the railway receipt, was sold to the plaintiffs who paid part of the price on the very day of the contract, and the balance subsequently. Section 78 of the Indian Contract Act prescribes that, where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price is paid. The requirements of this section have been fulfilled in the present case, and the learned District Judge has rightly held that the property in the goods had passed to the plaintiffs on the 6th May, six days before they were burnt. The vendors cannot, therefore, be called upon to refund the price.

For the aforesaid reasons we dismiss the appeal with costs.

Appeal dismissed.

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* A. I. R 1926 Lahore 607

ZAFAR ALI AND ADDISON, JJ.

Gopal Das and *another*—Defendants—Appellants.

v.

Mulchand and *others*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 473 of 1922, Decided on 27th April 1926, from the decree of the Dist. J., Dera Ghazi Khan, D/- 16th November 1921.

* (a) *Civil P. C., O. 22, Rr. 2 and 4—Death of respondent—His legal representatives already on the record—Failure to apply under R. 4 does not cause appeal to abate.*

Where R. 2 is applicable no application under R. 4 need be made, and that if it is not made the appeal does not abate where all the representatives of the deceased respondent are already on the record : *A. I. R.* 1926 *Lah.* 37 ; *A. I. R.* 1925 *Patna* 123, *Dist.*; 11 *P. L. R.* 1921 and 26 *P. L. R.* 248, *Foll.* [P 608 C 1]

(b) *Deed—Construction—Mortgage—Mortgage for 5 years—Mortgagee authorised to redeem a prior mortgage within 5 years—Mortgagee can redeem it even after 5 years until his mortgage is redeemed.*

Where by a condition in the mortgage which was for a period of five years, the mortgagee was authorised to redeem a prior mortgage any time within the five years.

Held : the mortgagee was entitled to redeem the prior mortgage any time, even after five years, before his mortgage was redeemed. [P 608 C 2]

Haryopal and *B. A. Cooper*—for Appellants.

Sheo Narain—for Respondents.

Judgment.—Counsel for the plaintiffs-respondents raises a preliminary objection that the appeal has abated, because one of the four plaintiffs-respondents, namely, Thana Ram, died so far back as the 4th November 1924, but no application to bring his legal representatives on the record was made till the 1st April 1926. The appellants' counsel replies that the legal representatives of Thana Ram who was a Hindu minor were his brothers who were co-plaintiffs with him and that as the right to sue survived to them alone all that was necessary was to make an entry to that effect as provided by O. 22, R. 2, Civil P. C.

It is not denied that the surviving brothers alone are the legal representatives of the deceased and that the right to sue survives to them alone, but counsel for respondents contends on the authority of a decision of a Division Bench of this Court consisting of Abdul Raoof and Fforde, JJ. *Gurditta Mal* v. *Mahomad Khan* (1) that even in a case like the present an application should have been made within 90 days to bring the legal representatives of the deceased party on the record. In the case referred to the said learned Judges held that

> the mere fact that the legal representatives of the deceased respondents are already on the record does not relieve the appellant from the necessity of making an application under O. 22, R. 4, Civil P. C.

In arriving at that conclusion the learned Judge appeared to have followed *Lilo Sonar* v. *Jhagru Sahu* (2) but that case is quite distinguishable because there only one of the legal representatives of the deceased party was already on the record but not the rest and it was held that

> the fact that one of the representatives of the deceased was already on the record (though not in representative capacity) did not relieve the appellant or the other heirs of the deceased respondent from making an application for substitution of legal representatives of the deceased respondent in the terms of R. 4 of O. 22.

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(1) A. I. R. 1926 Lah. 37.
(2) A. I. R. 1925 Patna 123=3 Pat. 853.

The distinction between the Patna case and the present is therefore obvious. The decision in *Gurditta Mal* v. *Md. Khan* (1) it may be observed, is contrary to several previous judgments of this Court, one of which reported in *Kartar Singh* v. *Lal Singh* (3) is by Mr. Justice Abdul Raoof himself. In it that learned Judge held that

> where on the death of a respondent it appears that his heirs are already parties to the appeal it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased.

In *Fateh Shah* v. *Bahabshah* (4) a Division Bench of this Court of which Mr. Justice Fforde was a member came to the same conclusion, and the same view was taken in *Dowlat* v. *Asa* (5). The rulings of the other Courts to the same effect are *Hafizunnissa* v. *Jawahir Singh* (6) *Mg. Po* v. *Ma Shwe* (7), *Shamanund* v. *Raj Narain* (8).

Where, as in the present case, O. 22, R. 2 which corresponds to S. 362 of the Civil P. C. of 1882 clearly applies, it is difficult to see why it is necessary to make an application under O. 22, R. 4. The two rules contemplate two different sets of circumstances and the provisions made in R. 2 is independent of and is in no way subject to the provision of R. 4. We are, therefore, of opinion that where R. 2 is applicable no application under R. 4 need be made, and that if it is not made the appeal does not abate whereas in this case. all the representatives of the deceased respondent are already on the record.

But the appeal must fail on the merits.

The suit was for possession of a shop by redemption. The shop was in the possession of Defendant 1 by virtue of a mortgage granted to him by Defendants 2 and 3. This mortgage was executed on the 25th March 1904 and was for Rs. 1,200. On the 3rd April 1912 Defendants 2 and 3 executed a second mortgage in favour of the father of plaintiffs and Plaintiff 2 himself for Rs 2,300. out of which Rs. 1,200. was to be paid to the prior mortgagee. and before the Sub-Registrar the mortgagors i. e. Defendants 2 and 3 admitted that they had received Rs. 1,100. themselves. The conditions of this second mortgage, five in number, were, briefly as below :

(1) that the mortgage was for five years ;

(2) that the mortgagees were entitled to redeem the previous mortgagee at any time within the said period ;

(3) that if the shop were redeemed from the first mortgagee, the mortgagors might at their option, take it on lease at a rent of Rs. 40 per 'mensem ;

4) that the mortgagors would be liable to ejectment if they should fail to pay rent and

(5) that if the mortgagors should fail to redeem after the expiration of the said term of five years the mortgage would become a sale.

The prior mortgagee did not contest the suit but the mortgagors contended that the plaintiffs were not entitled to redeem as they had failed to do so within the stipulated period of five years. Both the Courts below agreed that this contention was untenable and we too are of the same opinion.

According to Condition No. 1 the plaintiffs were entitled to hold the shop in mortgage for five years and the mortgagors could not redeem before the expiration of that period. But it was nowhere stipulated that the mortgage would terminate after that period without being redeemed. Similarly in view of Condition No. 1 it was stated in No. 2 that the plaintiffs could redeem at any time within five years. But it does not follow from this that they were precluded from redeeming after the expiration of that period.

We are, therefore, of opinion that the plaintiffs' suit for redemption was rightly decreed and we dismiss this appeal with costs.

Appeal dismissed.

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(3) [1921] 11 P. L. R. 1921=59 I. C. 238=9 P. W. R. 1921.
(4) [1925] 26 P. L. R. 248.
(5) [1886] 45 P. R. 1886.
(6) [1921] 24 O. C. 374.
(7) A. I. R. 1925 Rang. 95=2 Rang. 445.
(8) [1906] 4 C. L. J. 568=11 C. W. N. 186.

A. I. R. 1926 Lahore 609

CAMPBELL, J.

Ruliya Singh and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 202 of 1926, Decided on 17th May 1926, referred by the S. J., Ludhiana, on 28th January 1926.

(a) *Criminal P. C., S.* 188 — *Section does not give direction for signing a certificate by any particular person—Document signed by Political Agent is preferred.*

The section does not mention the word "certificate" at all and there is no direction for the signing of a certificate by any particular person. Nor is the manner prescribed in which it is to be proved that the Political Agent has certified that the charge ought to be enquired into in British India although obviously the most convenient method of proving this is the production of a document signed by the Political Agent. [P. 610, C. 2]

(b) *Criminal P. C., S.* 188—*Certificate by Under Secretary to Political Agent is not sufficient.*

It is unreasonable to assume on the strength of a certificate signed by the Under Secretary to the Political Agent that the Political Agent has himself certified that the charge ought to be enquired into in British India. [P. 610, C. 2]

(c) *Criminal P. C., S.* 188—*Certificate prior to commencement of proceedings — Proceedings are valid.*

Where the Political Agent has certified that in his opinion the charge ought to be enquired into in British India prior to the commencement of the committal proceedings, the commitment is perfectly valid. [P. 611, C. 1]

Jai Gopal Sethi—for Petitioners.

Ram Lal—for Opposite Party.

Referring Order.—In this case the charge against Ruliya Singh and Jagta Singh, accused, is that on the night between 18th and 19th May 1925, they murdered Mt. Shamon, wife of Ruliya Singh, accused, near the canal bank in the area of village Gaihal, which is situated within the jurisdiction of Badhaur police station in Patiala State. The police of Ludhiana took cognizance of this case, because both the accused persons belong to village Chananwal which is situated in the jurisdiction of Shehna police station of this district. As the offence was said to have been committed within the territory of the Maharaja of Patiala, the police applied to the Political Agent for a certificate under S. 188 of the Criminal P. C., in order to enable the Court of the Ludhiana District to have jurisdiction in the matter. From a copy of the Political Agent's order produced before me to-day, (vide Ex. Pz 4), it appears that the Political Agent ordered the issue of the required certificate on 17th July 1925. In compliance with this order, the certificate, Ex. Pz 2, dated 21st July 1925, was issued under the signature of Rai Bahadur Diwan Giyan Nath, Under Secretary to the Political Agent. The certificate, Ex. Pz 2, shows that Diwan Giyan Nath signed it for the Political Agent.

After receipt of the certificate, enquiry in the case was commenced by the Magistrate, and the case was finally committed to this Court for trial, without any objection having been taken to the validity of the certificate.

In this Court, the certificate was formally produced by the Court Inspector on 20th January 1926, and then it was pointed out that the certificate was invalid, as it had not been signed by the Political Agent himself. Thereupon, I ordered the Public Prosecutor to obtain a fresh certificate signed by the Political Agent himself, and also to ascertain if the Under Secretary had been validly authorized to sign such certificates on behalf of the Political Agent. The fresh certificate, Ex. Pz 3, duly signed by the Political Agent, dated 22nd January 1926, has been produced before me to-day and it has been brought to my notice that according to *Ram Charan* v. *Emperor* (1), the production of the certificate at this stage does not render the commitment and the trial valid. Raizada Bhagat Ram, who appeared for the accused, made it clear that he did not object to the jurisdiction of this Court to try the case, but that he considered it his duty to bring the matter to the notice of the Court for such action as might be deemed necessary : vide his statement of to-day.

Now the questions for determination are :

Whether the certificate Ex. Pz 2 issued under the signature of Rai Bahadur Diwan Giyan Nath, Under Secretary to the Political Agent is a valid certificate, as required by S. 188, Criminal P. C.

If not, whether the production of the certificate Pz 3 at this stage renders the commitment and the trial valid.

(1) A. I. R. 1925 Lah. 185=5 Lah. 416.

Section 188 of the Criminal P. C. contemplates that the certificate in question must be issued by the Political Agent, and it has not been satisfactorily shown that the Political Agent had authorized his Under Secretary to issue such certificate under his signature, or that the Political Agent, had, under law, the power to delegate such powers to his Under Secretary. The learned Public Prosecutor urged that by an order dated 17th July 1925 the Political Agent had ordered the issue of a certificate in this case, and that the fact that the certificate had been signed by the Under Secretary did not render it invalid. This contention appears to be plausible on the face of it, but I doubt very much if it is really sound in view of the wording of S. 188, Criminal P. C., which lays down clearly that the certificate is to be given by the Political Agent. I am, therefore, at present inclined to think that the certificate Pz 2 is not a valid certificate which is required under S. 188, Criminal P. C., to give jurisdiction to the Courts of this District in this case.

In *Ram Charan* v. *Emperor* (1) it was held that want of certificate required by S. 188, Criminal P. C., was a defect which could not be cured by subsequent production of such certificate, and that consequently the commitment order was wholly void, and must be quashed under S. 215 of the Criminal P. C.

The learned Public Prosecutor tried to distinguish this case on the ground that, in the case reported as *Ram Charan* v. *Emperor* (1), no certificate at all had been produced ; but this contention does not, in my opinion, appear to be well founded because for all practical purposes there is no difference between the non-production of a certificate and production of an invalid certificate. In *Emperor* v. *Kali Charan* (2) it was held that the actual existence of a certificate at the date of commitment, but which at the time of committal had not come into the hands of the committing Magistrate, would not make the commitment valid. The point involved is a difficult one, and I hesitate to express any definite opinion, but the trend of the authorities cited above is that the commitment in this case is not valid, and I, therefore, deem it proper to refer the matter for orders of the Honourable the High Court, with the request that if the Honourable Judges hold that the commitment in this case was invalid, the commitment may be quashed under S. 215 of the Criminal P. C.

In conclusion, I may note that Raizada Bhagat Ram, counsel for defence, did not press this objection, but if the objection is well founded, waiver on the part of counsel does not confer jurisdiction on this Court.

Order.—The facts are stated in the referring order of the learned Sessions Judge and they clearly distinguish the case from those in which no certificate from the Political Agent has been obtained.

The relevant words of S. 188, Criminal P. C., are that no charge as to any such offence shall be enquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be enquired into in British India. The section does not mention the word 'certificate' at all and there is no direction for the signing of a certificate by any particular person. Nor is the manner prescribed in which it is to be proved that the Political Agent has certified that the charge ought to be enquired into in British India although obviously the most convenient method of proving this is the production of a document signed by the Political Agent.

The situation here is in reality a very simple one. The committing Magistrate commenced his proceedings on the 27th August 1925, and he then had before him a certificate in the following terms :

> Certified that the marginally noted case is one which, in my opinion, should be tried in British India at Ludhiana.
>
> (*Sd.*) Gyan Nath, R. B. Diwan
> Under Secretary,
> *for* Agent to the Governor-General,
> Punjab States.

It was unreasonable for the committing Magistrate to assume on the strength of this document that the Agent to the Governor-General, Punjab States, had himself certified that the charge ought to be enquired into in British India. Later on the question was raised for the validity of the commitment in the absence of a certificate signed by the Agent to the Governor-General himself. This involved an enquiry not whether the Agent to the Governor-General had ever signed a document in any special form

(2) [1902] 24 All. 256=(1902) A. W. N. 45.

but whether in fact he had certified before the committal proceeding commenced that the charge ought to be enquired into in British India. A certified copy of an order was then produced dated the 17th July 1925, signed by the Agent himself and directing that a certificate should issue under S. 188 in this particular case. The copy of that order proved for all necessary purposes that on the 17th July 1925, the Political Agent had certified that in his opinion the charge ought to be enquired into in British India, and as this date was prior to the commencement of the committal proceedings the commitment was perfectly valid. The learned Sessions Judge has referred to *Emperor* v. *Kali Charan* (2), but the report indicates that there the required certificate was obtained some days before the commitment was actually made, but not before the committing Magistrate's proceedings had commenced, a fact which distinguishes the case from the present one.

I, therefore, refuse to interfere with the commitment and direct that the records be returned to the learned Sessions Judge. I should add that I have been asked to adopt the view, which I have taken, not only by counsel for the accused persons but also by the learned Assistant Legal Remembrancer.

Commitment confirmed.

A. I. R. 1926 Lahore 611

JAI LAL, J.

Emperor

v.

Dharam Parkash—Accused.

Criminal Revision No. 305 of 1926, Decided on 20th May 1926, from an order of the S. J., Ambala, D/- 14th December 1925.

Reformatory Schools Act (7 of 1897)—Act is intended for youthful first offenders—Criminal P. C., S. 562.

The sending of first youthful offenders, whose antecedents are not shown to be bad, to ordinary jails has the effect of making them hardened criminals after they are discharged from such jails. Their association with all classes of offenders has a very unhealthy influence on them. It is the duty of the Magistrate to take into consideration all such matters, when deciding the question of sentence. There are other suitable forms of punishment provided by the law. The provisions of Reformatory Schools Act are intended for cases of youthful offenders. [P 611 C 2]

Order.—Dharam Parkash has been convicted under S. 381 of the Indian Penal Code by Lala Hukam Chand, Magistrate, First Class, Ambala, and sentenced to one year's rigorous imprisonment. He was found guilty of having stolen a bicycle of his master, with whom he took up service on the 6th September 1925 and disappeared with the bicycle on the 15th September 1925. He was arrested and convicted on the 30th September 1925. The above facts are fully established by the evidence on the record and I agree with the conclusion of the Magistrate as to the guilt of the convict.

When I visited the District Jail of Ambala as a member of the Jail Committee appointed by the Punjab Government my attention was drawn by the other members of the Committee to the inadvisability of sending young men like the convict to jails reserved for habituals; the District Jail of Ambala is one of that description. The convict was kept in the jail along with habitual offenders of all description and no attempt at segregation was made. The sending of first youthful offenders, whose antecedents are not shown to be bad, to ordinary jails has the effect of making them hardened criminals after they are discharged from such jails. Their association with all classes of offenders has a very unhealthy influence on them. It is the duty of the Magistrate to take into consideration all such matters, when deciding the question of sentence. There are other suitable forms of punishment provided by the law. The provisions of Reformatory Schools Act are intended for cases like the present. The scope of S. 562 of the Criminal P. C., has recently been widened. In his statement before the Magistrate, the accused appears to have mentioned his age as 20, but in the First Information Report he is stated to be 16 or 17 years of age and by appearance he was certainly of that age. The sentence of one year's rigorous imprisonment was from every point of view excessive in this case. The learned Magistrate in his judgment states that

> there have been very many cases of cycle thefts and, therefore, deterrent punishment is justified in this case.

It was for this reason that he awarded a sentence of one year's rigorous impri-

sonment. Even if I were to hold that this was an adequate reason for awarding a "deterrent sentence," there is nothing on the record to support this observation of the Magistrate. The convict has already been in jail for more than seven months and a half and under the circumstances the only order that I can pass in this case is to reduce the sentence to that already undergone by him and to order his release from the jail forthwith.

Release ordered.

A. I. R. 1926 Lahore 612

ADDISON, J.

Mt. Imam Bibi — Plaintiff — Petitioner.

v.

Fazal Muhammad Shah and *others*— Defendants—Respondents.

Civil Revision Petition No. 770 of 1925, Decided on 15th May 1926, from an order of the 4th Cl. Sub-J., Hoshiarpur, D/- 13th July 1925.

Civil P. C., S. 115—Another remedy open by way of suit—High Court can interfere in exceptional circumstances—Civil P. C., O. 9, R. 4.

High Court can interfere in revision though there may be another remedy by way of instituting suit, provided there are exceptional circumstances.

After arguments were over Court granted permission to defendants to bring their witness in the absence of plaintiff's counsel, and after hearing the witness, dismissed the plaintiff's suit in default.

Held: that the Court committed a material irregularity and High Court can interfere in revision. [P. 612, C. 2]

Gulam Mohy-ud-Din—for Petitioner.

Niaz Muhammad—for Respondents.

Judgment.—This is a suit for possession of 1 kanal 1 marla of land. It was instituted by a pardanshin lady on the 9th May 1923 and had been finished except for the examination of the local commissioner which was desired by the defendants. The date fixed for his evidence was the 10th July 1925. On that day it was found that the defendants had not even summoned him. The next order passed by the Court on the same day was that arguments had been heard. Then there was another order below to the effect that it permitted the defendants to go to fetch the witness from the city at once and that this order was announced. Finally, the witness came and the defendants were present, but the plaintiff's counsel were not present. The Court waited a little longer, and when it was past 3 o'clock it dismissed the suit in the absence of both parties. An application was made to set aside this dismissal in default, but it was summarily rejected on the ground that one of the two counsel engaged by the plaintiff could have been present. Against these orders, this revision has been filed.

There is an affidavit by the two counsel engaged by the plaintiff who is a pardanashin lady. They have sworn that the Court in their presence did not grant time to the defendants to bring the local commissioner, but that the Court heard arguments in the case and when the arguments in the case were finished, the parties were told to wait outside so that they might hear the order when ready. The Court, however, allowed the plaintiff's counsel to go to their work telling them that they could ascertain the order later. It was afterwards, according to that affidavit, that the defendants were allowed to go and fetch the local commissioner. This affidavit has not been contradicted by a counter-affidavit and it must be taken to be correct.

In these circumstances it must be held that the trial Court committed a material irregularity in the exercise of its jurisdiction. It was contended however that another suit would lie and that I should not interfere in revision. This is undoubtedly the general rule, but it has been held that even in such cases the High Court should interfere provided there are exceptional circumstances. In the present case the litigation has been going on for three years. Everything was finished except for the examination of the witness, who was not present owing to the defendants' laches, I, therefore, accept this petition and, setting aside the orders of the trial Court direct it to proceed with the suit on the merits. The defendants should be given an opportunity to produce the local commissioner. The parties will bear their own costs here.

Petition accepted.

S. N. Dar
Advocate High Court
Jammu & Kashmir

A. I. R. 1926 Lahore 613

ADDISON, J.

Piran Ditta and *others*—Plaintiffs—Appellants.

v.

Lal and *others*—Defendants—Respondents.

Misc. Second Appeal No. 159 of 1926, Decided on 15th May 1926, from an order of the Dist. J., Sailkot, D/- 13th October 1925.

Punjab Tenancy Act (1877), *S. 50—Suit by dispossessed tenant for possession lies in revenue Courts only though brought after one year.*

A suit for possession by a tenant who is dispossessed by landlord more than a year prior to suit lies only in revenue Court and not in civil Court : *A. I. R.* 1924 *Lah.* 539, *Foll.*

[P. 613, C. 1]

Sayad Mohsin Shah—for Appellants.

Muhammad Amin—for Respondents.

Judgment.—An occupancy tenant named Mamun died. The plaintiffs got into possession as his heirs and then instituted a suit against the landlords for a declaration that they were entitled to hold the land as occupancy tenants. Their claim was decreed in the Court of the District Judge on the 18th of December 1921 ; later the landlord dispossessed the plaintiffs who have brought the present suit in the civil Courts for possession of the occupancy land in question on the allegation that the defendants, i. e., the landlords unlawfully dispossessed them two years before the suit was instituted. The trial Court decreed the claim holding that the suit was cognizable by the civil Courts. On appeal the learned District Judge held that the suit was cognizable by the revenue Courts and he accepted the appeal, and ordered the plaint to be returned for presentation to the proper Court. Against this decision this second appeal has been filed.

It is clear that if the case is cognizable by the revenue Courts then the plaintiffs have no remedy left as the period of limitation under S. 50 of the Punjab Tenancy Act is one year from the date of dispossession. The one point argued before me was whether the civil or revenue Courts had jurisdiction to try this suit. There is a conflict of authority on this point. The later ruling seems to be on the whole in favour of the view taken by the learned District Judge. Suits for recovery of possession by a tenant or for compensation for dispossession, or for both, are provided for by S. 50 of the Punjab Tenancy Act. *Akbar Hussain* v. *Karam Dad* (1) was a case where the tenant sued for compensation under that section more than a year after his dispossession. The suit was brought in the civil Courts, but it was held that it was cognizable only by a revenue Court even though not brought within one year from the date of plaintiff's dispossession. This Full Bench decision expressly overruled *Imam Din* v. *Feroz Khan* (2), where it was held that S. 50 of the Punjab Tenancy Act did not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the civil Courts and that a plaintiff would have up to 12 years to sue in the civil Courts.

In *Parman* v. *Lhassu* (3), however, a Division Bench of this Court held that the civil Courts had jurisdiction to try a suit, brought by a person dispossessed from his tenancy in accordance with a notice issued under S. 43 of the Punjab Tenancy Act and who had been unsuccessful in a suit to contest his liability to ejectment, for possession of the land from which he had been ejected on the ground that he had a right of the occupancy therein. The Full Bench ruling of the previous year was distinguished on the ground that it did not deal with the case of a tenant who had been dispossessed in due course of law. *Parman* v. *Lhassu* (3), therefore, does not help the appellants before me as they were wrongfully dispossessed as was the case in the Full Bench ruling of 1918.

The latest decision on the point seems to be that reported as *Mahindar Singh* v. *Allah Ditta* (4). That is a case on all fours with the present and it was held that a suit of this nature was cognizable only by a revenue Court even though not brought within one year of the plaintiff's dispossession.

I, therefore, hold that the decision of the learned District Judge is correct and I dismiss this appeal, but leave the parties to bear their own costs.

Appeal dismissed.

(1) [1918] 90 P. R. 1918=48 I. C. 8 (F. B.).
(2) [1898] 64 P. R. 1898.
(3) [1919] 49 P. R. 1919=51 I. C. 443.
(4) A. I. R. 1924 Lah. 539.

Jammu & Kashmir

* A. I. R. 1926 Lahore 614

CAMPBELL, J.

Firm Jagan Nath-Baij Nath—Plaintiffs—Appellants.

v.

Secy. of State—Defendant—Respondent.

Second Appeal No. 2557 of 1925. Decided on 20th February 1926, from the decree of the Addl. Dist. J., Lahore, D/- 9th May 1925.

(a) *Railways Act, S. 72—Risk Note H.—Contract under the Risk Note covers the whole period during which goods remain with railway.*

The contract under Risk Note H forms a complete special contract, between the consignor and the Railway covering the whole period during which the goods remain with the railway. [P. 614, C. 2]

* (b) *Railways Act, S. 72—Risk Note—Loss of complete consignment—Perishable goods—If goods become of no value there is loss of complete consignment.*

In the case of perishable goods if the contents of the whole consignment deteriorate to such an extent that they become of no value, the loss amounts to a loss of the whole consignment. [P. 615, C. 1]

(c) *Railways Act, S. 72—Risk Note—"Wilful neglect" implies intentional and of set purpose doing or omitting to do something—Onus is on plaintiff to prove wilful neglect.*

A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done and the onus of proving wilful neglect lies upon a plaintiff suing a railway for compensation for loss of goods consigned under a Risk Note. [P. 615, C. 1]

J. G. Sethi—for Appellants.

C. H. Carden Noad—for Respondent.

Judgment.—In this case 66 baskets of betal leaves were booked to the plaintiff from Bassein Road to Lahore. They were placed at Bassein Road in a motor truck, and when the truck arrived at Lahore on the 4th of June the railway officials thought that it contained a motor car and placed it in the motor siding to await the owner of the Car. Meantime the plaintiff presented his railway receipt two or three times at Lahore railway station and was told that his betel leaves had not arrived. The plaintiff's consignment was despatched under Risk Note H, according to which in consideration of a reduced rate of carriage the railway was absolved from responsibility for any loss, destruction, deterioration or damage from any cause whateever, before, during and after transit over the railway except for the loss of a complete consignment or of one or more complete packages due to the wilful neglect of the Railway Administration or to theft by or due to the wilful neglect of the railway's servants, etc.

There was no label attached to the truck when it arrived at Lahore and eventually on the 10th of June it was opened and was found to contain the plaintiffs, baskets of betel leaves. There were made over to the delivery clerk who noted that the contents of the packages were in a rotten condition. The plaintiff refused to take delivery and, subsequently brought the present suit against the Secretary of State as representing the North-Western Railway for Rs. 792 as damages. The trial Court awarded Rs. 783-12, but on appeal the suit was dismissed by the Additional Judge who held that no libiality attached to the railway : firstly, because there was no loss of goods, and secondly because, if there had been, there was no wilful neglect on the part of the Railway Administration or its servants.

The plaintiff has come to this Court on second appeal and it has been argued firstly, that the Risk Note covered only the time of actual transit between Delhi and Lahore and did not cover the period from 4th June to 10th June, during which the plaintiff's goods were damaged or destroyed, as held by the lower appellate Court, in consequence of remaining in a closed truck in the open yard for those days. This contention has no force. The contract under Risk Note H formed a complete special contract between the consignor and the railway covering the whole period during which the goods remained with the Railway. This is clear from the terms of S. 72 of the Indian Railways Act which permits responsibility of the Railway under S. 161 of the Indian Contract Act, which is the section relied upon for the appellant to be limited by and agreement in writing in a form approved by the Governor-General in Council and the words used in the Risk Note "before during and after transit over the said Railway" are quite definite.

The second point taken is that the lower appellate Court was wrong in holding the case not to be one of loss of

goods but merely to be one of detrioration. Here I think the appellant is right. In my opinion the proper test is that applied by the learned judges of the Madras High Court in *M. and S. M. Ry. Co. Ltd.* v. *Muttai Subba Rao* (1), namely, whether the appellant's baskets of betel leaves were of no value when delivery was tendered. On the finding of the learned Additional Judge that the betel was in a rotten condition when taken out of the truck and that later on it was destroyed under the orders of the station master the decision must be in the favour of the appellant that he suffered loss of his whole consignment.

The third contention of the appellant is that the loss should be held to have been due to the wilful neglect of the servants of the railway administration. In regard to this, as already stated, the learned Additional Judge has found that the facts do not establish any wilful neglect and I agree with him. Wilful neglect was defined by the learned Judicial Commissioner's Court in Sindh in *Firm of Daulat Ram* v. *Secy. of State* (2) in the following terms which are adequate for the present purpose.

> A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done.

The same judgment points out that the onus of proving wilful neglect lies upon a plaintiff suing a railway for compensation for loss of goods consigned under a Risk Note and this, since the decision of the well-known case of *Smith* v. *Great Western Railway* (3), is the rule rigidly applied by the Courts both in England and in India. The matter has been discussed at some length in *G. I. P. Ry.* v. *Dattu Ram* (4) and the position of a sufferer such as the present appellant has been explained. Had he not sought to have his goods carried at a reduced rate under the terms of a risk note but had paid a higher freight to have them carried under another form of contract, the railway would have had to assume a much fuller responsibility.

The plaintiff has proved that the betel was put in a truck intended primarily for the carriage of a motor car that the truck arrived in Lahore without a label and that it was not opened by the railway servants to ascertain its contents but was shunted away as it was into the yard and and kept there for several days. It is possible that he has shown bungling on the part of the railway but he has shown nothing more. He has failed to prove that the motor truck was used intentionally and of set purpose with the knowledge that it should not be used for freight of the description of the plaintiff's goods, or that no label was placed on the truck at the station of departure; or that the absence of a label was due to some intentional act or omission, or that the shunting of the truck at Lahore was done of set purposes by someone who knew that the truck ought not to be put there. On the other hand the Court below has found that the truck was shunted because the railway officials at Lahore thought that it must contain a motor-car and did not want to open it until the owner appeared.

Without proving wilful neglect the plaintiff could not succeed. His appeal must fail and is dismissed with costs.

Appeal dismissed.

(1) [1920] 43 Mad. 617=38 M. L. J. 360=11 L. W. 358=55 I. C. 754=(1920) M. W. N. 138.
(2) [1916] 9 S. L. R. 177=32 I. C. 551.
(3) [1922] 1 A. C. 178=91 L. J. K. B. 423=38 T. L. R. 359.
(4) A. I. R. 1926 Pat. 148=5 Pat. 118.

A. I. R. 1926 Lahore 615

ZAFAR ALI, J.

Rulia and *another*—Plaintiffs—Appellants.

v.

Nur Muhammad and *another*—Defendants—Respondents.

Second Appeal No. 2229 of 1925, Decided on 17th March 1926, from the decree of the Dist. J., Jullundur, D/- 14th May 1925.

Adverse possession—Using land for cattle shed does not prove possession.

Where the defendants used as a cattle shed a corner of the vacant site belonging to plaintiffs.

Held: the user cannot be tantamount to possession and it is upon the defendants to establish adverse possession for over twelve years; 16 *Bom.* 338, *Foll.* [P. 616, C. 1]

Fakir Chand—for Appellants.

R. C. Soni—for Respondents.

Judgment.—The subject-matter of dispute in this case is a site situated at present in the abadi of a village. It was originally a portion of agriculture land assessed to land revenue, and it fell to the plaintiffs' share on partition in 1899 and they are the recorded owners thereof as would appear from the jamabandi prepared from 1899 down to 1913. Their case was the defendants had recently taken forcible possession of the site by constructing a cattle shed in a corner of it. The defandants pleaded adverse possession for over twelve years, but the trial Court overruled that plea and decreed the plaintiffs' suit. On appeal the learned District Judge dismissed the suit on the ground that the plaintiffs had failed to prove possession and dispossession within twelve years before suit.

Now it is clear that the whole of the site, with the exception of the corner where there is a dilapidated shed, is still lying vacant with heaps of rubbish or mangers in it here and there.

According to the principle that possession goes with title, the presumption is that possession has been with the owners throughout. The defendants' house adjoins the corner containing the shed and they have been using the site or a portion of it, but the user could not be tantamount to possession and it was upon them to establish adverse possession for over twelve years. This they have failed to do. The case is, therefore, on all fours with that reported in *Framji Cursetji* v. *Goculdas* (1).

I, therefore, accept the appeal, and, reversing the decree of the lower appellate Court, restore that of the trial Court. The defendants shall pay plaintiffs' costs in this Court as well as in the lower appellate Court.

Appeal accepted.

(1) [1892] 16 Bom. 338.

A. I. R. 1926 Lahore 616

ZAFAR ALI AND ADDISON. JJ.

Ganda Singh—Appellant.

v.

Bhag Singh-Bhagwan Singh and *another*—Respondents.

Second Appeal No. 629 of 1922, Decided on 27th April 1926, from the decree of the Dist. J., Lahore, D/- 5th November 1921.

Limitation Act, S. 21 (2)—*Acknowledgment by one of two joint contractors after cessation of their business does not bind the other.*

G and K were sub-contractors under M. They failed to carry out their sub-contract and were sued by M who obtained a decree against them for the performance of which G and K gave separate sureties. No business was carried on by them after that.

Held : in a suit against both G and K by one B for price of goods sold that an acknowledgment signed by K after close of the business was not enough to extend limitation as against G : 41 *Mad.* 427 (*F. B.*), *Ref.* [P. 617, C. 1]

Amar Nath Chopra—for Appellant.

Manohar Lal—for Respondents.

Addison, J.—The plaintiff firm sued Ganda Singh and Gopal Singh, son of Kala Singh, for recovery of Rs. 1,797-8-0 on the basis of an acknowledgment made by Kala Singh, deceased, in plaintiff's bahi to the effect that he and Ganda Singh owed Rs. 2,150 to the plaintiff-firm for bricks. This acknowledgment is dated the 23rd December 1913 and the suit was filed on the 23rd December 1919. It was further alleged that on the 23rd December 1913 Kala Singh paid Rs. 75, and next day gave a bond to the plaintiff-firm for Rs. 1,000. After deducting these sums it was claimed that Rs. 1,797-8-0 were due for principal and interest. Ganda Singh denied the claim and also pleaded that the suit was time barred. The first Court held that it was within time and decreed the claim against Ganda Singh only. The plaintiff firm did not appeal, but Ganda Singh did. The District Judge also held that the suit was within time and dismissed the appeal. Ganda Singh has instituted this second appeal.

The sole question is whether the suit is within time. It is admitted that the dealings were long prior to the 23rd December 1913, and that the suit would have been time barred had there been no acknowledgment by the deceased Kala Singh. It was argued on behalf of the appellant that under the provisions of S. 21 (2) of the Limitation Act time was not necessarily extended as regards him by reason only of an acknowledgment by Kala Singh. It is a recognized principle of law that in a going mercantile concern the authority of one partner to sign acknowledgments on the firm's behalf is to be presumed as the ordinary rule. It is clear, however, that in the present case Ganda Singh and Kala Singh were only sub-contractors under a Mr. Mackay who

had a contract in Lahore Cantonments. They failed to carry out their sub-contract and were sued by Mr. Mackay who obtained a decree against them on the 28th May 19.3, for the performance of which Kala Singh and Ganda Singh gave separate sureties. No business was carried on by them after that and this must have been within the knowledge of the plaintiff firm. It was held in *Pandiri Veeranna* v. *G. Veerabhadraswami* (1) that direct evidence that one of several partners had authority to acknowledge liability was not necessary, but such authority could be inferred from the surrounding circumstances such as the position of the other partner. In the circumstance explained above it cannot be said that Kala Singh had any authority to acknowledge liability of debt on behalf of Ganda Singh. We, therefore, hold that the suit as against Ganda Singh was time-barred.

The learned counsel for the plaintiff firm did not press for a decree against the representatives of Kala Singh. His son Gopal Singh has died since this appeal was instituted and his widow has been brought upon the record as his representative. We, therefore, accept the appeal and dismiss the suit with costs.

Appeal accepted.

(1) [1918] 41 Mad. 427=34 M. L. J. 373=(1918) M. W. N. 285=45 I. C. 18=7 L. W. 552 (F. B.).

A. I. R. 1926 Lahore 617

FFORDE, J.

Ishar Singh—Accused—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 389 of 1926, Decided on 21st May 1926, from an order of the 1st Cl. Mag., Lyallpur, D/- 10th March 1926.

(a) *Criminal trial—Escape from custody after conviction should not affect amount of punishment.*

Escape from custody after conviction is not a matter which could influence a Court in arriving at the amount of punishment to be inflicted. [P. 617, C. 2]

(b) *Penal Code, S. 75—Conviction before 12 years—Section does not apply.* [P. 617, C. 2]

Conviction, which was had nearly 12 years ago, should not be used for the purpose of applying the provisions of S. 75.

I. C. Chopra for *Govt. Advocate*—for Respondent.

Judgment.—The appellaht Ishar Singh has beeu convicted by a Magistrate of the First Class, invested with S. 30 powers of having on the 29th of June 1925, stolen a mare, the property of one Arjan Singh. He has also been convicted of being a previous convict, having been sentenced to five years' rigorous imprisonment under S. 401, Indian Penal Code, on the 22nd of December 1914. After his conviction in the present case the appellant escaped from the custody of the police while they were conveying him to the police station, and he was not arrested until the 1st of March of the present year.

The guilt of the appellant has been established beyond any question. Not only was he seen galloping away with the mare, but he admitted that he had stolen it, and he attempted to compound the matter by the payment of Rs. 50. The maximum imprisonment which can be imposed for the present offence is three years' rigorous imprisonment, but the trial Magistrate, in view of the appellant's previous conviction, and also, taking into consideration his escape from custody, has imposed an additional term of four years' rigorous imprisonment. The escape from custody is obviously not a matter which should have influenced the learned Magistrate in arriving at the amount of punishment to be inflicted. As to the previous conviction, it appears that after serving six months of this term the appellant was released to enable him to join the army, and he served in the army in Mesopotamia for a period of three and a half years. Under these circumstances the conviction, which was had nearly 12 years ago should not, in my opinion, be used for the purpose of applying the provisions of S. 75, Indian Penal Code.

I would accordingly reduce the sentence to the maximum term of imprisonment which may be imposed under S. 379, Indian Penal Code, namely, three years' rigorous imprisonment with three months' solitary confinement. To this extent only the appeal is accepted.

Appeal accepted in part.

A. I. R. 1926 Lahore 618

BROADWAY AND FORDE, J.

Abdul Rahim—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 2901 of 1922, Decided on 14th July 1926, from the decree of the Dist. J., Lahore. D/- 11th August 1922.

Land Acquisition Act, S. 23—Potential uses should be considered—Advantages to owner and not to the promoters are material—Evidence of offers is admissible—Existence of right of pre-emption affects the value.

In assessing the value of lands compulsorily acquired, consideration has to be paid to all the potential uses to which the said land can be put. The basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice and not their value, when taken, to the promoters, but all advantages which the land possesses, present or future, in the hands of the owners may be taken into consideration, and the owner is entitled to have the price assessed in reference to those advantages which would give the land greater value.

The owners are entitled to ask for compensation by estimating the market-value of the property not according to its present disposition but in the most lucrative and advantageous way in which the owners could dispose of it. But in order to apply this principle the objector should have put forward a scheme showing how the site in question could have been developed.

Evidence of offers is admissible, but as an offer amounts merely to an expression of opinion on the part of the person making it, oral offers unsupported by any documentary evidence do not carry any weight or afford any assistance.

Existence of right of pre-emption in a locality also has an important bearing on the price.

[P 619 C 2 P 620 C 1 & 2]

Tek Chand and *Gopal Chand*—for Appellant.

Govt. Advocate and *Mehr Chand Mahajan*—for Respondent.

Broadway, J.—By Notification No. 433G, dated the 28th January 1920, the Local Government acquired certain land for the purpose of erecting bungalows for officers of the North-Western Railway. The land acquired was a strip lying between the Davis Road and the Bari Doab Canal situate in three villages, namely, Mian Mir, Mozang and Killa Gujar Singh. The area in Killa Gujar Singh was 4·44 acres (42 kanals 18 marlas). in Mozang 0·11 acre (1 kanal 2 marlas) and in Mian Mir 99·30 acres (967 kanals 15 marlas). The area in Mian Mir on measurement was found to be 99·95 acres. The whole area acquired was 1011 kanals 15 marlas. There were certain wells, trees, gardens and small kothas or buildings on the land. The Land Acquisition Officer purported to treat the land as agricultural land and classified it as nehri Class A in which he allowed Rs. 600 per kanal, nehri class B for which he allowed Rs. 250 a kanal, and barani banjar jadid, banjar kadim and ghair mumkin for which he allowed Rs. 135 per kanal. In addition to this compensation was also allowed for wells, gardens, etc. The owners had claimed before the Land Acquisition Officer very much higher rates varying from Rs. 1,500 to Rs. 8,000 a kanal. Being dissatisfied with the award made by the Land Acquisition Officer the said owners, 23 in number, received the money under protest and asked for a reference to the District Court. 23 separate references were accordingly made. By an agreement between the parties the evidence for both the objectors and the Government was recorded in one reference, namely, No. 16 of 1920, and the learned District Judge at the conclusion of the enquiry made one award dealing with all the references. This award maintained the award given by the Land Acquisition Officer in all the references with the exception of that made in the case of Ram Prashad in whose case the rate payable to him was increased to Rs. 750 per kanal. Against this award the remaining 22 objectors preferred separate appeals. In 16 of these the learned Government Advocate raised a preliminary objection which we were constrained to uphold and it resulted in these 16 appeals being dismissed. We have now to consider the five remaining appeals, namely, Nos. 2891, 2892, 2895, 2901 and 2936. The appellants have not challenged the compensation paid for the trees, wells, etc., and have confined their attack to the rate at which the land is to be valued. In this appeal No. 2901 of 1922 the appellant is one Abdul Rahim. The whole of his land is situate in Mian Mir and his interest extends to one-third of 367 kanals 10 marlas. He has been allowed Rs. 39,208 the land being rated and classified as follows:

6 kanals 13 marlas as nehri Class A at Rs. 600 per kanal. 312 kanals 8 marlas as nehri Class B at the rate of Rs. 250 a

kanal, and 47 kanals 19 marlas as banjar at the rate of Rs. 135 per kanal.

On his behalf Mr. Tek Chand has urged that he should be allowed an all round rate of Rs. 750 per kanal. The award of the learned District Judge has been attacked on the ground that the learned District Judge had refused to consider the sales of lands effected in the neighbourhood. Further it has been urged that this land should not have been treated as agricultural land but as land eminently suitable for building purposes.

As has been stated above the land acquired consists of a fairly lengthy strip lying between the Davis Road to the west and the Bari Doab Canal and the Mayo Road to the east. It is bounded on the north by private land and on the south by a canal distributory. This distributory is a private one for the purpose of taking water from the canal to Government House and the Canal Authorities have always jealously guarded their rights along this area and have consistently refused to allow anyone to use the unmetalled road running along the said distributory. As a result there was no access to this land from the south. The nearest road to the west is the Davis Road and it is the western portion of the land which has been regarded by the Land Acquisition Officer, as well as by the learned District Judge, as more valuable. Access to this plot from the Davis Road was possible by arrangement with the owners of the lands and houses abutting on the said Davis Road. It has been said that access was also possible from the Durand and Mayo Roads. They are however at a certain distance from the land acquired and although it must be admitted that access would be possible by arrangements with the owners of the lands intervening, nevertheless it must be held that the land acquired is too remote from the Durand Road to be regarded as land to which access can be had from that road. The Mayo Road is at one point much nearer to the land acquired but it is a road on which practically no residential quarters of any value exist and access to this land from that side may also be be disregarded as having any value.

Now it has repeatedly been held that in assessing the value of lands compulsorily acquired consideration has to be paid to all the potential uses to which the said land can be put and there can be no doubt that this particular land was situate in an area in which residential buildings might well have been erected. In Cripps on Compensation at page 108 it is pointed out that the basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice and not their value, when taken, to the promoters, but that all advantages which the land possesses, present or future, in the hands of the owner may be taken into consideration, and the owner is entitled to have the price assessed in reference to those advantages which would give the land greater value.

It has to be seen, therefore, what the value of these lands to the owners was at the date of the notification, i. e., on the 28th January 1920. On behalf of the appellant it has been urged that a lay-out plan prepared by the Municipal Committee in 1917 establishes the fact that this area was considered by the Municipal Committee as suitable for building purposes. This lay-out plan was produced by P. W. 1, Lala Hukam Chand, Municipal Engineer, who stated that since 1917 no plan has been submitted to the Municipal Committee for erecting a bungalow on this site. Further it appears that this lay-out plan was not intended to be a project for the building of houses but the object of its preparation was to provide proper roads in the locality if buildings should be erected. The land did not belong to the Municipal Committee but that Committee, recognizing that the city of Lahore was extending, worked out a scheme according to which it would be prepared to sanction the erection of bungalows in this particular area. Lala Hukam Chand goes on to say that

> no building has as yet been started in accordance with the sanctioned plan. It was only sanctioned about 20 days ago.

His evidence was recorded on the 24th January 1921.

In these circumstances no great value can be placed on this lay-out plan; for although it was prepared in June 1917 it does not appear to have been sanctioned till nearly a year after this land had been acquired, and, as pointed out by the learned Government Advocate, since 1917

no houses had been built in the vicinity of the site acquired.

No doubt the owners are entitled to ask for compensation by estimating the market-value of the property not according to its present disposition but in the most lucrative and advantageous way in which the owners could dispose of it. But it seems to me that in order to apply this principle the objector should have put forward a scheme showing how the site in question could have been developed. It has been admitted that no such scheme has ever been prepared by the objectors and further that it was impossible to prepare any such scheme owing to the fact that there were so many separate persons concerned who could not be brought to agree to the drawing up of any scheme which would entail the pooling of their respective interests. There, therefore, appears to be considerable force in the learned Government Advocate's contention that the immediate use of this particular land for building purposes was impracticable unless and until a body such as a syndicate or the Government could acquire all the interests of the various owners and then prepare a scheme for the development of the site as a whole. I think, therefore, that for the purposes of assessing the value of this land its potentialities as a building site or as site for the erection of bungalows cannot be considered as being very great,

The next point urged by the learned counsel for the appellant was that evidence of offers for portions of this land should have been taken into consideration. Attention was drawn to the evidence on this point. Now no doubt it has been held that evidence of offers is admissible, but an offer amounts merely to an expression of opinion on the part of the person making it and, having regard to the fact that in the present case all the offers deposed to by the various witnesses were oral ones unsupported by any documentary evidence whatever, I do not think that they carry any weight or afford any assistance in the present case. Dr. Allah Jawaya (P. W. 2) says that about two years ago he offered to buy the whole of Khan Sahib Sardar Shah's share in the land at Rs. 2,000 a kanal, and that the offer was refused. As against this there is the undoubted evidence of Mr. Haq Nawaz that lands adjacent to the present site were sold at Rs. 637 and 660 a kanal. After considering all the evidence relating to offers I am of opinion that the learned District Judge was right in not taking these into consideration. (The judgment here described the several sales and remarked as follows.) The evidence of this witness (i. e , Mr. Haq Nawaz) is important as showing that the right of pre-emption existed in this locality and that alienation by various owners were, therefore subject to the restrictions that this right of pre-emption always affords. The existence of this right also has an important bearing on the price paid by Ram Prasad for his portion of the land. This land bought by Ram Prasad and subsequently acquired under this notification is situate in Mian Mir. Admittedly Ram Prasad was not a proprietor in Mian Mir itself. The purchase of a small strip of land, which at the time owing to its situation was of not much value, gave Ram Prasad a footing in Mian Mir and would entitle him to acquire other lands in that village without the fear of being pre-empted. The same may be said in relation to the other purchases referred to above, and in these circumstances I am forced to the conclusion that these sales do not represent the actual value of the lands sold, more especially when the vendees were persons who would have to consider this question of pre-emption. It will be noted that when Bashir Ahmad sold the land to persons who could disregard any threat of pre-emption the prices realised were Rs. 637 and 660 per kanal. I think therefore, that these two sales may be regarded as giving a fair guide as to the value of land in that neighbourhood. The Collector has accepted this to some extent and has allowed compensation at the rate of Rs. 600 per kanal for a plot measuring 6 kanals 13 marlas which adjoins the lands to which these two sales relate. It has been urged that the Collector has arrived at this area by arbitrarily drawing a line across the plan and that the entire land is of the same value. It seems to me that the Collector was right in thinking that the whole area had not the same value. The question of access cannot be disregarded and it cannot be disputed that the farther the land is from Davis Road the more

difficult it is to obtain access to it. I think also that the rate fixed is reasonable, though it is less than the rate at which Bashir Ahmad sold the plot of land, for Bashir Ahmad's land was nearer to Davis Road and more easy of access. At the same time it seems to me that the fact that the other land was potentially building land cannot be wholly ignored and I think it inequitable to treat it as purely agricultural land. It is difficult to assess the exact value of this other land on the material on the record but after taking all the factors into consideration I would regard the rest as being of the same class and fix an all round rate of Rs 300 per kanal, i. e., half the amount allowed for the plots adjacent to Bashir Ahmad's land. I would, therefore, accept this appeal to the extent indicated and enhance the amount payable accordingly. I would allow costs to both parties according to their measure of success. (The judgment then briefly dealt with the remaining four appeals and allowed a similar rate of compensation.)

Fforde, J.—I agree.

Appeal partly accepted.

A. I. R. 1926 Lahore 621

JAI LAL, J.

Bhanjan Ram and *another*—Appellants.

v.

Official Receiver, Muzaffargarh and *another*—Respondents.

Misc. First Appeal No. 1003 of 1926, Decided on 25th June 1926 from the order of the Dist.-J. Multan, D/- 6th January 1926.

Provincial Insolvency Act (5 *of* 1920), *S.* 53—*Mortgage executed in favour of relations shortly before application for adjudication—Mortgage presumed to be fictitious.*

The insolvent executed a mortgage deed in respect of his property in favour of his father-in-law, and his son, shortly before an application was made by his creditors to adjudicate him insolvent. The mortgagees were not in a financial position to invest amount in a mortgage and the insolvent was not able to account for the amount alleged to have been received by him from the mortgagees.

Held: that the mortgage was fictitious and fraudulent. [P. 621, C. 2]

Rama Nand—for Appellants.

Mool Chand—for Respondents.

Judgment.—On the 13th March 1924 an application was presented by the creditors praying that one Mewa Ram be adjudicated an insolvent. This was granted on the 2nd February 1925. On the 3rd January 1924 Mewa Ram executed a mortgage-deed in respect of his property in favour of his father-in-law, Bhanju Ram, and his son, Nebh Raj. The consideration was Rs. 1,000 and Rs. 980 were paid before the Sub-Registrar. On the application of the Official Receiver this mortgage-deed has been set aside by the District Judge under S. 53 of the Provincial Insolvency Act. The District Judge has held that Bhanju Ram and Nebh Raj were not in a financial position to invest Rs. 1,000 in a mortgage and that the insolvent has not been able to account for Rs. 1,000 alleged to have been received by him from the mortgagees. Having regard to the relationship between the parties and the financial circumstances of the mortgagor and the mortgagee, the learned District Judge has held that the mortgage was fictitious and fraudulent.

This order of the District Judge is sought to be attacked in this appeal. I have heard the learned counsel on both sides, and am of opinion that no good ground has been shown why I should differ from the conclusion of the District Judge. Considerable stress was laid by the learned counsel for the appellant on the fact that there was no clear allegation on any evidence that Rs. 980 paid to the mortgagor before the Sub-Registrar were returned to the mortgagees. There is no force in this contention because from the very beginning the Official Receiver alleged that the mortgage was a fictitious one. That being so there was a clear allegation, that as a matter of fact no consideration was really paid. It is not ordinarily possible to prove the return of the money paid before the Sub-Registrar. This can only be inferred from the circumstances established in the case. In my opinion the circumstances established here clearly lead to the conclusion that the mortgage-deed was fictitious and fraudulent as held by the learned District Judge. I dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 622

CAMPBELL AND DALIP SINGH, JJ.

Jaswant Singh and *another*—Plaintiffs—Appellants.

v.

Tula Ram and *others*—Defendants—Respondents.

Second Appeal No. 1120 of 1922, Decided on 7th July 1926, from the decree of the Addl. Dist. J., Ferozepore, D/- 24th January 1922.

(a) *Custom (Punjab)—No right to mortgage site exists in a non-proprietor.*

A non-proprietor in the village of Gur Harsahai in the Ferozepore district cannot mortgage his residential house and site with or without possession without the consent of the proprietors. [P. 622, C. 1]

(b) *Custom (Punjab)—Alienation—Acquiescence does not amount to a proof of contrary custom.*

The fact that proprietors have acquiesced in previous alienations does not necessarily imply a renunciation of their discretionary right to object to a subsequent alienation, and that mere evidence of a number of previous alienations without objection does not prove a custom of unrestricted power of alienation. [P. 623, C. 1]

(c) *Custom (Punjab)—Mortgage and sale of site by non-proprietor.*

Where proprietors succeed in showing that alienation by sale of house-site by a non-proprietor is forbidden by custom very much strong proof is required to establish that in spite of the prohibition against sale there is a custom permitting mortgage. [P. 623, C. 1]

Faqir Chand—for Appellants.

Campbell, J.—The question for decision in this second appeal is, as stated in the certificate granted by the learned District Judge, whether a non-proprietor in the village of Gur Harsahai in the Ferozepore district can mortgage his residential house, and with cr without possession without the consent of the proprietors.

The mortgage with which the suit deals was by one non-proprietor in favour of another for Rs. 400 by a registered deed dated the 20th February 1918. In the deed the mortgagor claimed to be full proprietor of the premises, and the courtyard of the house was distinctly included in the subjects mortgaged. There can be no doubt that the mortgage purported to be not only of the materials of the house but also of the site.

The plaintiffs are two out of the four proprietors of the village, and they alleged that the mortgagor had no right to alienate the site of the building which belonged to the village proprietors. The prayer was that a decree for possession by cancellation of the mortgage should be granted in respect of the site.

The Courts below have considered that there is a distinction between alienation by sale and alienation by mortgage of village sites by non-proprietors. The plaintiffs have been held to have established that by custom a non-proprietor in this village cannot sell the site of his house, but the Courts have concurred in holding that he can mortgage it. The grounds for this decision are, firstly, certain obssrvations made by a Judge of the Chief Court in *Bagga Singh* v. *Harnam Singh* (1), and secondly, evidence produced by the defendants of previous instances of mortgages.

The case reported as *Bagga Singh* v. *Harnam Singh* (1), bore no similarity with the present case and the remarks referred to by the learned District Judge were obiter. In the present transaction there was a plain denial, by the occupier transferor of the plaintiffs' ownership rights, and abstention by the latter from asserting those rights might quite possibly result in their losing them by mortgagee bringing the mortgaged subjects to sale. The general rule of custom is clear and has been laid down in many cases that non-proprietors have no right of unrestricted alienation of the sites occupied by them, and that in a case like the present it lies upon the defendants to prove with certainty that a contrary custom is observed in their village.

The defendants have been able to prove at the most eleven instances of uncontested alienations by mortgage of houses of non-proprietors dating from 1888 onwards. Assuming these mortgages in each instance to have included the site of the house the number of instances is wholly insufficient in my opinion to establish a custom of unrestricted alienation by mortgage when the plaintiffs have produced a number of instances of successfully contested alienations by sale and have proved that non-proprietors have no right of sale. It appears from the first judgment of the trial Court that the old part of Guru Harsahai has a population of over 5,000 and that there is a

(1) [1911] 95 P. L. R. 1911=11 I. C. 377=213 P. W. R. 1911.

growing addition called the Mandi. This Court and the Chief Court have laid down in several cases that the fact that proprietors have acquiesced in previous alienations does not necessarily imply a renunciation of their discretionary right to object to a subsequent alienation, and that mere evidence of a number of previous alienations without objection does not prove a custom of unrestricted power of alienation, e. g., *Kharak Singh* v. *Allah Ditta* (2), *Har Sahai* v. *Ganga Ram* (3), *Maya Das* v. *Jan Muhammad* (4), *Buta Mal* v. *Ruldu* (5) and *Ram Lok* v. *Bhagwan Singh* (6). As in the last mentioned case, so here the total number of alienations is not large according to the standards adopted in the previous decisions, and where the plaintiffs succeed, as they have succeeded in this case, in proving that alienation by sale is forbidden by custom very much stronger proof than has been given by the defendants is required to establish that in spite of the prohibition against sale there is a custom permitting mortgage.

The question propounded in the certificate must be answered in the negative and the plaintiffs' suit must succeed. The remand jndgment of Mr. Bhide, District Judge, dated the 19th March 1920 held against the pleadings of the defendants that the suit could lie in the form in which it was presented. There was no appeal against that judgment and in view of it I consider that the plaintiffs must have the decree for which they have asked.

The appeal is accepted and the plaintiffs are granted a decree for possession of the site by cancellation of the mortgage together with costs throughout.

Dalip Singh, J.—I agree.

Appeal accepted.

(2) [1882] 85 P. R. 1882.
(3) [1900] 7 P. R. 1900=145 P. L. R. 1900.
(4) [1889] 13 P. R. 1889.
(5) [1889] 40 P. R. 1889.
(6) A. I. R. 1922 Lah. 158.

A. I. R. 1926 Lahore 623

JAI LAL, J.

Sazawar Khan and *another* — Defendants—Appellants.

v.

Qabul Chand—Plaintiff—Respondent.

Second Appeal No. 28 of 1926, Decided on 17th May 1926, from a decree of the Dist. J., Ambala, D/- 28th October 1925.

Custom (Punjab)—Alienation by father—Half consideration found to be for necessity—Debt not found to be immoral — Transaction challenged after many years—Strict proof of necessity is not necessary.

Where in a suit by son to set aside sale by father on the ground of necessity, it is found that about half the amount is for necessity and the alienation is challenged after a number of years, very strict proof of the manner in which the money was actually spent by the father is not necessary when it has been found that there was no reason to hold that the money was spent on immoral purposes. [P. 623, C. 2, P. 624, C. 1]

Prakash Chandra for *Shamair Chand*—for Appellants.

Har Parshad—for Respondent.

Judgment.—One Sital Parshad sold the land in dispute to the appellants for Rs. 405. The plaintiff, Qabul Chand, his son, instituted a suit for possession of the land sold on the ground that the sale was without consideration and necessity, that the land was ancestral and his father was of bad character, and that, therefore, he was entitled to recover the possession of the land after the death of the latter. The District Judge has found that the allegations as to the bad character of Sital Parshad had not been proved and, secondly, that the sale was not effected to raise money for immoral purposes. He held that the land was ancestral and that though Rs. 450 were paid by the appellants only Rs. 205 were for necessity. The property was sold in 1915 and the present suit was instituted in 1924. It has been found that at the time of the sale Sital Parshad was carrying out litigation for the benefit of the family. In this litigation he finally succeeded. The mutation entry shows that the money was borrowed for payment of 'Court-fees'. It has been found that Rs. 185 were actually paid by him immediately after the sale as Court-fees stamp on his plaint. The view of the District Judge is that as in the mutation papers the money was stated to be required for the purposes of Court-fees and as only Rs. 185 were paid on account of Court-fees stamp, it is immaterial, whether or not Sital Parshad required money for other expenses connected with the litigation.

Having regard to the time that has passed between the date of the sale and the institution of the suit and the fact that Sital Parshad is now dead, I think that very strict proof of the manner in which the money was actually spent by

Sital Parshad was not necessary especially when the suit is by his son and it has been found that there was no reason to hold that the money was spent on immoral purposes.

The expression 'Court-fees' in the mutation proceedings should not have been interpreted very strictly. It is beyond doubt that Sital Parshad wanted money for litigation and the vendees were not prepared to see to its application. I accept this appeal, and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 624 (1)

SHADI LAL, C. J. AND COLDSTREAM, J.

Manghi and *others*—Plaintiffs—Appellants.

v.

Dial Chand and *another*—Defendants-Respondents.

Second Appeal No. 2356 of 1922 Decided on 28th May 1926, from a decree of the Dist. J., Dera Ghazi Khan, D/- 13th June 1922.

(a) *Transfer of Property Act, S.* 100—*Personal liability to pay interest does not lessen charge on property.*

The mortgagee, in the absence of any contract to the contrary, is entitled to treat interest due under a mortgage as a charge on the property: *A. I. R.* 1924 *P. C.* 183, *Foll.*

The fact that the mortgagors made themselves personally liable for the payment of the interest is in no way incompatible with the fact that the interest formed also a charge on the property. [P 624, C 2]

(b) *Words—"Zar Mutaliba."*

The expression "zar mutaliba" means money "demandable" or "claimable". [P 624, C 2]

Ghulam Mohy-ud-din—for Appellants.

Devi Dayal—for Respondents.

Judgment.—This appeal arises out of a suit for redemption of a mortgage, and the only question which requires determination is whether the mortgagors are entitled to redeem the property on payment of only the principal mortgage money and are not liable to pay at the same time the interest due thereon.

Now the mortgage-deed contains a stipulation for the payment of interest and their Lordships of the Privy Council have laid down the principle that the mortgagee, in the absence of any contract to the contrary, is entitled to treat interest due under a mortgage as a charge on the property *Ganga Ram* v. *Natha Singh* (1). The learned counsel for the mortgagors, however, contends that this general rule has been displaced by the covenants in the deed. Now it is true that the mortgagors made themselves personally liable for the payment of the interest, but personal liability is in no way incompatible with the fact that the interest formed also a charge on the property.

Indeed, the covenant as to redemption distinctly provides that the property shall be redeemable on payment of zar mutaliba and the learned counsel for the appellants admits that the expression zar mutaliba means money 'demandable' or 'claimable' and that ordinarily a mortgagee would be entitled to claim not only the principal mortgage-money but also interest thereon. It is, however, urged that the context indicates that zar mutaliba was intended to include only the principal mortgage-money and such agricultural expenses as may have been incurred by the mortgagee. This construction has not been accepted by the learned District Judge, and after perusing the terms of the deed, we are of opinion that the parties used the expression in its ordinary meaning, and that there is no ground for putting a forced construction upon it.

We concur, accordingly, in the conclusion of the learned District Judge, and dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1924 P. C. 183=5 Lah. 525.

A. I. R. 1926 Lahore 624 (2)

HARRISON, J.

S. B. Billimoria, Official Liquidator—Applicant—Appellant.

v.

Cecilla Mary DeSouza and *others*—Respondents.

Misc. First Appeal No. 2526 of 1925. Decided on 15th July 1926, against the order of the Dist. J., Delhi, D/- 18th August 1925.

(a) *Companies Act* (1913), *S.* 235—*Action can be taken against representative of a promoter or director only if he comes within the definition of promoter or director.*

A representative or an executor can only be brought within purview of this section which

deals with the promoter, director etc., if he were himself capable of being defined or described by any of the words used therein. The barring of an application under this section does not debar the liquidator from seeking his remedy by a regular suit and it is contemplated that this executive action will only be taken against the particular individuals described in this section: 1 *Eq.* 219; 14 *Ch. D.* 335, *Foll.* [P 626 C 1]

(b) *Companies Act* (1913), *S.* 235—*Section has the same meaning as that of the English Statute.*

Section 235, Indian Companies Act, which is copied into an Indian Statute from an English Statute cannot be meant by the Legislature to have any different meaning from that of the parent Act more especially when it is to be found in a highly technical Statute governing proceedings in one of the most technical branches of law which has been borrowed wholesale from England. [P 626 C 1]

Mehr Chand Mahajan and *D. C. Ralli*—for Appellant.

Tek Chand—for Respondents.

Judgment.—An application was presented under sections 185 and 235 of the Indian Companies Act against Mr. DeSouza director of the Development Corporation of India Limited in liquidation, Mr. Billimoria, the liquidator, being the applicant. Two preliminary objections were taken as to the Court's jurisdiction and as to the petition being barred by limitation under Art. 36. The first was decided against the respondent, the second in his favour and the application was dismissed on the 18th August 1925. On the 8th October 1925 Mr. DeSouza died and on the 12th October 1925 an appeal was lodged by the liquidator against the order of dismissal.

At the hearing two preliminary objections were taken by Mr. Tek Chand who appeared for the respondent, the first being that S. 185 is wholly inapplicable inasmuch as it only deals with action taken where there is no contest and in his reply Mr. Mehr Chand admitted this to be so. He further contended that S. 235 did not apply as Mr. DeSouza's death put an end to the proceedings and that this is shown both by the wording of the section itself and the English authorities which deal with S. 215 of the English Act, which is practically word for word the same as the section in our present Act.

As against these contentions it has been urged that the liabilities of representatives in this country are wider than in England, that the Legislature has made them so because of the peculiar circumstances of this country, that both S. 306 of the Succession Act and Act 12 of 1855 make it clear what these liabilities are and that although the latter Act deals only with actions it should be held by analogy that the liabilities are equally wide when an application of this sort is involved. In the second place Mr. Mehr Chand has pointed out that S. 214 of the old Act of 1882 did not reproduce word by word S. 165 of the English Act of 1862 inasmuch as while it provided for repayment of moneys and the payment of compensation, it did not provide for the return of property or securities. To this section of the Act of 1882 there was an explanation making it quite clear that proceedings could not be taken against representatives. The section of the present Act is not followed by any explanation and this Mr. Mehr Chand contends is due to the fact that the present section is precisely the same as the corresponding section of the English Act and includes the return of property and therefore he says the necessity of safe-guarding and protecting of the representatives disappeared and the omission of the explanation can only be read as meaning that the Legislature deliberately altered the law on the subject and made it different from the law of England. He further contends that of the two leading English cases which have made the law on the subject Law Reports 1 Equity cases page 219 and 14 Chancery Division 335 the latter contemplates the possibility of a broader view being taken of the wording of the English Act and thus makes it possible and indeed desirable when read with the omission of the explanation to interpret this particular section of the Indian Act in a different way to what has been done in England.

These arguments are ingenious and have been carefully worked out more especially that dealing with S. 306 of the Succession Act. The relief sought is the return of the property and the granting of it would not be nugatory but in spite of this the section does not apply in my opinion for the good reason that S. 235 does not permit the proceedings legally instituted to continue. It is undoubtedly true that the omission of the explanation in the present Act is a fact to which due weight must be given. Mr. Tek Chand's explanation of the omission is that the English Law was so clear on the subject that it was considered unnecessary

having to retain the explanation. The law was just as clear in 1882 when the explanation was introduced for both the rulings bear an earlier date. Whatever the reason may have been for the omission I cannot believe that the draftsman or the Legislature were in any way influenced by this consideration for the trial Courts in this country who have to interpret the Succession Act are not supposed to be well versed in English authorities or English statutes.

I can only suppose that it was thought that the actual wording of the section required no explanation at all. This speaks of the Court examining the conduct of the promoter, director etc., and compelling him to repay or restore money or property etc., or to contribute such sum' etc. It has been pointed out in many text books that a representative or an executor could only be brought within purview of this section which deals with the promoter, director etc., if he were himself capable of being defined or described by any of the words used therein. The barring of an application under this section does not debar the liquidator from seeking his remedy by a regular suit and it is contemplated that this executive action will only be taken against the particular individuals described in this section. The two ruling cases on the subject which have been mentioned already are Law Reports 1 Equity Cases 219 and 14 Chancery Division 335. The standard text-books on the subject which are all unanimous in accepting these two rulings as sound law are Sciebel Vol. 2 Company Law, page 1195, Buckley on the Companies Act 509, Lindely on Companies Vol. 2, page 944 and Halsbury's Laws of England Vol. 5, pages 479 and 818. I think it impossible to hold that the section copied into an Indian Statute from an English Statute can be meant by the Legislature to have any different meaning from that of the parent Act more especially when it is to be found in a highly technical statute governing proceedings in one of the most technical branches of law which has been borrowed wholesale from England. I dismiss the appeal with costs.

Counsel for the respondent asks for costs to be awarded against the liquidator personally and relies on Buckley on Companies Act page 377. Following the procedure adopted in *Kayastha Trading & Banking Corporation* v. *Sant Narain Singh* (1) I allow costs in the first place against the assets of the Company in the event of their being insufficient against the liquidator personally. It is true that he did not obtain permission of the Court before the institution of the appeal but the Court appears to have been aware that the appeal was being instituted and I think the point was worth raising on appeal.

Appeal dismissed.

(1) [1921] 43 All. 433=60 I. C. 763=19 A.L.J. 262.

A. I. R. 1926 Lahore 626

SHADI LAL, C. J., AND COLDSTREAM, J.

Naul and *others*— Plaintiffs— Appellants.

v.

Mula and *others*— Defendants— Respondents.

Second Appeal No. 4076 of 1922, Decided on 20th May 1926, from the decree of the Dist. J., Hoshiarpur, D/- 9th February 1922.

(a) Civil P. C., O. 42, R. 2 (Punjab)—Copy of judgment filed by respondent—Appellant cannot avail himself of it.

When a copy of the judgment of the Court of first instance is filed by the respondents in a cross-appeal and not by the appellants, the latter cannot avail themselves of a copy filed by their adversaries. [P. 627, C. 1]

(b) Civil P. C., O. 41, R. 3—Appeal presented four years before—Time to amend memorandum cannot be extended.

Where an appeal was presented four years ago, the time for removing the defect in the presentation of the appeal cannot be extended. [P. 627, C. 1]

Nand Lal—for Appellants.

Fakir Chand—for Respondents.

Shadi Lal, C. J.—This second appeal must fail on the short ground that there was no valid presentation of the appeal, because the memorandum of appeal was not accompanied by a copy of the judgment of the Court of 1st instance. Rule 2 of O. 42, Civil Procedure Code, which has been framed by this Court under the provisions of S. 122, Civil Procedure Code, requires that in addition to the copies specified in O. 41, R. 1, the memorandum of second appeal shall be accompanied by a copy of the judgment of the Court of first instance, and there can be no doubt that this rule has not been

complied with. The learned counsel for the appellants states that the copy of the judgment was filed with Civil Appeal No. 558 of 1920, but that appeal was presented, at an earlier stage of the case, by the respondents and not by the appellants; and the latter cannot avail themselves of a copy which was filed by their adversaries. It is clear that a copy of the judgment of the Court of first instance did not accompany the present memorandum of appeal.

It is to be observed that the appeal was presented to this Court four years ago, and there is no reason for extendlng the time for removing the defect in the presentation of the appeal. The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 627

HARRISON, J.

Sammun—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 601 of 1926, Decided on 11th June 1926, reported by the S. J., Karnal, on 9th April 1926.

(a) *Evidence—Evidence of one co-accused cannot be treated as prosecution evidence against other.*

The evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against the other: *A. I. R.* 1925 *All.* 769, *Foll.* [P 627 C 2]

(b) *Criminal P. C., S.* 191—*Non-compliance with S.* 191 *vitiates trial.*

Trial is not in accordance with law if provisions of S. 191 are not complied with. [P 628 C 1]

Facts.—On 15th of August 1925, Ford Car No. D. 825, belonging to Mr. Cornelius, retired Inspector of Post Offices, Bhiwani, was found by Lala Amir Chand, Overseer, P. W. D., carrying seven passengers exclusive of the driver Shams-ud-Din. He reported the matter to the Office of the Deputy Commissioner and an order was issued to the Magistrate of the ilaqa to try the driver of the said motor-car. This report of Lala Amir Chand and the order of the Magistrate ilaqa bearing the signature of the Superintendent of the Deputy Commissioner's Office are both combined into one document (Ex. P. A). The Magistrate summoned Shams-ud-Din for the 9th of October 1925. Shams-ud-Din stated that he was only the driver of the car and that the seating of the passengers and receiving of the fare was carried on by Sammun who was son of Mr. Cornelius, owner of the car, and in whose name stood the road certificate. The Magistrate summoned Sammun and Mr. Cornelius also and proceeded with the trial of the case, and in the end he acquitted Shams-ud-Din and Mr. Cornelius but convicted Sammun under S. 16 of Act 8 of 1914 sentencing him to Rs. 35 fine.

Grounds.—The evidence for the prosecution consists only of a single witness Lala Amir Chand, Overseer, who says nothing against the applicant Sammun except that he was in the car on that date. He says that the car was being driven by Shams-ud-Din, and when the witness asked Shams-ud-Din why he was carrying seven passengers instead of five, which he was entitled to carry by the license which stands in the name of Cornelius, the driver begged pardon and said that he will not do so again, and that about Sammun he said that he was not a passenger but only a cleaner. This shows that the defence adopted by Shams-ud-Din later on in the Court was not that which he took on the 15th of August when questioned by the Overseer. It also appears from Cornelius' statement that Sammun is not his son. In *Bahoru* v. *Emperor* (1) it has been held that the evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against the other. There is no legal evidence, therefore, in the case to show that Sammun did in any way contravene any of the provisions of Act 8 of 1914 or rules made thereunder, and so his conviction does not seem to be right. Again the complaint on which the Magistrate took cognizance of the offence mentioned nothing about Sammun. The Magistrate summoned Sammun upon information received from Shamas-ud-Din and had thus taken cognizance of the offence against Sammun under Cl. (c) of S. 190, Criminal P. C., and S. 191 lays down that

> when a Magistrate takes cognizance of an offence under Cl. (c) of S. 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court.

This was not done by the Magistrate in this case and so the trial was not in

1) A. I. R. 1925 All. 769.

accordance with law. This case is, therefore, submitted to the High Court with a recommendation that the conviction of Sammun may be quashed and the sentence set aside.

Note.—The fine has been realized.

Order.—For the reasons given by the learned Sessions Judge I accept the application and set aside the conviction and sentence on Sammun. The fine to be refunded.

Conviction set aside.

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* A. I. R. 1926 Lahore 628

JAI LAL, J.

Maula Bakhsh—Accused—Petitioner

v.

Marshall—Complainant—Respondent.

Criminal Miscellaneous Petition No. 76 of 1926, Decided on 1st July 1926, for transfer of the case from the Court of the 1st Cl. Mag., Murree.

(a) *Civil P. C., S. 526 — Sufficient reason—Adjournments.*

That the case has unnecessarily been adjourned on several occasions in order to enable the complainant to appear is not sufficient ground for transfer. [P 628, C 2]

* (b) *Criminal P. C., S. 247—Summons case—Presence of complainant cannot be dispensed with.*

Section 247 merely authorizes Court to adjourn the case to enable the complainant to appear. That section does not authorize him to dispense with the presence of the complainant except when he is a public servant. [P 628, C 2]

Aziz Ahmad—for Petitioner.

Order.—This is an application under S. 526, Criminal P. C., for the transfer of a complaint under S. 504, Indian Penal Code, filed against the petitioner by Sergeant Marshall. The case is pending in the Court of Colonel John Powell, Honorary Magistrate, First Class, of Rawalpindi and Murree. The main ground on which the transfer is applied for is that the Magistrate was consulted by the complainant before the complaint was filed. This allegation is denied by the Magistrate and I have no hesitation in accepting his explanation. Another ground raised on behalf of the petitioner is that the Magistrate's conduct in giving several adjournments to enable the complainant to appear before him creates a reasonable apprehension in the mind of the petitioner that he will not receive justice in his Court. I have examined the record and find that the case which was instituted on complaint has unnecessarily been adjourned on several occasions in order to enable the complainant to appear. But this by itself is no ground for transferring the case. I consequently dismiss this petition for the transfer of the case.

An examination of the record, however, shows that after recording the evidence produced on behalf of the complainant the Magistrate came to the conclusion that the case was one under S. 352, Indian Penal Code, which is a summons case. He called upon the accused to produce his evidence. Afterwards the complainant went to England and his absence was excused by the Magistrate under S. 247, Criminal P. C. Some hearings have taken place since the order under S. 247 was passed. It appears to me that the Magistrate had no power to hear the case in the absence of the complainant. S. 247 merely authorizes him to adjourn the case to enable the complainant to appear. That section does not authorize him to dispense with the presence of the complainant except when he is a public servant. This circumstance does not exist in this case. In my opinion, therefore, the only course open to the Magistrate was to acquit the accused in the absence of the complainant or to adjourn the case in order to enable the complainant to appear. The complainant having gone to England it would be unfair, in my opinion, to keep the case pending till his return especially having regard to the nature of the case.

After examining the record I am of opinion that this is a fit case in which in exercise of the revisional jurisdiction of this Court I should direct the Magistrate to acquit the accused unless the complainant appears personally to prosecute the case on a date within one month from to-day to be fixed by the Magistrate. I direct accordingly.

Revision allowed.

A. I. R. 1926 Lahore 629

JAI LAL, J.

Fateh Muhammad—Appellant.

v.

Hakim Khan and *another*—Respondents.

Second Appeal No. 754 of 1926, Decided on 9th June 1926, from a decree of the Dist. J., Gujranwala, D/- 10th December 1925.

(a) *Pre-emption—Land subject to pre-emption—Improvements made by vendee in anticipation of suit for pre-emption—Compensation cannot be allowed.*

The vendee of a land which is subject to the right of pre-emption is not necessarily deprived of his right to claim compensation for improvement made by him on the land by the mere fact that he erected the buildings with full knowledge of such right. If it be established that he constructed the buildings bona fide, he is entitled to compensation. If, however, the building is constructed in anticipation of a suit for pre-emption then he would probably not be entitled to compensation. [P. 629, C. 2]

(b) *Evidence Act, S. 35—Process server's report is inadmissible if he is not examined.*

The report of the process-server is not admissible in evidence unless he is examined as a witness with regard to it. [P. 629, C. 2]

Mehr Chand—for Appellant.

Shuja-ud-Din—for Respondents.

Judgment.—This was a suit for pre-emption. It has been decreed by both the Courts below. The trial Court had granted the vendee Rs. 251 as compensation for the building erected by him on the site in dispute. The laarned District Judge on appeal has set aside this order because in his opinion the vendee's claim as to the costs of his building was unjustified. This is the only point raised before me on this second appeal.

I have examined the record and find that the plaintiff admitted in his statement made before the issues were framed that the vendee defendant had built a kotha on the site in dispute, but he did not admit that any expenses had been incurred thereon. A number of witnesses were produced on behalf of the vendee who deposed that he had built the kotha before the institution of the suit. The plaintiff himself did not go into the witness-box to deny these facts and no other evidence was produced on his behalf. The valuation of the kotha was made by a commissioner appointed by the Court. The District Judge has arrived at the conclusion that the house was constructed when the defendant was fully aware of the plaintiff's suit. This conclusion is based on the report of the process-server who went to serve the order of injunction restaining the defendant from continuing the building on the site. This injunction was granted by the trial Court after the institution of the suit and the process-server reported that the house was under construction and that the defendant refused to accept service of the order. The process-server was not examined as a witness in the case and his report was not therefore admissible against the defendant-vendee. If this report is eliminated there is no evidence on behalf of the plaintiff, and, therefore, the conclusion of the learned District Judge is based on no evidence. Then the learned District Judge remarks that

> even if it be assumed that the building was actually commenced before the suit was instituted the defendant cannot derive any benefit therefrom. Whenever a vendee erects a building on land which is subject to a suit for pre-emption he does so at his own risk.

In my opinion the learned District Judge has laid down a very broad proposition of the law. It has been held by this Court on a previous occasion that the vendee of a land which is subject to the right of pre-emption is not necessarily deprived of his right to claim compensation for improvement made by him on the land by the mere fact that he erected the buildings with full knowledge of such right. His right to claim compensation depends upon the circumstances proved in each case. If it be established that he constructed the buildings bona fide he is entitled to compensation. If, however, the building is constructed in anticipation of a suit for pre-emption then he would probably not be entitled to compensation. In the case before me the construction of the building was commenced about six months after the sale. It is not established that any building operations continued after the service of the summons or the order of injunction. The learned counsel for the plaintiff mas unable to show that any notice of the plaintiff's intention to pre-empt the sale was served upon the vendee before he commenced the building operations. Under these circumstances it cannot be held that the building was constructed otherwise than bona fide. I hold, therefore, that the vendee

was entitled to be compensated for the building constructed by him.

I accept this appeal, set aside the decree of the learned District Judge and restore that of the trial Court. The respondent will pay the costs of the appellant in this Court.

Appeal allowed.

A. I. R. 1926 Lahore 630

HARRISON AND DALIP SINGH, JJ.

Khushi Ram and *others*—Plaintiffs—Appellants.

v.

Mangal Singh and *others* — Defendants—Respondents.

Second Appeal No. 1810 of 1922, Decided on 8th June 1926, from a decree of the Dist. J., Ludhiana, D/- 14th June 1922.

Custom (Punjab)—Dhilwan Jats of Ludhiana District—Nominated heir does not acquire right of collateral succession in adoptive family.

While among the Dhilwan Jats of Ludhiana District a nominated heir does not succeed in the presence of brothers to his father's estate, he retains the right of collateral succession in his father's family and does not acquire any right of collateral succession in the adoptive father's famiiy. [P 630 C 2]

Badri Das—for Appellants.

Manohar Lal—for Respondents.

Judgment.—The only question involved in this second appeal is whether amongst Dhilwan Jats of the Ludhiana District a nominated heir succeeds collaterally in virtue of his nomination and as the son of his adoptive father. The facts are simple and the pedigree table is to be found at p. 6 of the paper-book. One Maluka nominated as his heir one Hari Ram his brother's son. This man Hari Ram left three sons who now claim to succeed as the grandsons of Maluka, the suit being brought by Maluka's brother's sons to establish that they are not entitled to do so.

The suit was decreed by the trial Court but the appeal was accepted by the District Jndge who held that the sons of the nominated heir had established their claim. In coming to this conclusion he has relied upon a paragraph unsupported by instances in the Riwaj-i-am of Mr. Gordon Walker in Settlement of 1882, three judgments D-1, D-2 and D-7 and four instances Nos. 67, 68, 69 and 70 cited under the answer to question No. 69 in the current Riwaj-i-am compiled by Mr. Dunnet in 1911. The general rule amongst agriculturists is to be found in paras. 48 and 49 of the Rattigan's Customary Law and para. 69 of Mr. Dunnet's Riwaj-i-am is in accordance with the rule.

It has to be seen whether the rulings and the instances relied upon by the District Judge establish the contrary position in the case of these Dhilwan Jats. D-1 does support this view. D-2 is a judgment based on the acquiescence of the defendant, D-7 is a judgment decided on two points, the first is the estoppel of the defendant and the second a special custom established for the village Malaud by its own private Riwaj-i-am. So far as the instances are concerned No. 67 supports the view. It is not shown that Nos. 68 and 69 were cases of collateral succession and so far as No. 70 is concerned the record of the case, which is before us shows that the result was incorrectly given by the Settlement Officer. This leaves us with nothing but one judgment and one instance. The rule as laid down by Mr. Dunnet is supported by many instances quoted by him. We find that the defendants have wholly failed to establish that they are governed by any special custom in this matter and hold that they follow the rule as laid down in the current Riwaj-i-am, namely, that while they do not succeed in the presence of brothers to their father's estate they retain the right of collateral succession in their father's family and do not acquire any right of collateral succession in the adoptive father's family.

We accept the appeal and restore the decree of the trial Court. The costs of the plaintiff will be paid throughout by the contesting defendants, Mangal, Sundar and Chanan in all three Courts.

Appeal accepted.

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* A. I. R. 1926 Lahore 631

ZAFAR ALI AND ADDISON, JJ.

Firm Ramnath-Ludhu Ram—Plaintiff—Appellant.

v.

North-Western Railway and *others*—Defendants—Respondents.

Second Appeal No. 782 of 1924, Decided on 4th May 1926, from the decree of the Dist. J., Karnal, D/- 22nd December 1923.

(a) *Railways Act, S. 72—Risk note, R. 6—N. W. Railway Rules, Ch. 1, R. 22.*

Rule, 6 which is an abridged reading of R. 22 of Ch. 1 of the North-Western Railway General Rules, does not authorize the Railway to alter contract between the parties : 29 *All.* 228, *Foll.* [P. 631, C. 2]

* (b) *Railways Act, S. 72—Risk Note, R. 6—Goods carried at owner's risk—Difference between schedule rate and class 1 rate cannot be charged.*

Where goods which under Railway rules could be carried only at railway risk were carried at owner's risk, it is not permissible under R. 6 for the Railway to charge the difference between class 1 rate and schedule rate on the ground that they were booked at owner's risk instead of Railway risk through mistake of the booking clerk. [P. 631, C. 2]

Shamair Chand—for Appellants.

C. H. Carden Noad—for Respondents.

Judgment.—The plaintiff firm sued the North-Western Railway for recovery of Rs. 2,300-2-0 in the following circumstances :

The plaintiff firm sent by five consignments 643 bags of jagree to Hyderabad and 641 to Warangal. The consignments were booked at Rohtak and up to Delhi had to go by the North-Western Railway while from Delhi to Wadi they had to go over the Great Indian Peninsula Railway and from Wadi to their destination over the Nizam's Guaranteed State Railway. Altogether the plaintiff paid at Rohtak Rs. 4,260-4-0 On arrival at the destinations the Nizam's Guaranteed State Railway claimed Rs. 2,300-2-0 more as an undercharge. This sum was paid under protest and the present suit was then instituted for its recovery. The claim was decreed by the trial Court but dismissed by the learned District Judge in appeal.

It is admitted that the booking clerk at Rohtak made a mistake. He charged at schedule rate from Delhi to Wadi over the Great Indian Peninsula Railway, whereas jagree is only carried over that portion of the route at class 1 rate. This also means that the goods should have been carried over that portion of the route at railway risk, whereas they were booked at owner's risk for all three parts of the journey. Rule 6 at the back of the railway receipts runs as follows :

The Railway Administration have the right of remeasurement, reweighment, reclassification and recalculation of rates at terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or undercharged.

This is an abridged reading of R. 22 of Chapter 1 of the North-Western Railway General Rules. It was held, however, by the Allahabad High Court in *Chunni Lal* v. *Nizam's Guaranteed State Railway Company Limited* (1) that this rule did not authorise the railway to alter contract between the parties and charge at the place of destination maund rates instead of wagon rates. This decision of the Allahabad High Court had been followed later by the same Court and also by the Madras High Court. On the other hand there are rulings which show that if there is merely an undercharge on account of the rates being miscalculated or mis-stated, etc., the undercharge can be collected at destination. In the present case there is this special circumstance that the goods were booked throughout at owner's risk whereas the undercharge collected was because Class 1 rate had not been charged between Delhi and Wadi, payments of this rate that the implyings good were carried at railway risk and not at owner's risk. It seems to us that as the goods were booked throughout at owner's risk it was not possible under this rule to collect at the destinations the difference between class 1 rate and schedule rate for the journey between Delhi and Wadi as this meant that the goods should have been carried between these two places at railway risk. To hold otherwise would not only be most inequitable but would amount to allowing a basic alteration of the contract between the parties.

For these reasons we accept the appeal and setting aside the order of the District Judge restore the decree of the first Court with costs.

Appeal accepted.

(1) [1907] 29 All 228=(1907) A. W. N. 21=A. L. J. 80.

A. I. R. 1926 Lahore 632

JAI LAL, J.

Gopal Mal—Judgment-debtor—Appellant.

v.

Firm Gopal Singh-Hira Singh—Decree-holder—Respondent.

Miscellaneous Second Appeal No. 486 of 1926, Decided on 27th May 1926, from an order of the Dist. J., Amritsar, D/- 1st February 1926.

Execution—Instalment decree—Whole sum becoming recoverable in default of any one instalment—Decree-holder accepting instalment in respect of which default was made—Whole amount does not become recoverable.

Where an instalment decree is passed and there is a condition in the decree that on default of payment of any instalment the whole balance would become due, then if the decree-holder waives a default by the judgment-debtor and accepts the instalment in respect of which a default has been made, he is not competent afterwards to turn round and take advantage of the default clause and execute the decree for the whole amount. [P 632, C 2]

Dev Raj Sawhney—for Appellant.

Badri Das—for Respondent.

Judgment.—A money-decree was passed against the respondent. The amount decreed was payable by instalments. The first instalment was not paid by the appellant on the due date. The amonnt was deposited in Court two days later. It was, however, withdrawn by the decree-holder. The next instalment was paid within time and was received by the decree-holder. The decree-holder alleging that the third instalment which was payable on the 10th of October 1925, had not been paid by the judgment-debtor and that, therefore, default had been made by him, applied for the execution of the whole decree. There was a proviso that on the failure of the judgment-debtor to pay any instalment the whole balance due under the decree plus Rs. 50 would become immediately recoverable. The judgment-dabtor alleged that he had paid the third instalment to one Shiv Ram who received it on behalf of the decree-holder and granted him a receipt. This receipt was produced in Court. The District Judge without going into the question of the genuineness of this receipt or of the authority of Shiv Ram to receive the instalment on behalf of the decree-holder has held that the first instalment having been paid two days later there had been a default by the judgment-debtor and, therefore, it was immaterial whether or not there had been a default in the payment of the third instalment. He, therefore, agreeing with the executing Court allowed the execution to proceed.

On behalf the respondent it is contended that mere receipt of aninstalment after the due date does not amount to a waiver of a default. In this contention I do not agree. In this case the conduct of the decree-holder in receiving the first two instalments and not executing the decree immediately after the alleged default clearly shows a waiver of the first default.

The next contention of the counsel for the respondent is that in the case of instalment fixed by the decree with a default clause it is not open to the decree-holder to waive the default because such waiver amounts to a variation in the terms of the decree. He cited certain authorities in favour of this contention but none of the authorities cited by him are binding on me and my own view is that the decree-holder who has waived a default by the judgment-debtor and has accepted the instalment in respect of which a default has been made is not competent afterwards to turn round and take advantage of the default clause and execute the decree for the whole amount.

The only point, therefore, which requires decision is whether the third instalment was paid by the judgment-debtor to the decree-holder through his duly authorized agent, Shiv Ram, before the due date. The District Judge has given no finding on this point. Accepting this appeal I remand the case to the District Judge with directions to decide the appeal on the merits with reference to the allegation of the judgment-debtor that he has duly paid the third instalment. Costs will follow the event.

Case remanded.

A. I. R. 1926 Lahore 633

SHADI LAL, C. J., AND COLDSTREAM, J.

Sultan Muhammad and *another* — Plaintiffs—Appellants.

v.

Ladha Singh and *others*—Defendants—Respondents.

Second Appeal No. 2025 of 1922, Decided on 27th May 1926, from the decree of the Dist. J., Jhelum, D/- 3rd July 1922.

(a) *Transfer of Property Act, S. 60—Mortgagor creating further charge and agreeing to redeem only on payment of further charge—Mortgagor cannot redeem without paying the charge.*

The rule of law is firmly established that where a mortgagor has expressly stipulated that he would not be entitled to redeem without paying other debts due from him to the mortgagee and charged on the property covered by the mortgage he cannot be permitted to redeem that property without paying such other debts as well as the amount due on foot of his mortgage: 37 *All.* 634 ; (1906) *A.W.N.* 278, *Dist.*; 32 *All.* 651, *Ref.* [P 633 C 2]

(b) *Contract Act, S. 25—Limitation only bars remedy but does not extinguish the right—Plaintiff is affected by limitation but not defendant—Civil P. C., O. 8, R. 6—Limitation Act, S. 3—Practice—Plea.*

The law of limitation, as distinguished from the law of prescription, merely bars the remedy of the plaintiff, but does not extinguish his right. A barred debt can constitute a valid consideration for a fresh contract. Limitation affects only the claim of the plaintiff and has no application to a plea urged by the defendant. The defendant may therefore interpose a demand though barred as a defence to the suit. [P 634 C 1]

Nanak Chand—for Appellants.

D. R. Sawhney—for Respondents.

Judgment.—On the 23rd November 1896, Daswandhi, the ancestor of the plaintiffs, mortgaged with possession the land in dispute to Defendants 1 and 2 for Rs. 940. The instrument of mortgage contained a stipulation that the mortgagees were to receive the rents and profits of the property in lieu of interest on the loan advanced by them. On the 21st March 1898, the mortgagor created in favour of the mortgagees a further charge on the same property for Rs. 99 and promised to repay this amount with interest at the time of redemption.

The plaintiffs seek to redeem the land on payment of only Rs. 940 and claim to recover possession of the property without redeeming the second mortgage. Now, the learned District Judge rightly holds that the covenant contained in the second deed required the mortgagor to pay both the mortgage debts before he could redeem the property ; and this stipulation is by no means an unusual one, and is often entered into in order to secure the repayment of the loan advanced on a subsequent mortgage. The convenant does not constitute a clog on the equity of redemption and can, therefore, be enforced by a Court of law.

The rule of law is firmly established that where a mortgagor has expressly stipulated that he would not be entitled to redeem without paying other debts due from him to the mortgagee and charged on the property covered by the mortgage, he cannot be permitted to redeem that property without paying such other debts as well as the amount due on foot of his mortgage. The learned counsel for the plaintiffs relies upon the judgment of the Allahabad High Court in *Bhartu* v. *Dalip* (1) ; but that case is distinguishable on the ground that the learned Judges were unable to discover in that case any clear stipulation entered into between the parties which obliged the mortgagor to redeem both the mortgages at the same time. This was the ground on which Stanley, C. J., who was a party to that judgment, distinguished it in the subsequent case of *Brij Lal Singh* v. *Bhawani Singh* (2). Mr. Nanak Chand invites our attention also to the judgment in *Kesar Kunwar* v. *Kashi Ram* (3) where the mortgagor first executed a usufructuary mortgage and then a simple mortgage in favour of the defendant. In the latter bond he covenanted not to redeem the usufrucuary mortgage till he had paid the money due on the simple mortgage. He brought the suit to redeem the usufructuary mortgage at a time when, if the defendant had sued on the simple mortgage, his claim would have been barred by limitation. It was held that the plaintiff was entitled to redeem the first mortgage without paying the money due on the second mortgage. It appears that the learned Judges, who decided that case, were of opinion that as the mortgagees' suit for the recovery of the money due on foot of the second mortgage would be barred by

(1) [1906] 3 A. L. J. 672=(1906) A. W, N. 278.
(2) [1910] 32 All. 651=7 I. C. 115=7 A. L. J. 821.
(3) [1915] 37 All. 634=30 I. C. 777=13 A.L.J. 389.

time, he was precluded from raising the plea that the mortgagor could not redeem the property without discharging the second debt. In the case before us the debt due on the simple mortgage was, it appears, acknowledged by the debtor; but as the question of limitation with respect to that debt was never raised by the plaintiffs in the lower Court, the nature of the acknowledgments and the time when they were made cannot be determined upon the present record and it cannot, therefore, be said with any reasonable certainty that if the mortgagee had brought a suit for the debt on the strength of the simple mortgage, it would have been barred by time.

Moreover, the law of limitation, as distinguished from the law of prescription, merely bars the remedy of the plaintiff but does not extinguish his right. Indeed, a barred debt can constitute a valid consideration for a fresh contract. It has been repeatedly held that limitation affects only the claim of the plaintiff and has no application to a plea urged by the defendant. The defendant may, therefore, interpose a demand, though barred, as a defence to the suit.

We are, therefore, unable to concur in the view expressed in *Kesar Kunwar* v. *Kashi Ram* (3), and it is significant that in *Brij Lal Singh* v. *Bhawani Singh* (2) the mortgagee was allowed to resist the suit for redemption at a time when his suit for the debt on the strength of the simple mortgage would apparently have been barred by time. Upon the stipulation entered into between the parties the plaintiffs must pay not only the amount due on the first mortgage, but also the debt due on the second mortgage. We accordingly confirm the decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 634

ADDISON, J.

Nanhum—Plaintiff—Petitioner.

v.

Jumma—Defendant—Respondent.

Civil Revision Petition No. 251 of 1926, D cided on 16th June 1926, from an order of the Junior Sub-J., Karnal, D/- 3rd December 1925.

Civil P. C., O. 9, R. 4—*"Sufficient cause."*

The plaintiff came from a long distance to attend the Court but not having found the name of his case in the cause list went to another Court thinking that his case might be before another Court, and not finding it either there returned to the first Court and found that his case had been dismissed under O. 9. R. 3.

Held: that the case should be restored. [P 634, C 2]

Raj Kishna—for Petitioner

Judgment.—On the 7th August 1923, the suit of the petitioner was dismissed by the Junior Subordinate Judge, Karnal under O. 9, R. 3 of the Civil P.C. Next day the plaintiff applied for its restoration alleging that in the morning he attended the Court in question and had the cause list read out to him, but the name of his case was not on the cause list. He accordingly thought that his suit might be before the Additional Subordinate Judge at the Tahsil and he went there. He found, however, that it was not at the Tashil either. He, therefore, went back to the Junior Subordinate Judge's Court and found that it had been dismissed under O. 9, R. 3. His absence was not intentional. The Junior Subordinate Judge refused to restore the suit on the ground that his cause list did contain the name of the plaintiff's suit and also because the application was not made till the following day. Against this order this revision has been admitted.

It is no longer possible for the plaintiff to file a fresh suit as it would be barred by limitation. It would appear that the Junior Subordinate Judge before whom the suit was instituted was transferred and the Additional Subordinate Judge began to hold his Court in his room. It was for that reason, it would seem, that the plaintiff went to the Court of the Additional Subordinate Judge. Further the fact that the defendant did not appear shows that there must have been a mistake. It is clear that the plaintiff would not have come 30 miles simply for this case and then deliberately absented himself especially when the defendant was absent. I have no hesitation in accepting the revision and setting aside the order of the Junior Subordinate Judge, direct that the suit be restored to his pending file and proceeded with according to law. The respondent did not appear and there will be no costs here.

Case remanded.

A. I. R. 1926 Lahore 635

HARRISON AND DALIP SINGH, JJ.

Firoz and *others*—Plaintiffs—Appellants.

v.

Sultan Surkhru—Defendant—Respondent.

Second Appeal No. 1798 of 1922, Decided on 20th May 1926, from the decree of the Dist. J., Jhelum, D/- 5th June 1922.

(a) *Custom (Punjab)—Alienation by Will.*

A Will by Kassar of Chakwal Tahsil, Jhelum District, of ancestral land is not void, but is only voidable. [P 635 C 2]

(b) *Limitation Act, Arts. 91 and 120—Cancellation of a will—Suit is governed by Art. 120.*

A suit for cancellation of Will is governed by Art. 120 and not Art. 91: 23 *Cal.* 1 (*P. C.*), *Foll.*; 82 *P. L. R.* 1909, *Ref.* [P 635 C 2]

Harish Chandra and *B. A. Cooper*—for Appellants.

Ghulam Rasul—for Respondent.

Judgment.—This suit was instituted by several collaterals claiming possession of the land left by one Mehra after cancellation of a Will in virtue of which Mehra's sister's son was in possession. The parties are Kassars of Chakwal Tahsil of the Jhelum District.

The trial Court decreed the suit finding on all points in favour of the plaintiffs.

On appeal the learned District Judge reversed the decision agreeing with all the findings of the trial Court, with the exception of the point of limitation. The District Judge held that the suit was governed by Art. 91 and was therefore barred by time.

On second appeal the points agitated before us, and which require decision are:

Is the will voidable or void ab initio ?

Whether the suit was primarily for possession or for concellation of the will; and

Which article of the Limitation Act or the Punjab Custom Act governs the suit.

As regards (1) both the Courts below have held that Mehra had no power to make this Will. They have relied on a general paragraph in Talbot's Customary Law of the Jhelum District. As against these findings counsel has drawn our attention to a certified copy of the riwaj-i-am of the Kassars of this very village in which it is stated that they have the right of testamentary disposition though they do not exercise it, the reason for this being that the power to make gifts without restriction satisfies all their requirements. In addition to this entry counsel has referred us to p. 11 of Appendix II of the general riwaj-i-am of the district where an instance is quoted of a Will upheld after contest up to the Financial Commissioner of ancestral land in favour of a collateral and having been contested by nearer collaterals. He has also drawn our attention to three judicial decisions based on many earlier decisions in support of the wide powers enjoyed by Mahomedans of the Western Punjab in this respect. We hold that the defendant has succeeded in showing that the Will in question is voidable and not void.

As regards No. 2: On this point the will being voidable and not void, *Gauhar Bibi* v. *Ghulam Mahomed* (1) is conclusive. On the death of the testator in 1912 a contest arose between the defendant and the mother and widows of the testator. A suit was brought on the 9th March 1914 by the defendants against the mother and the remaining widow who had not been married by that time and, on 25th March 1914, a consent decree was passed by which he obtained possession of two-thirds; on the death of the mother he obtained possession of her share; and the second widow died before the present suit was instituted. The Will therefore has been openly acted upon since the 9th March 1914 or earlier. Possession could not be obtained without having the Will set aside and we are of opinion that the relief of possession was ancillary to the main prayer.

The question of limitation remains. It is clearly laid down in *Sajid* v. *Ibdad* (2) by their Lordships of the Privy Council that Art. 91 does not govern a will. It is true, as pointed out by counsel, that this was an obiter dictum in the sense that the question was not contested, but their Lordships say that the plaintiff advisedly refrained from relying on this article as it had no application to the case of a Will. Apart from this expression of opinion the wording of the article itself makes the point very clear. Art. 91 not being applicable and the suit being one primarily

(1) [1909] 82 P. L. R. 1909=4 I. C. 923=88 P. W. R. 1909.

(2) [1896] 23 Cal, 1=22 I. A. 171=6 Sar. 627 (P. C.).

for cancellation of a Will Art. 120 applied. The plaintiff here states that he had no knowledge of the Will within six years of the institution of the suit but unfortunately for him this contention is rendered impossible by the averments contained in the plaint itself where it is stated that on the death of Mehra the applications of the defendants to obtain mutation of one-half of his estate was defeated by the objection of the plaintiff's own father, the previous paragraphs in the plaint having recited the factum of the execution of the registered Will. It is clear, therefore, on the plaintiff's own showing that he had knowledge about nine years before the institution of his suit and his suit is therefore barred by time.

We agree, therefore, with the learned District Judge in his conclusion, though holding that the suit is governed by a different article. We dismiss the appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 636

CAMPBELL, J.

Ali Muhamad—Surety—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 422 of 1926, Decided on 31st May 1926, from the order of the Dist. Mag., Ferozepore, D/- 7th January 1926.

* *Criminal P. C., S. 514—Agreement come to between accused in S. 107 case and complainant that both would not appear in Court—Surety knowing this—Full forfeiture of surety money should not be ordered.*

Where in a S. 107 case the accused and complainant agreed that they would not appear in Court the next hearing day and the accused accordingly absented and the surety knowing this concluded that the case would not proceed and took no steps to cause accused's presence in Court.

Held: that penalty should not be exacted from him. [P 636 C 2]

Nand Lal—for Petitioner.

Judgment.—The petitioner Ali Mohammad, on the 7th April 1925, stood surety for Buta, an accused person, in certain proceedings under S. 107, Code of Criminal Procedure. By his security bond the petitioner undertook to produce Buta in Court one very date fixed for the hearing of the case. On one of these dates fixed, the 2nd of September 1925, Buta failed to appear and the petitioner was called upon to show cause why he should not pay the amount of the security bond which was Rs. 500. He failed to satisfy the trial Court and the trial Court ordered him to pay this amount.

In appeal the learned District Magistrate has considered the evidence produced by the petitioner in extenuation of his failure. Two witnesses deposed that Buta and Muhammad Hussain, the complainant in the S. 107 case, came to an ostensible agreement not to appear in Court on the 2nd of September 1925, and to allow the S. 107 proceedings to go by default. Probably the trial Magistrat did not believe this evidence, because he said in his order that the petitioner's explanation was not satisfactory; but the learned District Magistrate does not seem to have disbelieved it since he says that the lower Court in exacting the entjre penalty had shown a certain severity. At the same time the learned District Magistrate thought that the petitioner had not made out that he had any real reason to believe that the case would not proceed. Holding that it was important that the, security bonds should be fully respected the learned District Magistrate refused to remit any portion of the penalty.

It appears from the record of the Magistrate that, as soon as a notice was served upon the petitioner, he produced Buta in Court, and in my judgment the presumption is from the evidence and from the petitioner's conduct that he knew of the arrangement made, or at any rate discussed, between Buta and Muhammad Hussain for absenting themselves on the 2nd of September. The case does not strike me as one in which the petitioner should be called upon to pay the full amount. I accept the petition, and order that Rs. 25 only be recovered.

Petition partly accepted.

A. I. R. 1926 Lahore 637

ADDISON, J.

S. Burden & Co.—Plaintiff — Petitioner.

v.

Army Canteen Board, India, Simla—Defendant—Respondent.

Civil Revision Petition No. 156 of 1926, Decided on 17th June 1926, from an order of the 2nd Cl. Sub-J., Gurdaspur, D/- 15th January 1926.

Civil P. C., O. 9, R. 13—Order setting aside ex parte decree—Plaintiff accepting costs—No revision lies—Appeal—Civil P. C., S. 115.

Where an order setting aside an ex parte decree has been passed and the plaintiff accepts costs and his pleader appears in Court thereafter, the plaintiff should be deemed to have accepted the order setting aside decree and the order will not be interfered with in revision. [P 637 C 2]

Sundar Das—for Petitioner.

Anant Ram and *Dalip Singh* — for Respondent.

Judgment. — The plaintiff sued at Dalhousie the Army Canteen Board, India, through the Controller thereof. The summonses were only served upon the Station Manager, Dalhousie, who appeared in Court and stated that he had no authority and could not appear on behalf of the Board. The suit was thereafter decreed ex parte on the 2nd October 1925.

On the 19th December 1925, the District Manager of the Board applied to have the decree set aside on the ground that he only came to know that an ex parte decree had been passed about the 25th November 1925. The trial Court held that under O. 29, R. 2 of the Civil P. C., the service should have been effected upon some principal officer of the Corporation, and, as that had not been done, there was no service in the suit. He, therefore, passed an order that the ex parte decree would be set aside if the defendant paid Rs. 15 as costs to the plaintiff. This was on the 15th of January 1926. Costs were paid and the conditional order was made absolute. The 19th of January 1926 was also fixed for proceeding with the suit. On that day the defendant's pleas were filed and the hearing adjourned to the 25th of February 1926, to allow the plaintiff or his counsel to admit or deny the documents of the other party. On the 15th February 1926, the hearing was again adjourned to the 2nd March 1926, as plaintiff's counsel stated that a near relative of his client had died. It was then adjourned to the 22nd March 1926, when the plaintiff's counsel admitted certain documents of the defendant and issues were framed. Later it would appear that the plaintiff's suit was dismissed in default.

This civil revision was filed in the High Court on the 10th February 1926, that is, after costs had been paid to the plaintiff and after the first hearing of the revived suit which took place on the 29th January 1926. It is obvious that there was no proper service under O. 29, R. 2, Civil P. C. as the Station Officer at Dalhousie was not a principal officer of the Corporation though the District Manager is. The defendant had, therefore, 30 days within which he could file his application from the date of his knowledge of the decree. The trial Court has not said in so many words that the defendant only came to know about the decree within a month though the fact that it ordered the ex parte decree to be set aside on condition of payment of Rs. 15 shows that it was of opinion that this was the case. In fact, the District Manager gave evidence to the effect that he only came to know of the decree on the 25th November 1925, and this statement stands unrebutted on the record. From this reason I do not think it necessary to send the proceedings back to the trial Court for a distinct finding on this question.

Further, interference on the revision is discretionary, and seeing that the plaintiff accepted Rs. 15 as costs, and his counsel appeared thereafter before the trial Court, it must be held that he accepted the Court's order, though later he filed this revision. In such circumstances he cannot now be allowed to challenge the decision of the trial Court. I, therefore, dismiss this petition, but leave the parties to bear their own costs.

Petition dismissed.

A. I. R. 1926 Lahore 638 (1)

FFORDE AND ADDISON, JJ.

Sh. *Abdullah*—Defendant—Appellant.

v.

Behari Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 2866 of 1925, Decided on 12th July 1926, from the decree of the Dist. J., Lahore, D/- 4th June 1926.

Civil P.C., O. 42, R. 2 (Lahore)—Some issues tried by one Judge and remaining issues decided by his successor—Judgment of second Judge filed—Judgment of first Judge must also be filed to make appeal competent.

Where the trial Judge decided some issues and afterwards he was succeeded by another Judge who decided the remaining issues and gave judgment only in respect of issues tried by him.

Held: that the decision by the first Judge on the issues tried by him is a judgment. Such judgment is required to be filed with the memorandum of appeal to make the appeal competent. If this has not been done, the appeal cannot be entertained: *Civil Appeal No. 2450 of 1922, Foll.* [P. 638, C. 1 & 2]

Mehar Chand—for Appellant.

Badri Das and *Tirath Ram*—for Respondents.

Fforde, J.—Mr. Badri Das has raised a preliminary objection that the memorandum of appeal in the present case has not been accompanied by a copy of the judgment of the Court of first instance as required by O. 42, R. 2, Civil P. C. It appears that the trial of the suit was commenced by Lala Niranjan Das, who decided Issue No. 1 against the Defendants, Issue No. 2 in favour of the plaintiffs, and Issue No. 6 against the Defendant No. 1. Lala Niranjan Das was then succeeded by Lala Muna Lal, who proceeded to try the remaining issues which had been framed by his predecessor, and in respect of these remaining issues only did he give judgment. The judgment of Mr. Muna Lal has been filed with the memorandum of appeal, but the decision of his predecessor in respect of Issues Nos. 1, 2 and 6 has not been filed. Mr. Mehar Chand for the appellant argues that the decision by the first Judge on these issues is not a judgment, and, therefore, need not be filed with the memorandum of appeal.

In my opinion the decision of the first Court on these particular issues is a judgment, and such judgment is required to be filed with the memorandum of appeal to make the appeal competent. As this has not been done the appeal cannot be entertained and must be dismissed with costs.

I am fortified in the view above expressed by a decision of a Division Bench of this Court in the *Bhiwani Cotton Spinning and Weaving Mills* v. *Firm Bishen Sahai Bhagwan-Das* (1).

Addison, J.—I agree.

Appeal dismissed.

(1) C. A. No. 2450 of 1922.

A. I. R. 1926 Lahore 638 (2)

JAI LAL, J.

Nathoo—Appellant.

v.

Ghulam Dastgir and *another*—Applicants—Respondents.

Misc. First Appeal No. 460 of 1926, Decided on 8th June 1926, from an order of the Dist. J., Jullundur, D/- 4th December 1925.

Provincial Insolvency Act (1920), *S. 9—Application by creditor for debtor's adjudication—Procedure as in S. 24 should be followed—Provincial Insolvency Act, S. 24.*

On an application by creditor for debtor's adjudication as insolvent it is the duty of the Court to enquire whether the debtor owed the petitioning creditor Rs. 500 or more, and also generally to follow the procedure laid down in S. 24. [P. 639, C. 1]

B. D. Qureshi—for Appellant.

H. C. Kumar—for Respondent.

Judgment.—The appellant has been adjudicated an insolvent on a petition presented by the firm of Sewa Ram-Dial Das, who claim to be his creditors to the extent of Rs. 10,880. Usual notices were issued and on the date of the hearing the appellant and his creditors were present. The former filed objections, the most important of which is that he denied being indebted to the petitioning creditor as claimed by him. The District Judge did not examine the petitioner or the appellant and adjudicated the latter insolvent on the ground that he admitted that his debts exceeded Rs. 500 and that he did not declare before him that he could pay them.

On appeal it is contended on behalf of the appellant that it was incumbent on the District Judge to follow the

procedure laid down in S. 24 of the Insolvency Act and to require proof that the petitioning creditor was entitled to present the petition. S. 9 of the Act lays down that a creditor shall not be entitled to present an insolvency petition against a debtor unless the debts owing to him amount to Rs. 500. It was, therefore, the duty of the learned District Judge to enquire whether the appellant owed the petitioning creditor Rs. 500, or more, and also generally to follow the procedure laid down in S. 24 of the Insolvency Act.

I accept this appeal, set aside the order of the District Judge and remand the case to him with directions to proceed with the petition in accordance with law. No order as to costs of this appeal.

Appeal accepted.

A. I. R. 1926 Lahore 639 (1)

HARRISON, J.

Fatteh Muhammad and *others* — Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Petition No. 754 of 1926, Decided on 19th June 1926, from the order of the S. J., Attock, D/- 30th April 1926.

Criminal P. C., S. 403—Conviction under S. 297, I. P. C. set aside — Charge for theft on the same facts cannot be based.

Where accused were convicted under S. 297, I. P. C., for entering a Muhammedan graveyard and cutting a tree there and were acquitted in appeal.

Held: that they cannot be again prosecuted for theft on the same facts: 48 *Cal.* 78; 31 *Cal.* 1007 and 40 *Bom.* 97, *Cons.* [P 639 C 2]

Lachhmi Narain and *Din Dayal*—for Petitioners.

Abdul Kshid—for the Crown.

Judgment.—In this case seven men were sent up for trial under S. 297 and convicted by the Magistrate. They were acquitted by the District Magistrate on appeal who thereupon ordered them to be prosecuted for theft. A charge was framed and they applied for revision to the Sessions Judge. The application was dismissed and a petition to this Court has been admitted.

The facts alleged are that these seven men went into a Muhammadan graveyard and there cut down a tree. The cutting down of the tree was in the first instance said to have hurt the religious feelings of the Muhammadans, and now it is said that by the cutting down they committed the offence of theft. Counsel for the Crown has relied on *Ramsahai* v. *Emperor* (1); *Emperor* v. *Prasanna Kumar Das* (2) and *Emperor* v. *Jivram* (3). None of these cases, in my opinion, throw any light upon the position. This is not a case for forging a document and then making use of it, nor do the facts in this case resemble those of any of the authorities quoted. The action complained of is the cutting of the tree. This may have had two distinct results of hurting the religious feelings of those interested in the graveyard and of causing wrongful loss to the Muhammadan community who owned the graveyard. The act, however, was one. On the principle of "autrefois acquit" no further action could be taken against the accused after they had been acquitted on the first charge. I accept their application and quash the charge.

Application accepted.

(1) [1921] 48 Cal. 78=31 C.L.J. 476=57 I.C. 278=24 C.W.N. 763.
(2) [1904] 31 Cal. 1007.
(3) [1916] 40 Bom. 97=31 I.C. 361=17 Bom. L.R. 881.

A. I. R. 1926 Lahore 639 (2)

SHADI LAL, C. J.

Muhammad Din and *others*—Judgment-debtors—Petitioners.

v.

Sharampat and *another*—Decree-holders—Respondents.

Civil Revision Petition No. 194 of 1926, Decided on 22nd May 1926, from an order of the Dist. J., Gujranwala, D/- 5th February 1926.

Civil P.C., O. 21, R. 89—Time for deposit cannot be extended—Court is not bound to suggest to deposit 5 per cent. of the purchase money.

An application under O. 21, R. 89, must be made within 30 days from the date of the sale and Court has no power to extend the period of limitation.

It is not the duty of a Court to suggest to the judgment-debtor that a deposit of five per cent. for payment to the auction-purchaser should be made at the time of depositing decretal amount. [P. 640, C. 1]

Ghulam Mohi-ud-din—for Petitioners.

Judgment.—On the 3rd June 1925, a house belonging to the judgment-debtors was sold in execution of a money decree against them; and on the 9th June an application was made on their behalf to the Court asking for information as to the decretal amount due to the decree-holder. That information was correctly supplied, and the exact sum due to the decree-holder was deposited on the 9th June. On the 22nd July, the sale was confirmed, and the order of confirmation has been upheld by the District Judge.

Now, it is quite clear that, although the amount due to the decree-holder was deposited within 30 days from the date of the sale, a sum equal to 5 per cent. of the purchase money for payment to the purchaser was never deposited in Court. It is beyond dispute that an application under O. 21, R. 89 of the Civil P. C. must be made within 30 days from the date of the sale and it has been repeatedly held that the Court has no power to extend the period of limitation. The learned counsel for petitioners contends that the guardian of the judgment-debtors was misled by the information given by the Court. But no such contention was ever raised in the Courts below. Moreover, a perusal of the application made on the 9th June leaves no doubt that the sale of the property was entirely ignored by the guardian, and that the only information asked for was with respect to the amount due to the decree-holder. That information was correctly given, and it was not the duty of the Court to suggest to the judgment-debtors that a deposit of 5 per cent. for payment to the auction-purchaser should also be made.

The learned District Judge has recorded his findings on all the points raised before him, and no ground for interference on revision has been established. The application is accordingly dismissed.

Application dismissed.

A. I. R. 1926 Lahore 640

DALIP SINGH, J.

Ismail—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 521 of 1926, Decided on 3rd July 1926, from an order of the S.-J., Karnal, D/- 11th March 1926.

Penal Code, S. 411—Proof of theft is not necessary for convicting under S. 411.

It is not correct that for a conviction under S. 411 there must be proof of theft.

The Public Prosecutor—for Respondent.

Judgment.—Ismail, appellant, has been convicted by the learned Sessions Judge, Karnal, under S. 403 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment including three months' solitary confinement.

The facts of the case, as found by the learned Sessions Judge, are that the accused-appellant was found in possession of two buffaloes. These buffaloes are proved to be the property of other persons from whose possession they had either strayed or been stolen about a month before they were discovered with the accused. The appellant does not account for his possession and the fact that he was found in possession of the buffaloes is proved by disinterested evidence. That same evidence on which the learned Sessions Judge has relied proves also that the appellant confessed at the time that the property was stolen property. It is difficult, therefore, to see why the learned Sessions Judge did not convict the appellant under S. 379 or S. 411 in the alternative of the Indian Penal Code. The learned Sessions Judge had not said that he disbelieved this evidence. He seems to consider that for a conviction under S. 411 there must be proof of theft. This is not correct: see S. 410 of the Indian Penal Code. However, there is no revision before me for enhancement of the sentence and I find on the evidence that the accused-appellant is guilty either under S. 379 or S. 411 in the alternative or in the circumstances under S. 403 and, therefore, maintain the conviction and dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Lahore 641

DALIP SINGH, J.

Wali Shah and *others*—Appellants.

v.

Bihari Lal and *another*—Respondents.

Miscellaneous First Appeal No. 1070 of 1925, Decided on 25th November 1925.

Civil P. C., O. 21, R. 2 (3)—Decree ordering that decree-holder would not be entitled to execute the decree if judgment-debtor fulfilled certain condition—Judgment-debtor alleging fulfilment of the condition—O. 21, R. 2 (3) does not apply.

Where the decree ordered that the decree-holder would not be entitled to execute the decree if the judgment-debtor would fulfil certain conditions, and where the judgment-debtor did not certify that he had fulfilled the conditions within the prescribed time. *Held*: on application for execution by the decree-holder, that the judgment-debtor was entitled to prove that as a matter of fact the conditions in the decree had been complied with, and in such a case O. 21, R. 2 (3), did not apply. [P. 642, C. 1]

Durga Das and *Devi Dayal*—for Appellants.

Nand Lal—for Respondents.

Dalip Singh, J.—In this case the respondents obtained a decree in a suit for money against the appellants, the relevant portion of which was as follows: That the Defendants 1 to 3 shall lease certain land to the plaintiffs for a term of 20 years for Rs. 5,218 and that the defendants should redeem the land and put the plaintiffs in possession within one year on payment by the plaintiffs into Court of the sum of Rs. 375 within a month. In case the defendants put the plaintiffs in possession of the land in compliance with the agreement, the plaintiffs shall get a decree for Rs. 375 only payable without interest in five yearly instalments of Rs. 75 each. In case of non-compliance the plaintiffs shall, in addition to the decree of Rs. 375 payable as stated above, be entitled to a decree for Rs. 5,218 plus costs of their suit against Defendants Nos. 1 to 3.

The plaintiffs decree-holders took out execution for Rs. 5,218 alleging that the defendants judgment-debtors had failed to comply with the terms of the decree. The judgment-debtors pleaded that they had complied with the terms of the decree by putting the plaintiffs into possession of the land and that therefore the execution application was not competent. There was also a minor point that the second instalment of Rs. 75 was not due at the time of the application. This last contention seems to me to be correct, but I refrain from deciding anything on this point. The main point was the question whether the terms of the decree had been complied with or not. The Court below held that as the judgment-debtors had not certified compliance with the decree within the meaning of O. 21, R. 2 (3), Civil Procedure Code, therefore the executing Court could not go into this question and accordingly refused to allow the judgment-debtors to prove their contention.

The judgment-debtors have appealed. Lala Durga Das on their behalf urges that O 21, R. 2 (3) does not in terms apply to all the facts of this case and has cited *Legraj* v. *Mahadeb* (1) in support of his contention. Dr. Nand Lal for the respondents argues that the point as put by Lala Durga Das was not raised in the Court below. I find, however, that the judgment-debtors did not plead that the decree had been satisfied and the plaintiffs put in possession according to the terms of the decree. This contention therefore has in my opinion no force. Dr. Nand Lal has next cited the following rulings in support of his proposition that the terms of O. 21, R. 2 (3) are applicable to the case, *viz.*

Lachu v. *Kishen Lal* (2); *Rama Krishna Rao* v. *Balakrishna Rao* (3); *Abdul Latif* v. *Bathula Bibi* (4); *Imamudin* v. *Bindabasini Prasad* (5); *Parma Ram* v. *Lahna Singh* (6); *Muthar Dravia* v. *Subramania Pillai* (7); *Budrudeen* v. *Ghulam Mohideen* (8); *Chattar Singh* v. *Amir Singh* (9); *Bajrang* v. *Lachmi Narain* (10) *and Sethurama* v. *Chotta Raja Sahib* (11).

I have been through all these rulings and none of them seems to me to have any application to the facts of this case.

Legraj v. *Mahadeb* (1), cited by Lala Durga Das, seems to me to be directly in point. It was a condition precedent to the decree-holders taking out execution for Rs. 5,218 that there should have been

(1) [1919] 30 C. L. J. 118=53 I. C. 882.
(2) [1906] 44 P. R. 1906=82 P. L. R. 1907.
(3) [1920] 43 Mad. 476=56 I. C. 289=(1920) M. W. N. 261.
(4) [1914] M. W. N. 346=23 I. C. 530=15 M. L. T. 338.
(5) [1920] 5 Pat. L. J. 70=55 I. C. 89[illegible]=1 Pat. L. T. 149.
(6) [1919] 135 P. R. 1919=53 I. C. 443.
(7) [1917] 5 L. W 644=40 I. C. 889.
(8) [1918] 36 Mad. 357=24 M. L. J. 541=12 I. C 562=(1911) 2 M. W. N. 473.
(9) [1916] 38 All. 204=32 I. C. 590=14 A. L. J. 132.
(10) [1912] 15 [illegible]. L J. 88=13 I. C. 944.
(11) [1917] M. W. N. 327=40 I. C. 820.

non-compliance with the terms of the first portion of the decree. It is open in my opinion to the judgment-debtors to prove that as a matter of fact the decree has been complied with and that O. 21. R. 2 (3) does not apply to such a contention.

I, therefore, accept the appeal, set aside the order of the Court below and remand the case for decision by the executing Court. The respondents will pay the appellants' costs of this appeal; other costs will be costs in the cause.

Case remanded.

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* A. I. R. 1926 Lahore 642

JAI LAL, J.

Firm Bhajan Ram-Gil Raj Mal—Defendant—Petitioner.

v.

Mt. Narain Devi—Plaintiff—Respondent.

Civil Revision No. 755 of 1925, Decided on 17th June 1926, from the order of the 1st Cl. Sub-J., Amritsar, D/- 9th November 1925.

* (a) *Civil P.C., S. 115—Interlocutory orders—Final orders in proceedings prior to suit or after the suit terminating the proceedings one way or the other, are revisable.*

Revision lies when the order sought to be revised is not passed in the course of proceedings in the suit or when it terminates one way or the other any separate proceedings which may arise either before the suit is deemed to be instituted or after the suit has been disposed of an instance of the former being proceedings in an application for leave to sue as a pauper and an instance of the latter being proceedings to set aside an ex-parte decree or a dismissal for a default: 32 *All.* 623; *A. I. R.* 1922 *All.* 1; *A. I. R.* 1925 *All.* 610; *A. I. R.* 1926 *Lah.* 379, and *A.I.R.* 1925 *Lah.* 191, *Ref.* [P 643, C 1]

(b) *Civil P.C. O. 33, R. 5 (e)—Plaintiff applying to sue as a pauper agreeing to pay certain amount to his pleader after succeeding in the suit—No condition enabling pleader to recover his fees from decretal amount—R. 5 (e) does not apply.*

The plaintiff applying to sue as a pauper did not pay any fees to his pleader but entered into an agreement with him that after he succeeded in the suit, he would pay Rs. 80 to him as his fees. There was no condition by which the pleader could recover his fees from the decretal amount and the suit was for Rs. 10,175.

Held: that the case would not fall under R. 5 (e): 9 *Bom.* 371, *Dist.* [P 643, C 2]

(c) *Civil P. C., O. 33, R. 5—Applicant held to be pauper—All matters mentioned in R. 5 need not be gone into unless raised.*

When the Court has found that the applicant is a pauper it is not necessary for it to give a finding on the other matters given in R. 5, unless it finds that there is ground for holding that the application was liable to be rejected for any of the reasons mentioned therein. [P 643, C 2]

Dev Raj Sawhney—for Petitioner.

Badri Das for *Fakir Chand*—for Respondent.

Judgment.—The respondent Salig Ram applied for permission to sue as a pauper. The Subordinate Judge has granted him this permission. This is an application presented by the defendant for revision of the order of the Subordinate Judge. A preliminary objection is taken on behalf of the respondent that the order of the Subordinate Judge being an interlocutory one, no application for revision lies. *Firm Lal Chand Mangal Sen* v. *Firm Behari Lal Mehr Chand* (1) is cited as authority in support of this contention. It was held in that case by a Full Bench of this Court that no application for revision of an interlocultory order lies. Reliance was also placed on *Mohammad Ayub* v. *Mohammad Mahmood* (2) in which a Division Bench of the Allahabad High Court held that no application for revision of an order granting an application for leave to sue as a pauper lies. An opinion, however, was expressed that when such an application is rejected the case of the applicant comes to an end and application for revision would lie, but that when the application is granted the case of the pauper is not decided within the meaning of S. 115 of the Code of Civil Procedure.

In *Mahadeo Sahai* v. *Secy. of State* (3) it was held that no application for revision lies against an order rejecting an application for leave to sue as a pauper. A contrary view however, was expressed in *Ram Prasad Singh* v. *Jagdamba Prasad* (4) which is also a case decided by the Allahabad High Court. So far as I have been able to discover, *Mohammad Ayub* v. *Mohammad Mahmood* (2) has not been expressly dissented from in any subsequent case in that Court. In *Ram Surup* v. *Gaya Prasad* (5) however an opinion was expressed that an application for revision would lie when an order is passed by a Subordinate Court in pro-

(1) A. I. R. 1924 Lah. 425=5 Lah. 288 (F.B.).
(2) [1910] 32 All. 623=6 I.C. 831=7 A.L.J. 741.
(3) A. I. R. 1922 All. 1=44 All. 248.
(4) A. I. R. 1925 All. 547=47 All. 872.
(5) A. I. R. 1925 All 610=48 All. 175.

ceedings which are separate from the suit. The same view was taken in *Piroz Shah* v. *Qarib Shah* (6); *Azim Bibi* v. *Imtiaz Begum* (7). An examination of the authorities shows that the latest tendency of the Courts is to entertain applications for revision when the order sought to be revised is not passed in the course of preceedings in the suit or when it terminates one way or the other any separate proceedings which may arise either before the suit is deemed to be instituted or after the suit has been disposed of. An instance of the former are proceedings in an application for leave to sue as a pauper and an instance of the latter are proceedings to set aside an ex-parte decree or a dismissal for default. In all such cases the final orders of the Courts are open to revision. Consequently I overrule the preliminary objection.

On the merits it was contended on behalf of the petitioner that Salig Ram admittedly had entered into an agreement with reference to the subject-matter of the proposed suit under which the counsel who appeared on his behalf had obtained an interest in such subject-matter. It appears that when being examined Salig Ram stated that he had not paid the fees to his counsel but that he had agreed to pay Rs. 80 to him when he succeeds in the suit. Plaintiffs' claim was for the recovery of Rs. 10,175-15-3. I do not think that under all the circumstances the provisions of O. 33, R. 5 (e) apply to the present case. It was no doubt held in *Manohar Ram Chandra* v. *Lakshman Mahadev* (8) that where two persons, being about to sue to redeem a certain jagir village, applied for permission to sue as paupers, and it appeared that they entered into an agreement with a vakil to pay him as remuneration for his services as vakil in the case a lump sum of Rs. 1,500 as soon as the case was decided and in default of payment the vakil was authorized to recover the money out of the revenues of the said village, the agreement was within the scope of Cl. (d) of S. 407 of the Civil Procedure Code, 1882. That case in my opinion is distinguishable from the present. In this case there is no condition that the vakil would be entitled to recover the money out of the amount, if any, decreed in favour of Salig Ram. As compared with the value of the suit the amount of fee to be paid to the Vakil is so small that it would be unreasonable to apply the provisions of O. 33, R. 5 (e) to this case.

It was then contended on behalf of the petitioner that Salig Ram having died since permission to sue as a pauper had been given to him by the Subordinate Judge the suit could not be continued in *forma pauperis* at the instance of his legal representative, unless the latter proved that she also was a pauper. *Radhakrishna Aiyar, In re.* (9) was quoted as authority in support of this proposition. I do not express any opinion on the merits of this objection because in my opinion it ought more appropriately to have been taken before the trial Court.

Then it was contended that the learned Subordinate Judge has not given any finding on the other matters mentioned in R. 5 of O. 33. The learned Judge having held that Salig Ram was a pauper it was not necessary for him to give a finding on such matters, unless the learned Judge found that there was ground for holding that the application was liable to be rejected for any of the reasons mentioned therein. It appears that no such objections were pressed before the Subordinate Judge I must assume that the Subordinate Judge was of the opinion that the application was not open to any of the objections mentioned in R. 5 of O. 33.

The next objection of the learned counsel was that the Subordinate Judge did not allow him to produce the whole of his evidence. A reference to the record, however, shows that the witnesses were examined on behalf of the petitioner and that his case was closed without any protest on his behalf. The consequence is that his application is dismissed with costs.

Application dismissed.

(6) A. I. R. 1926 Lah. 379=7 Lah. 161.
(7) A. I. R. 1925 Lah. 191.
(8) [1885] 9 Bom. 371.
(9) A. I. R. 1925 Mad. 819.

A. I. R. 1926 Lahore 644

ZAFAR ALI, J.

Bishna—Appellant.

v.

Narain Singh and *others*—Respondents.

Second Appeal No. 2898 of 1925, Decided on 12th March 1926, from a decree of the Dist. J., Gurdaspur, D/- 13th August 1925.

Co-sharers—Adverse possession.

Jh., H and Js, were three co-owners of a certain land, being brothers. Possession was with the first. Plaintiffs, sons of H, sold their share in the holding to stranger, which was pre-empted by G, son of Jh., and in whose favour the share of Js. was mutated on Js's death, no mention being made of the plaintiffs who then sued for possession of a half-share of Js., 12 years after his death.

Held: that the suit was time-barred as G was in possession in his own right since Js's death and not as his co-owner and so his possession became adverse to plaintiffs. [P 644 C 2]

Fakir Chand—for Appellant.

Jamna Dass—for Respondents.

Judgment.— The proprietary holding in which the plaintiffs claim a share appears to have descended from Jamiat Singh the common ancestor of the parties. Jamiat Singh had three sons. Jagat Singh Jhanda Singh and Hira Singh. The defendant Bishan Singh is the grandson of Jhanda Singh and the plaintiffs are grandsons and representatives of Hira Singh. In the jamabandi of 1890 Jhanda Singh, the sons of Hira Singh and Jagat Singh were entered to be co-owners of the holding, but Jhanda Singh alone was in possession of the entire holding, and the other co-sharers were entered as absentees. In 1896 the sons of Hira Singh sold off their share in the holding to a stranger and thus ceased to be co-sharers therein. Jhanda Singh seems to have died before that and Gattu his son, pre-empted the share sold successfully and thus became owner of 2-3rds share in the holding and he was like his father in possession of the entire holding.

Jagat Singh died in 1907 and his share was then mutated in the name of Gattu alone who was actually in possession. In the mutation proceedings no mention was made of the plaintiffs who were undoubtedly entitled to succeed to a moiety of Jagat Singh's share as his heirs, but they were absent in another village and did not come forward to claim it. They brought the present suit in 1923 for possession of half of Jagat Singh's share and the defendants pleaded inter alia that the suit was time-barred. This plea has been overruled by the trial Court as well as the learned District Judge who has disposed of it thus:

> Jagat Singh had been recorded as an absentee ever since 1890. In 1907 Gattu (appellant's father) made a report to the patwari setting forth Jagat Singh's absence and his own possession and requesting that Jagat Singh's name might be removed and his own substituted. Before the mutation came before the Revenue Officer Jagat Singh died; Gattu became aware of his death and he claimed the land as Jagat Singh's heir. Mutation was sanctioned in his favour as Jagat Singh's heir.

Appellant's counsel relies on this long absence and especially on the statement to the patwari in 1907 as proving the appellant's adverse possession. In my opinion this case is governed by the general principles of joint possession of property as laid down by their Lordships of the Privy Council in *Appeal Case No. 230 of 1915* and *Hardit Singh* v. *Gurmukh Singh* (1). No doubt Gattu manifested to the patwari his intention to hold adversely in future, but how was that communicated to the other heirs of Jagtu. If he had succeeded as the sole heir of Jagtu the result might have been different but he succeeded simply as heir.

This reasoning of the learned District Judge is obviously erroneous and the rulings cited by him are not in point. The plaintiffs and the defendant were neither co-parceners nor members of a joint family and the former were not co-sharers in the holding with the latter. The possession of Gattu was not as one of the co-owners but in his own right exclusively which he asserted in 1907. The plaintiffs' right to sue for possession accrued in that very year on the death of Jagat Singh and as they brought the present suit in 1923, the suit is clearly time-barred because defendant has been in possession adversely to them in his own right and not as a co-owner on behalf of himself and other co-owners.

I, therefore, accept the appeal and reversing the decree of the Court below dismiss plaintiffs' suit with costs throughout.

Appeal accepted.

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(1) [1918] 20 Bom L. R. 1064=28 C. L. J. 437=47 I. C. 626=64 P. R. 1918 (P. C.)

* A. I. R. 1926 Lahore 645

CAMPBELL AND DALIP SINGH, JJ.

Nihal Chand—Plaintiff—Appellant.

v.

Amar Nath—Defendant—Respondent.

First Appeal No. 64 of 1922, Decided on 13th July 1926, from the decree of the Senior Sub-J., Lahore, D/- 1st October 1921.

* (a) *Contract — Construction—Counter offer implies rejection of offer.*

A offered by a letter to sell only at Re. 0-14-0 in a rupee his claims against a certain Bank in liquidation to *B*. *B* offered Re. 0-13-9 a rupee which *A* did not accept. Then *B* accepted by telegram *A's* offer at Re. 0-14-0. *A* did not assent to this, but he had not expressly withdrawn his original offer of Re. 0-14-0 a rupee. *B* sued *A* for damages for breach of contract.

Held : that *B* by his counter-offer at Re. 0-13-9 impliedly rejected *A's* original offer at Re. 0-14-0 and there was no contract. [P 647, C 2]

(b) *Contract Act, S. 6—Revocation of offer—Counter-offer determines original offer.*

An offer can be determined by action on the part of the offeree and a counter offer puts an end to the original offer. [P 647, C 2]

* (c) *Court-fees Act, Sch. 1, Art. 1—Cross-objection on ground of costs—Ad valorem fees should be paid.*

When costs are the sole ground of cross-objections it cannot be said that costs are not the subject matter in dispute, and Court-fees should be *ad valorem* on the amount of costs: 8 *M. I. A.* 262 and 13 *M. I. A.* 85, *Dist.* [P 649, C 2]

Badri Das and *Har Gopal*—for Appellant.

Jagan Nath Aggarwal and *Mehr Chand Mahajan*—for Respondent.

Judgment.—The plaintiff-appellant in this case sued the defendant-respondent for Rs. 14,025-13-8 as damages for breach of contract. He alleged that the defendant had made him an offer by a letter dated the 5th of November 1918 to sell the defendant's deposit debt due from the People's Bank of India Ltd., Lahore, in liquidation, at the rate of As. 14 in the rupee, less As. 6 per rupee already received by the defendant from the Bank by way of dividend. The plaintiff alleged that he had accepted the proposal of the defendant by means of a telegram dated the 16th of November 1918 and that subsequently the defendant had refused to fufil the contract ; hence the suit.

It is necessary to set out the correspondence between the parties at length. It appears that the plaintiff had sent out various circulars to the public at large offering to buy claims of creditors and depositors with the People's Bank which had gone into liquidation in October 1918. Since that date some As. 6 in the rupee had been paid by way of dividend by the liquidators. In response to one of these circular letters. which is dated the 4th November 1918, marked as Exh. P-1, the plaintiff invited offers of sale from creditors and requested a statement of the price that they will be willing to take. On the 5th November accordingly the defendant replied as follows :

In reply to your letter above I beg to inform you that my total claim against the People's Bank (in liquidation is Rs. 44,800 and I have got another friend whose claim is about Rs. 8,000. I have been offered up to As. 13-6 per rupee, (annas thirteen and pies six per rupee) minus the dividends already received by some Lahore men whose names I am not inclined to state both for People's Bank and Amritsar Bank. But I am not willing to sell them for anything less than As. 14 a rupee minus the amount or As. 6 per rupee already received. Annas 14 is my minimum rate. So if you are willing to purchase it for As. 14 a rupee I shall be willing to part from it and you can inform me by wire if you like. No need for writing less rate. I have also about Rs. 24,000 in Amritsar Bank besides and I will sell it also for As. 14 per rupee if you desire, but it is not compulsory for you.

On the 9th November 1918 the plaintiff sent the following telegram :

Letter received accepting peoples thirteen annas nine pies.

To this the defendant replied by wire which is not printed but a copy of which is written at the back of Ex. 1 D. 12 :

Less then fourteen annas not accepted.

On the 16th of November the plaintiff sent anothar telegram.

Transaction people's claim. Your offer at fourteen annas accepted. Sending money before Tuesday.

On the same date defendant replied by postcard as follows :

Your wire accenting annas fourteen per rupee minus amount already received reached me on 16th November 1918. But this wire refers to my People's Bank deposits only, while my offer for annas 14 (fourteen annas) per rupee (minus amount already received) is for both Banks as per my letter sent to you on the subject in reply to your enquiry i. e., for People's Bank and Amritsar Bank, both. Therefore if you are willing to buy my deposits of both the above noted Banks People's and also Amritsar Bank at annas 14 per rupee, you my send the money to the Manager of the Punjab National Bank Hoshiarpur (Lala Ganga Bishen) together with other transfer forms for both Banks. If not I am not willing to part with my People's Bank deposit only at annas 14 per rupee if you do not

want to buy my Amritsar Bank's deposits also Total amount is about Rs. 69,000 for both Rs. 45,000 plus Rs. 24,000, People's and Amritsar. If you want to buy People's and Amritsar Bank deposits at annas 14 per rupee you may send the money ; if not willing no money then.

Evidently before this post card reached the plaintiff he sent a wire on the 17th November :

May send money on Monday or Tuesday you there wire.

To this the defendant sent a wire in reply on the same date :

Do not send money at all.

On the 18th November in reply to the postcard of the 16th November from the defendant the plaintiff wrote as follows :

Your postcard dated sixteenth confirming your offer and my acceptance for People's claim at fourteen annas received your letter referred clearly gave me option to purchase People's alone. Thus contract legally complete. Not sending money as instructed in your telegram of the seventeenth come personally and take lying your disposal will want two days ; otherwise enforcing contract through Court responsible you for costs, take notice.

On the 19th November the defendant sent a postcard :

In reply to your telegram of 18th November 1918, I inform you that as I am with whole of my family in bad health, I am unable to come to Lahore. If I have given you option in my letter in reply to your enquiry to buy any one of the two Banks deposits I am willing to sell People's to you at annas 14 per rupee. No need of going to Court. I, therefore, request you to come to Hoshiarpur at once with necessary forms and money to settle the matter. I also request you to bring with you my letter on the subject. I shall wait for you and be at Hoshiarpur up to 22nd November 1918 for settlement. But please do not fail to bring my letter on the subject which is on the back side of your letter for my perusal.

On the 21st November the plaintiff replied by wire as follows :

Registered postcard received twenty-second hearing in Chief Court ; money ready come and take otherwise ; reaching on Sunday. Wire.

On the 23rd November the plaintiff sent a further telegram :

No reply ; coming with money to-morrow.

On the same date the defendant sent a telegram to the plaintiff :

Do not come Sunday time limit passed.

On this the plaintiff sent a telegraphic notice on the 24th November :

Telegram received not bound by your further time limit not agreed by me. Plea nonsense money lying since acceptance according your instructions ; my part of contract complete. Carry out transaction gentlemanly otherwise proceeding in Court at your risk costs.

No notice seems to have been taken by the defendant of this last wire and the plaintiff accordingly brought his suit.

The defendant pleaded inter alia : (1) that the telegram dated the 16th November did not constitute an acceptance because no offer had been made by the defendant, (2) that if there was an offer it was rejected by the defendant by telegram dated the 9th November and (3) that the acceptance was not sent within a reasonable time of the offer. The other pleadings are immaterial to the decision of the case.

The issue relevent to the above pleading was framed by the Court as follows :

Whether there was a valid contract between the parties on the 16th November 1918.

The trial Court held that the letter of the defendant of the 5th November was an offer and not a mere enquiry or quotation. It also held that the offer had lapsed by the counter-proposal of the plaintiff made on the 9th November that the plaintiff's acceptance of the 16th November, therefore, was not an acceptance of an offer still outstanding but was a fresh proposal and constituted a fresh offer. There was no contract therefore on the 16th November, the date alleged by the plaintiff as the date of the contract and therefore it dismissed the plaintiffs' suit. The Court did not allow the defendant his costs. The plaintiff has appealed and the defendant has put in cross-objections as regards his costs.

In appeal before us it has been contended that the offer of the 5th was still standing when the plaintiff sent his telegram of the 16th and that, therefore, on the 16th there was a complete contract and the defendant had committed breach thereof. In support of this it is argued that the plaintiff's telegram of the 9th offering As. 13 9 was not a fresh offer at all but was only an enquiry, and that even if it was a counter proposal the reply of the defendant necessarily conveyed the implication that the offer to sell at As. 14 was still standing, and that therefore the plaintiff's acceptance of the 16th constituted a binding contract. In support of this proposition it was contended that the subsequent letters of the parties dated the 16th November to 24th November should be looked into to construe the meaning of the telegram dated the 11th November and that this correspondence made it perfectly clear that the defendant intended to keep the offer of the 5th November

outstanding until the 16th. On the other hand the respondent has contended that the letter of the 5th November does not constitute an offer at all and further that a counter proposal ipso facto implies the rejection of the offer and that therefore there was no offer outstanding after the rejection of the counter proposal on the 11th and there was nothing for the plaintiff appellant to accept on the 16th.

The respondent further contended that the subsequent correspondence could not be used for the purpose of deciding what the position of the parties was on the 16th and the respondent cited 52 *Revised Reports*, 144, *Hyde* v. *Wrench*, Leake on Contracts at page 26 of the latest edition Halsbury's Laws of England Vol. VII, page 352, paragraph 724; *A. I. R.* 1922 *Patna* 24 and 12 *English and Empire Digest* page 59. In reply the appellant contended that S. 6 of the Contract Act made it clear that the rule laid down in *Hyde* v. *Wrench* and in Halsbury's Laws of England, Vol. VII, page 352, paragraph 724, did not apply in India and he also replied generally to the arguments of the respondent.

The first point for us to decide in this appeal is whether the letter of the 5th November constituted an offer or not. We are definitely of opinion that it did constitute an offer in clear terms and there is no force in the contention of the respondent that it was only an invitation for offers. The next point that arises for decision is whether the telegram of the 9th November makes a counter offer by the plaintiff. We are again definitely of opinion that it does. The defendant had made it perfectly clear that he was not going to accept any offers of less than fourteen annas in his letter, yet the plaintiff sent the telegram offering Rs. 0-13-9. In the circumstances of this case, therefore, it seems to us perfectly clear that the rule in *Hyde* v. *Wrench* applies and the counter offer implies a rejection of the offer made by the defendant.

Next we have to consider the arguments of the appellant that the telegram of the 11th by the respondent implies that the offer of the 5th of November was still outstanding though the counter offer was rejected by the respondent. We are quite clearly again of opinion that this telegram does not contain any words from which a necessary implication arises that the defendant regarded his original offer as still outstanding, or that he renewed his offer of the 5th by means of this telegram.

The appellant has contended that S. 6 of the Contract Act (where revocation of an offer is defined) does not include revocation by means of a counter proposal, and that, as a Code is exhaustive on matters with which it deals, therefore the law in India is different on this point to the law in England. On its being pointed out to the appellant that his argument implied that even a rejection of the offer would not determine the offer which would still remain outstanding according to the appellant's argument until one of the conditions mentioned in S. 6 were complied with the appellant argued that this was so. We are clearly of opinion that this argument is wholly fallacious. In the first place, revocation of an offer means some action on the part of the offerer by which the offer is recalled or revoked. It does not follow that the offer cannot be determined by action on the part of the offeree and therefore while fully conceding to the appellant that a Code is exhaustive on matters with which it deals we do not see that there is any difference between the English and Indian Law on the question of the determination of an offer by its rejection by the offeree. Now, in *Hyde* v. *Wrench* it was held that in the circumstances of the case the counter offer by the offeree implied the rejection of the original offer. We are of opinion that in the circumstances of this case similarly the counter offer by the plaintiff appellant on the 9th implied a rejection of the previous offer of the defendant respondent of the 5th.

The matter can also be looked at from another point of view. Even assuming that an offer is only determined by revocation it seems to us that, ordinarily speaking, a counter offer would imply a rejection of the previous offer, because it would imply that a reasonable time for communicating acceptance of that offer had lapsed, and that, therefore, the offer had been determined. In the circumstances of this case it would be clear that the telegram of the 9th showed that the plaintiff regarded three days at the most as a reasonable time for the offer to be considered standing and that thereafter the offer was no longer standing. In the

letter of the 5th moreover the defendant said: "If you are willing to purchase it (i. e, the claim against the Bank) for annas 14 a rupee I shall be willing to part from it and you can inform me by wire if you like". Now, the words "If you like" we consider clearly do not mean that the plaintiff was given an option to wire or not as he chose but that he was definitely asked to wire if he decided to purchase the claim. We must remember that the parties are Indians and evidently not well acquainted with the English language in which the correspondence was carried on. However doubtful the English construction of the expression might be the literal translation of that expression into vernacular would at once make it clear to what the phrase "If you like" referred. There could be no doubt about it whatsoever in the vernacular and it seems to us perfectly clear that the defendant intended that if the plaintiff decided to purchase he should reply by wire. It is, therefore, clear that the defendant certainly demanded a prompt answer and we cannot consider that the delay of three days was a compliance with the request of the defendant. Further, the plaintiff by sending a telegram on the 9th showed that on that date he was of opinion that the offer of the defendant should be replied to and therefore at the most he himself considered that three days was a reasonable time in which to reply. From the above it follows also that, even if the telegram of the defendant of the 11th November be taken as containing an implied renewal of the offer of the 5th or implied statement of the fact that the offer of the 5th was still outstanding, the acceptance of the 16th was not in the circumstances a good acceptance. More than five days have elapsed since the 11th and we cannot hold that the offer of the 5th even if renewed impliedly by the telegram of the 11th was still standing on the 16th. It must be borne in mind that in his pleadings the plaintiff never relied on any renewal of the offer on the 11th. He only referred to one offer, namely, that of the 5th.

The next question we have to consider is the effect and bearing, if any, of the subsequent correspondence on which the appellant has relied strongly. Even assuming that this correspondence is relevant for the purpose of determining the position of the parties on the 16th, we do not think a consideration of the correspondence leads to the conclusion that the appellant would have us draw.

It is clear that on the 16th November the respondent by his post card said two things. He first repudiated the plaintiff's idea that the wire of the 16th was a good acceptance of any offer ever made by him. At that time the respondent seems to have been under a bona fide mistake as to the terms of his letter of the 5th as is shown by his insistance on seeing this letter in his post card of the 19th. Be that as it may, however, by his post card of the 16th he pointed out to the plaintiff that the acceptance was not a good acceptance and he then went on to report what he at the time seems to have thought was his original offer of the 5th but which was certainly not that original offer, namely, that he was willing to sell his deposits both in the People's Bank and in another Bank called the Amritsar Bank at annas 14 per rupee, but that he was not willing to sell one of them only.

On the plaintiff threatening him on the 18th of November with proceed ings in Court and alleging that the terms of the original offer were clear about the sale of the People's Bank deposit alone the defendant replied that he was willing to sell if as a matter of fact he had offered to sell the People's Bank deposits alone at annas 14. He requested the plaintiff however to come to Hoshiarpur, his own residence, before the 23rd September, and he insisted on the plaintiff bringing back his letter.

It is clear, therefore, that on the 19th the defendant said no more than this that he was willing to abide by the terms of his previous offer if there was such an offer, and that the matter should be settled by the plaintiff by coming to Hoshiarpur on the 22nd November. When the plaintiff did not come on the 22nd but offered to send the money the defendant definitely said that the time limit of the 22nd November was over and he was not willing to accept the plaintiff's offer of the 16th. The appellant would have us hold that this correspondence shows clearly that the defendant all along accepted the view that the offer of the 5th was still open to acceptance by the plaintiff but that he merely objected to the plaintiff accepting what he mistakenly considered was only a part of

his offer and that therefore it must be taken that if it can be shown that the telegram of the 16th did accept the offer of the 5th it is not open to the defendant to contend that he never agreed to regard the offer of the 5th as still standing. It seems to us that this is not the correct construction of the subsequent correspondence. It must be again borne in mind that the parties are not writing in a language familiar to them. Great stress has been laid by the appellant on the fact that in the post card of the 16th was the word "is" in connexion with the word "my offer". We do not think the parties should be tied to so meticulous a construction of the documents.

It is clear that while the defendant renewed his supposed offer of the 5th on the 16th and while it is clear that on threat of Court proceedings he said that he would be willing to abide by that offer whatever it was, he did introduce a further condition of settlement by the 22nd November. Now, if the defendant had considered that the whole question of whether the acceptance of the 16th was a good acceptance or not depended solely on the terms of his offer of the 5th he could not have added the condition of a settlement before the 22nd November. That he did so regard this as a fresh condition is proved by his subsequent telegram refusing to deal with the plaintiff after the 22nd November had passed. Considering, therefore, the whole of these documents together we are of opinion that it is not shown that the defendant has by necessary implication consented to the plaintiff regarding the offer of the 5th as outstanding.

No other point has been argued before us by the appellant. The appeal accordingly fails and is dismissed with costs.

The defendant's cross-objections remain to be dealt with. A preliminary objection is taken by the appellants that the Court-fee on the cross-objections is not the correct Court-fee. The respondent relies on *Kamal Kumari* v. *Rungpur North Bengal Bank* (1) in support of his contention that Art. 1, Sch 1 of the Court-fees Act does not cover the question of Court-fees on Cross-Objections on costs. *Kamal Kumari* v. *Rungpur North Bengal Bank* (1) no doubt supports his contention. On the other hand *In re Makki* (2) and *Rowlins* v. *Lachmi Narain* (3) a Patna ruling are against him. There is no ruling of our Court on the point which has been shown to us. It seems to us, however, that the decisions of the Madras and Patna High Courts are correct on this point and that, with all respect, the decision of the Calcutta High Court is not correct. On the plain meaning of the words of Art. 1, Sch. 1, of the Court Fees Act it seems to us perfectly clear that when costs are the sole ground of cross objections it cannot be said that they are not the subject matter in dispute, because it would follow that there is no subject matter in dispute at all. Counsel for the respondent's argument seems to be that costs are in dispute but costs are not the subject matter of the dispute. This seems to us to be a distinction without a difference.

The Calcutta High Court relied on two judgments of their Lordships of the Privy Council: *Doorga Dass* v. *Ramnath* (4) and *Nilmadhab Dass* v. *Bishumbar Dass* (5). Their Lordships, however, were not dealing with the construction of Art. 1, Sch. 1, of the Court Fees Act but were construing an order in council which is not before us and were deciding whether costs could be reckoned as part of the subject matter in dispute for the purpose of making up the Rs. 10,000 which was the requisite amount for an appeal to the Privy Council. The Privy Council decision therefore is not directly in point. Ordinarily speaking, the course of an appeal would be determined by the plaint as framed and laid in the suit and costs *ex necessitate rei* cannot be the subject matter of dispute in a suit, but from this it does not follow that costs cannot be the subject matter of dispute in an appeal or in a second appeal, and it seems to us that their Lordships decision does not apply to the facts of this case.

We therefore hold that the Court-fees should be ad valorem on the amount of the costs, but on the merits we do not see any reason to interfere with the discretion exercised by the trial Court in this matter and while we are not prepared to characterize the defendant's

(1) A. I. R. 1921 Cal. 55.

(2) [1896] 19 Mad. 350.
(3) [1918] P. H. C. C. 264=4 Pat. L. W. 223=44 I. C. 50=3 P. L. J. 443.
(4) [1860] 8 M. I. A. 262=1 Sar. 772 (P. C.).
(5) [1869] 13 M. I. A. 85=3 B. L. R. 27=12 W. R. 29=2 Suther 257=2 Sar. 489 (P. C.).

conduct as shifty we are not prepared to set aside the order of the trial Court on this point. The cross-objections are therefore dismissed with costs. The respondent should be called upon to make up the Court-fee on his cross-objections as he agreed to do if his objections were heard and the decision on the point was against him. In the circumstances we think time should be extended as there was no ruling of our Court bearing on the point and the latest ruling and the only one containing some discussion of the point was in the objector's favour.

Appeal and cross objections dismissed.

A. I. R. 1926 Lahore 650 (1)

FFORDE AND CAMPBELL, JJ.

Ram Sarup—Appellant.

v.

Ram Saran and *another*—Respondents.

Second Appeal No. 2601 of 1922, Decided on 7th June 1926, from a decree of the Dist. J., Ambala, D/- 18th July 1922.

Evidence Act, S. 115—Person entitled to challenge alienation present at mutation but failing to object is estopped.

Where in case of alienation a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it does not object he cannot challenge the alienation subsequently [P 650, C 2]

Shamair Chand—for Appellant.

N. C. Mehra—for Respondents.

Judgment.—This is a suit to set aside an alienation of ancestral land on the ground that it is not warranted by custom.

Mr. Shamair Chand's first argument against the respondents is that they are precluded by their conduct from now contesting this alienation. It has been found by the lower appellate Court that at the time of the mutation proceedings the respondents were present, and the learned District Judge refers to a number of witnesses who all stated that the plaintiffs-respondents were present at the mutation and consented to this gift. The learned District Judge then continues :

I, therefore, hold on this evidenoe that at the mutation plaintiffs were psesent and did not make any objection whatever to this gift.

Now, there is no doubt from the evidence that the plaintiffs were present, that they did make no objection to the gift, and that they had every opportunity of objecting had they desired to do so. It is also quite clear that they knew what the nature of the proceedings and the mutation entry was. Under these circumstances they are clearly estopped by the well-established rule of law and equity that a person is not entitled to do what is commonly known as blowing hot and cold. The maxim *allegans contraria non est audiendus* is incorporated in S. 115 of the Evidence Act. Upon the finding of the learned District Judge upon the question of consent, with which we are in entire agreement, we are of opinion that the plaintiffs are estopped from now contesting this alienation. The appeal must, therefore, be accepted and the suit dismissed with costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 650 (2)

ADDISON, J.

Bahawal and *others*—Plaintiffs—Appellants.

v.

Mohala and *another*—Defendant—Respondents.

Miscellaneous first Appeal No. 944 of 1926, Decided on 16th June 1926, from an order of the Senior Sub-J., Gujranwala, D/- 20th March 1926.

Civil P. C. O., 9, R. 9—Few minutes delay due to plaintiffs going to call his pleader—Restoration should be granted.

That when the case was called, the plaintiff ran away to call his pleader and returned a few minutes after the suit was dismissed is sufficient cause. [P 651, C 1]

Mool Chand—for Appellants.

Zafrulla Khan—for Respondents.

Judgment.—This suit was dismissed by the Senior Subordinate Judge, Gujranwala, under O. 19, R. 8 of the Civil P. C., in the absence of the plaintiff and in the presence of one defendant on the 21st November 1925. That very day the plaintiff applied for its restoration on the ground that when the case was called he went to call his counsel from another Court and discovered on his return after two minutes that his

suit had been dismissed. Evidence was produced to prove this allegation and there was no rebuttal of that evidence. The Senior Subordinate Judge, however, refused to restore the suit on the ground that most probably the plaintiff did not appear as his counsel had not come from Lahore to argue the suit on that date. Considering the absence to be intentional he, therefore, rejected the application. Against this order this appeal has been filed.

The evidence produced by the plaintiff shows that the pleader he had engaged for the hearing was a local pleader. There was no allegation that he absented himself because his pleader had not come from Lahore. A pleader had as a fact come from Lahore on a previous occasion, but he was not engaged for the date in question. The Subordinate Judge, knowing of the engagement of the pleader from Lahore on the previous hearing, erroneously thought that that was the reason why the plaintiffs did not appear and acted on this, though there was no allegation to that effect and no evidence had been produced on this point. As the evidence establishes that what happened was that the plaintiff ran away to inform his pleader when the case was called and returned within two minutes, I accept the appeal and, setting aside the order of the Senior Subordinate Judge, direct that the suit be restored to his pending file and proceeded with according to law. There will be no costs here.

Appeal accepted.

A. I. R. 1926 Lahore 651 (1)

HARRISON, J.

Emperor

v.

Lal—Accused.

Criminal Revision No. 567 of 1922 Decided on 19th June 1926, reported by the District Mag., Attock, on 31st March 1926.

Criminal P. C., S. 562—Two consecutive trials — Conviction in both — At the time of writing second judgment, S. 562 will not apply.

Where two cases against the same accused are tried consecutively and the accused in both is convicted, S. 562 will not apply at the time when second judgment is written, as then he must be considered to be a previous convict. [P 651 C 2]

Facts.—Accused on two separate occasions induced two children one a girl of four years one a girl of three years, to part with their ornaments to him, which he stole. In both cases accused confessed. In both the Magistrate has sentenced him to furnish security under S. 562, Criminal P. C, for two years for Rs. 200.

Grounds.—The cases were tried consecutively. Therefore, when the second judgment was written the accused had already been convicted within the knowledge of the Court and S. 562 no longer applied. The crime was premeditated and mean in the extreme and a deterrent sentence, preferably whipping, appears to me to have been called for. In any case the order of the lower Court appears illegal. I, therefore, submit the case for the orders of their Lordships.

Order.—For the reasons given by the learned District Magistrate in his undated order of reference, I set aside the orders passed under S. 562, Criminal P. C., and sentence Lal son of Qutab Din in Case No. 32 of 1926 (Attock district) to receive 15 stripes and in Case No. 33 of 1926 (Attock district) also to receive 15 stripes, provided he is passed fit to receive the punishment after undergoing the necessary medical examination.

Order set aside.

A. I. R. 1926 Lahore 651 (2)

BROADWAY AND COLDSTREAM, JJ.

Bhola Ram-Kundan Lal—Plaintiffs—Appellants.

v.

East Indian Railway Company — Defendant—Respondent.

First Appeal No. 2552 of 1924, Decided on 8th July 1926, from the decree of the Sub-Judge, 1st Class, Delhi, D/- 6th July 1924.

(a) *Railways Act, S. 72—Risk note B — Protection extends even after unloading.*

The protection offered by the risk note extends to damage done after the goods have been unloaded : 30 *Cal.* 257 ; 10 *Cal.* 210 and *A. I. R.* 1924 *All.* 605, *Foll.* [P 652 C 2]

(b) *Railways Act, S. 55—Claim not specified—Notice is not invalid.*

A notice under S. 55 is not invalid merely because the sum claimable is not specified in the notice. [P 652 C 2]

Moti Sagar and *Shamair Chand*—for Appellants.

Ram Lal and *Mehr Chand Mahajan*—for Respondent.

Coldstream, J —Messrs. Bhola Ram-Kundan Mal of Delhi were holders of a railway receipt covering a consignment of forty bales of gunnies being carried by the East Indian Railway Company from Kankinara to Delhi. The gunnies arrived in Delhi on or about the 7th July 1920, and after being unloaded were placed under cover. On the 12th July there was exceptionally heavy rain accompanied by wind and some of the gunnies were damaged. On the 15th or 16th July Messrs. Bhola Ram-Kundalan Mal presented the railway receipt to the Railway Company, paid Rs. 369-10-0 on account of the freight due and Rs. 30 on account of wharfage, intending to take delivery of these goods ; but on noticing that the gunnies had been damaged they declined to take delivery. It was consequently agreed between the firm and the local Goods Inspector of the Railway that the damage done would be fairly assessable at Rs. 400. The firm was not, however, prepared to take delivery unless the Railway promised unconditionally to pay this sum and waive their claim for wharfage. Some correspondence ensued, the firm emphatically refusing to pay the railway charges and the Railway threatening to sell the goods if the charges were not paid. Ultimately after giving notice the Company auctioned the gunnies in February 1921 for Rs. 3,730.

In April 1921 Bhola Ram-Kundan Mal instituted the suit from which the present appeal arises against the Railway Company claiming Rs. 5,942-2-9, being the cost price of the gunnies, Rs. 369-10-0 the freight paid. Rs. 55-3-0 incidental expenses, and Rs. 228 interest. The Railway Company pleaded that they were protected by the risk note in Form B, under which the goods had been consigned, denied negligence, justified the auction under S. 55 of the Indian Railways Act and offered to pay the plaintiffs the excess of the auction proceeds over the wharfage charges.

The learned Subordinate Judge held that the Railway had not acted with wilful negligence, that the risk note protected the Company against the claim for damages, that the plaintiffs were not justified in refusing to take delivery, and that the Company were entitled to charge wharfage for the period during which the goods had been in their possession. He dismissed the suit. Against this dismissal the plaintiffs have appealed.

The contentions urged before us by Mr. Moti Sagar in support of the appeal are (1) that the Railway Company was bound to pay the damage assessed by their officer, the Goods Inspector ; (2) that the protection offered by the risk note did not extend to damage done after the goods had been unloaded ; (3) that the Railway had no right to sell the goods ; (4) that the wharfage was not properly chargeable during the pendency of a bona fide dispute between the parties, and (5) that the sale was invalid because (a) there was no demand for a specific sum before the sale and (b) the provisions of S. 55 (2) of the Indian Railways Act regarding notice had not been regularly complied with.

It is clear from the evidence, including the plaintiff's letter of 19th August 1920, (P. 4) that there was never any promise by or on behalf of the Railway to pay any sum as damages. All that was agreed to by the Goods Inspector was an assessment of the damage suffered at Rs. 400. Mr. Moti Sagar frankly admits that he can cite no authority in support of his second contention upon which the rulings in *Toonya Ram* v. *E. I. Ry. Co.* (1) which follows *Moheswar Das* v. *Carter* (2) and *E. I. Ry. Co.* v. *Janki Prasad* (3) go directly against him. The Company's right to sell was a statutory one clearly conferred by S. 55 of the Indian Railways Act and Mr. Moti Sagar has not been able to show any reason for holding that the provisions of that section were inapplicable in the present instance. Mr. Moti Sagar's fourth contention is based on the ruling in *East Indian Railway Co.* v. *Bhagwan* (4). That judgment dealt, however, with a case in which the circumstances were entirely different from those of the present case, in which the responsibility for the non-delivery of the goods lay wholly on the plaintiffs. I can find no good ground for the assertion that a notice under S. 55 of the Indian Railways Act is invalid merely because the sum claimable is not specified in the notice. It is obvious that the sum may increase from day to day when it is claimable on account of demurrage.

(1) [1903] 30 Cal. 257=7 C.W.N. 370.
(2) [1884] 10 Cal. 210=12 C.L.R. 122.
(3) A.I.R. 1924 All. 605.
(4) A.I.R. 1922 Pat. 390=1 Pat. 15.

A notice of the Railway's intention to auction the goods was published in the "Eastern Mail", a Delhi newspaper, of the 30th November 1920. The advertisement gave notice that unless the goods concerned were removed and all charges due on their account paid before the 11th December the goods would be sold by public auction, and the proceeds disposed of in accordance with the Indian Railways Act.

It is urged on behalf of the appellants that this notice was irregular and defective inasmuch as (1) it did not allow fifteen days but only eleven in which the plaintiffs could, if they wished, pay the charges and remove the goods, and (2) did not specify the date on which the threatened auction would take place.

It is obvious from the record and the judgment that these objections in respect of the form and contents of the notice were not raised in the trial Court. On the contrary the judgment remarks that the sale was notified to the plaintiffs and "the notice of the sale was admitted to have been received." Whether this remark referred to the advertisement in the "Eastern Mail" or to an admission by counsel is not clear. But it is clear that the form and substance of the notice given were not attacked. Had they been attacked it is possible that the respondent would have been able to satisfy the Court on the point of sufficiency and regularity of notice by proving the services on the plaintiffs of a perfectly regular notice, to which the objections now taken could not be raised.

In the circumstances it would not, I think, be proper to admit the present technical objections at this late stage. It is obvious that as a fact much longer notice of the auction than a fifteen days' notice was given to the plaintiffs, for the goods were not auctioned until February 1921.

There is no reason for disbelieving the unrebutted evidence of Mr. Hinchey, the Goods Inspector, as regards the amount fetched by the goods at the auction, and as regards the amount claimable by the Railway from the plaintiffs under the rules on account of wharfage. It appears that the latter amount was in reality more than the amount charged by the Railway.

For all these reasons I consider that the suit was rightly dismissed, and I would dismiss this appeal with costs accordingly.

Appeal dismissed.

A. I. R. 1926 Lahore 653

FFORDE AND CAMPBELL, JJ.

The Firm Ganda Singh-Ganga Ram—Plaintiffs—Appellants.

v.

Nur Ahmad — Defendant —Respondent.

Second Appeal No. 399 of 1922, Decided on 18th May 1926, from a decree of the Dist. J., Lyallpur, D/- 13th December 1921.

(a) *Evidence Act, S. 102—Unregistered document—Execution admitted — Admission in the document challenged—Burden is on party challenging.*

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration : *A. I. R.* 1925 *Lah.* 471, *Foll.* [P 654 C 1]

(b) *Civil P. C., S. 100—Burden of proof—Error of principle—Appeal lies.*

A decision based on an error of the principles governing the question of onus will be set aside. [P 654 C 1]

Jagan Nath Bhandari — for Appellants.

Judgment.—This is an appeal from the judgment of the lower appellate Court reversing the decree of the trial Court and dismissing the plaintiffs' suit.

The suit was brought to recover a sum of money due upon a bahi account. The defendant had affixed the thumb mark to an entry in the account, thereby admitting his indebtedness to the extent of the sum therein appearing. In his defence to the action brought against him he alleged that his thumb impression had been obtained by fraud. The trial Judge found in favour of the plaintiffs and gave a decree for Rs. 1,355-2-0 having reduced the amount of interest from 25 per cent. to 12 per cent. per annum. On the matter coming before the lower appellate Court the learned District Judge took the view that in spite of the admission of the defendant

G. N. Dar
Advocate High Court
Jammu & Kashmir

as evidenced by his thumb impaession. the onus still lay upon the plaintiff to prove his indebtedness. This view appears to have been current in those Courts until recently, the rulings being that in case of unregistered documents the onus is always upon the party seeking to enforce a money demand. That view, however, has been expressly dissented from in the receut Full Bench decision in *Ram Chand* v. *Chunun Mal* (1) where it was held that where an unregistered document, the execution of which is admitted or proved, contains an admission of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration.

All the plaintiffs had to do in the present suit was to produce the account with the defendant's thumb impression evidencing its correctness, If the defendant failed to satisfy the Court that his thumb impression had been obtained by fraud as he alleged, or that the entry was in fact incorrect, the plaintiffs were entitled to a decree. In the present case the defendant has not attempted to prove that his thumb impressiou was obtained by fraud, nor has he attempted to discharge the onus of showing that consideration was not correctly entered in the bahi. The decision of the learned appellate Court having been based on an error of the principles governing the question of onus in a case of this kind its decision cannot stand. The plaintiffs are clearly, upon the facts before us, entitled to their decree, and accordingly we must accept the appeal, set aside the judgment of the lower appellate Court and restore that of the trial Court with costs throughout.

Appeal accepted.

(1) A. I. R. 1925 Lah. 471=6 Lah. 470 (F.B.).

A. I. R. 1926 Lahore 654

HARRISON AND DALIP SINGH, JJ.

Jholi and *another*— Plaintiffs— Appellants.

v.

Khazana and *another*—Defendants—Respondents.

Second Appeal No. 2134 of 1922, Decided on 9th June 1926, from the decree of the Dist. J., Hoshiarpur, D/- 8th June 1922.

(*a*) *Custom (Punjab)—Adoption.*

Onus of proving that a person of a different *got* can be validly adopted is on him who sets up the adoption. [P 655, C 1]

(*b*) *Limitation Act, Art.* 118—*Suit to contest gift in adopted son's favour ignoring adoption is not covered by Art.* 118.

A suit by reversioner that a gift to an alleged adopted person does not bind his reversionary interest is not barred by Art. 118 : *A. I. R.* 1924 *P. C.* 137, *Foll.* Plaintiff in such suit can treat the adoption as nullity and contest only the gift. [P 655 C 1]

(*c*) *Custom (Punjab)—Adoption—Evidence Act, S.* 115.

Consent of father and grandfather to an adoption does not bind the son or grandson. [P 655,C2]

Mehr Chand Mahajan—for Appellants.

Sohan Lal—for Respondents.

Judgment.—The plaintiffs sued for a declaration that an alienation by way of gift made by Defendant No. 2 in favour of Defendant No. 1 of which mutation was effected on the 21st November 1919, would not affect their reversionary rights after the death of Defendant No. 2. The defendant denied that the land was ancestral or the plaintiffs were heirs of Defendant No. 2 and he also pleaded that the suit was time-barred because he (Defendant No. 1) had been adopted by Defendant No. 2 in 1894 and the father and the grandfather of the plaintiffs acquiesced in the adoption. The learned District Judge held that Defendant No. 1 was pichhlag (stepson) of Defendant No. 2 and that he could be validly adopted with the consent of the collaterals. On this he held that as there was a valid adoption about the year 1894 the recent gift created no new cause of action and, therefore, must be upheld : *Khushal Singh* v. *Kanda* (1) was relied on by him as authority for the above proposition.

In second appeal the plaintiffs have contended that the learned District Judge is wrong on the question of custom. The necessary certificate has been attached.

Now the sole evidence on which the learned District Judge relied for the proposition that a person of a different *got* could be adopted with the consent of the collaterals was the oral evidence of P. W. 1. Fateh Singh P. W. 1, states that a person of a different *got* can be adopted if there is no collateral or if none of the collaterals existing are willing to be adopted. There is no proof on the record that none of the

(1) [1920] 5 L. L. J. 63=56 I. C. 931.

collaterals existing were unwilling to be adopted and it is clear that there were collaterals existing. The evidence, therefore, on which the learned Judge relied does not apply to this case. The riwaj-i-am of the district, question No. 75, states that as a general rule only a collateral can be adopted, but that a person of the same *got* may be adopted. It is further stated that a person of a different tribe cannot be adopted. Now no doubt it is not clearly stated that a person of the same tribe, but of a different *got* cannot be adopted, but the implication would clearly be that such a person cannot be adopted. In Rattigan's Digest of Customary Law, paragraph 35. and in remark 1 at page 69 of the latest edition, it is stated that at any rate for the eastern and central districts of the Punjab the general custom is against the adoption of a person of a different *got*. The onus, therefore, of proving that a person of a different *got* could be adopted lay on the defendant and we do not consider that that onus has been at all discharged by the evidence produced by him and we, therefore, hold that it is not proved that the adoption of Defendant No. 1 was valid.

Counsel for the respondent has also argued that the suit is barred by limitation under Art. 118. His argument is that as the adoption was not wholly void though it might be declared voidable at the instance of the reversioners, Art. 118 barred the suit though in form it was a suit for a declaration to set aside a subsequent gift and not a suit to set aside an adoption. This matter on which there has been controversy must now be held to be concluded by the decision of the Privy Council in *Kalyandappa* v. *Chanbasappa* (2). Put shortly the question in that case was whether in a suit to recover possession which involved the decision of an issue as to the validity or invalidity of the defendants' adoption Art. 118 applied. Their Lordships of the Privy Council held that Art. 118 did not apply and that it applied only to a suit to obtain a declaration and that it was at the option of the reversioner to treat an adoption as a nullity and bring a suit for possession whether the transaction in question was void or voidable. We, therefore, hold that the suit is not barred by limitation.

(2) A. I. R. 1924 P. C. 137=48 Bom. 411.

It was next contended that the father and grandfather of the present plaintiffs had consented to the adoption. The learned District Judge has held as a finding of fact that they did so consent. Counsel for the appellants has contended that even if they did consent their consent does not bind their son and grandson respectively. For this proposition he has relied on the Full Bench ruling reported as *Harvans Singh* v. *Harnam Singh* (3). Counsel for the respondents has not cited anything to the contrary, and we, therefore, hold in this case that the present plaintiffs are not bound. On these findings it follows that the plaintiffs had a cause of action on account of the mutation which was sanctioned on the 21st November 1919, and we accordingly accept the appeal and decree the plaintiffs' claim. In the circumstances of the case we leave the parties to bear their own costs throughout.

Appeal accepted.

(3) [1898] 84 P. R. 1898 (F. B.).

A. I. R. 1926 Lahore 655

ADDISON, J.

Mohammad Azmat Ullah Khan—Petitioner.

v.

Abdul Hamid—Respondent.

Civil Miscellaneous Petition No. 345 of 1926, Decided on 3rd July 1926, for review of the judgment of Addison, J., D/- 8th February 1926, in Second Appeal No. 1350 of 1925.

Civil P. C., O. 47, R. 1—"Any other sufficient reason" must be ejusdem generis to those specified.

The words "for any other sufficient reason" in O. 47, R. 1, must be reasons ejusdem generis with the other specified grounds for review. That an order appealed from has been set aside by the Court passing it on review is no ground to review the order passed in appeal.

[P. 656, C. 2]

Barkat Ali—for Petitioner.

J. N. Aggarwal—for Respondent.

Order.—The plaintiff brought a suit in the Court of the Senior Subordinate Judge, Simla, which was dismissed on certain preliminary issues. On appeal the District Judge of Ambala held that it had been wrongly dismissed on the preliminary issues and remanded the suit under O. 41, R. 23, Civil P. C., for disposal in accordance with law. He

further directed that the plaintiff should get his costs in his Court and in that of the Senior Subordinate Judge. The defendant presented a second appeal against this decision in this Court. In the 6th ground of appeal it was said that the learned District Judge should not have awarded costs as the costs always abide the event. The second appeal was dismissed by me, and at the same time I directed that the plaintiff would get his costs in the High Court and in the Court of the District Judge, but not in the Court of first instance.

Against my decision a petition for review has been presented on the ground that the District Judge himself, by order dated the 21st May 1925, reviewed his order as to costs and directed that the costs in his Court should be costs in the case. Now this order passed by the District Judge in review was made on the same day on which the second appeal was presented here. The defendant's counsel may thus not have known then of the order passed on review by the District Judge, but he certainly ought to have known before the 2nd or 3rd February 1926, when the appeal was heard by me. The order passed by the District Judge on review was a consent order, though it does not follow that the plaintiff knew when he consented that an appeal had been filed or was about to be filed in the High Court. The matter was not brought to my notice by either of the counsel who argued the appeal before me, and it is not known whether the record of the review proceedings before the District Judge was or was not here at that time. That record was not called for, nor was the copy of the order of the District Judge passed on review filed in the High Court, nor was this order ever alluded to.

There is no doubt that my order now takes the place of the order passed by the District Judge in review: see *Rukmani Ammal* v. *Narasimha Iyer* (1). The sole question is whether there is any sufficient reason for review. There is no doubt that the appellant's counsel could have brought the matter to my notice, for it was his client who obtained the review order from the District Judge. There is no mistake or error apparent on the face of this Court's record, and it has been held that the words "for any other sufficient reason" in O. 47, R. 1, Civil P. C., must be reasons ejusdem generis with the other specified grounds for review. In my opinion, therefore, there is no ground for review, and I dismiss the petition for review. I leave the parties to bear their own costs.

Petition dismissed.

(1) [1921] 41 M. L. J. 54=14 L. W. 85=63 I. C. 730=(1921) M. W. N. 487.

A. I. R. 1926 Lahore 656

HARRISON, J.

Mt. Bholan—Accused—Petitioner.

v.

Matu—Respondent.

Criminal Revision No. 656 of 1926, Decided on 18th June 1926, made by the S. J., Karnal, on 19th April 1926.

Criminal Trial — Statement by party that his case is closed not bearing party's signature—Statement cannot be presumed to be correct.

Where the statement by a party that he has closed his case bears no signature of the party, the statement is not recorded in accordance with law and there is no presumption of its correctness. [P 656, C 2]

Shamair Chand—for Petitioner.

REFERENCE:

Grounds. — Appellant says all his witnesses were not examined by the Magistrate, though they were present in the Court. This appears to be correct. The woman had called four witnesses and all four were duly served with summonses. There is a statement of complainant on the record that her evidence was closed but it does not bear her signature or thumb mark or any certificate (as all statements should do) that it was read over to the complainant. The statement being not recorded in accordance with law there is no presumption of its correctness. The applicant is a poor ignorant woman and most probably even if she made the statement that she closed her evidence she did so under some misconception.

It is recommended, therefore, that the order of the Magistrate may be set aside and the case remanded for full inquiry.

Order.—For the reasons given by the learned Sessions Judge I set aside the order of the Magistrate dismissing the application and discharging the accused. I order a full inquiry and all the evidence of the applicant to be heard and recorded.

Revision accepted.

A. I. R. 1926 Lahore 657

ADDISON. J,

Bhagat Singh—Defendant—Appellant.

v.

Karam Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 503 of 1925, Decided on 8th May 1926, from a decree of the Addl. Dist. J., Lahore, D/- 26th November 1924.

(a) *Custom (Punjab)—Alienation—Necessity—Alienee need go no further if he pays antecedent debt due to third person.*

Ordinarily speaking, payment of an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that the previous debt was in itself incurred for necessity. *A. I. R.* 1924 *Lah.* 41 and 1 *Lah.* 472, *Foll.* [P 657 C 2]

(b) *Custom (Punjab)—Alienation—Necessity.*

A reversioner is not competent to challenge alienations beyond the period of limitation merely because they are included in a sale in respect of which he has a subsisting right of ehallenge. [P 658 C 1]

(c) *Custon (Punjab)—Alienation—Debt payable by vendee to prior mortgagee not paid as not due—Court is not relieved from finding as to legal necessity.*

In a suit for setting aside a sale on the ground of want of legal necessity the mere fact that a portion of consideration was a debt to be discharged by the vendee and he has not paid it up to the time of the suit does not relieve the Court from recording a finding as to the necessity for that part of consideration.

Shamair Chand—for Appellant.

Badri Nath for *Mehr Chand*—for Respondents.

Order.—11th July 1925—Bur Singh sold by a registered deed dated the 17th June 1921, 72 kanals 15 marlas to Bhagat Singh, lambardar, for Rs. 5,700. One Karam Singh brougnt the usual declaratory suit challenging the alienation on the ground of want of necessity and consideration. The Court of first instance decreed the suit and the Additional District Judge dismissed the appeal. Against his decision this second appeal has been filed.

The one point taken in the appeal is that the District Judge should have decided the question as to whether the item of Rs. 2,900, which was left with the vendee to redeem a prior mortgage, dated the 9th January 1919, for Rs. 2,900, in favour of Ram Singh, was for neceessity. The mortgage in question eannot be redeemed for ten years, i. e., until 1929. For that reason the vendee had not paid that sum to the prior mortgagee. The Additional District Judge found that it was not necessary to discuss this item at all as the mortgage had not yet been redeemed.

This finding is clearly wrong. The other items making up the sum of Rs. 5,700 have been held to be without necessity, and the finding as regards them is final and this is not now challenged. It is, however, contended that the sale cannot be set aside for the lifetime of the vendor and that the vendee is entitled now to a clear finding as to how much of the consideration of the sale-deed was for necessity. It is obvious that the vendee can pay the sum of Rs. 2,900 any time he likes within the period of limitation and the mere fact that he has not paid it does not mean that the District Judge should not have given a finding as to whether the sale was for necessity as regards the item of Rs. 2,900. Ordinarily speaking, payment by an alienee of an antecedent debt due to a third person is justified and there is no necessity for the alienee to go further and to prove that ths previous debt was in itself incurred for necessity; *Mahammad Hassan-ud-din* v. *Saif Ali Shah* (1). The same principle is laid down in *Jhandu* v. *Niamat Khan* (2), where it was added that.

An alienee, however, paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the antecedent debts or act in bad faith.

At the time of the sale the prior mortgage was more than two years old and it does not appear that it has ever been challenged. It is necessary for the District Judge to come to a finding as to whether this item of Rs. 2,900 was for necessity. I accordingly remand the case to him under O. 41, R. 25, Civil P. C., for a finding on this question. Return to be made within three months.

Order.—(8th May)—My order dated 11th July 1925, should be read as part of this order The District Judge has made a return to the remand. He has held that Bur Singh's career as a spendthrift could not be said to have begun till the 6th August 1919, and that the mortgage in question was entered into on the 9th January 1919, when the mortgagee could not have known that he was

(1) A. I. R. 1924 Lah. 41=4 Lah. 122.
(2) [1920] 1 Lah. 472=54 I. C. 842.

a spendthrift. It follows from this that there was a just antecedent mortgage-debt in existence at the time of the sale in favour of the appellant and the sale must. therefore be held to be for necessity as regards the amount of that mortgage, namely, Rs. 2,900. The District Judge has further found that a suit could not now lie against the prior mortgagee to have it declared that it was without consideration and necessity as such a suit would be barred by time. This is also correct.

It is clear from *Bur Singh* v. *Hazara Singh* (3) that a reversioner is not competent to challenge mortgages beyond the period of limitation merely because they are included in a sale in respect of which he has a subsisting right of challenge. It is not necessary to quote other rulings on this point. This disposes of the argument of the respondent that the appellant should be considered as the vendee only of the equity of redemption. There is a long course of rulings of this Court that such a sale as the present of which part of the consideration was liability to repay the previous mortgage can be held to be for necessity as regards the previous mortgage.

I. accordingly, accept the appeal; and modifying the order of the Courts below, grant the plaintiff a decree that the sale in suit shall not affect his reversionary rights except to the extent of Rs. 2,900 provided that that sum is paid to the prior mortgagee in possession. If, however, this sum is not paid the plaintiff will be entitled to get possession without any payment to the appellant though, of course, in that case the question of payment to the prior mortgagee will remain.

Parties will bear their own costs throughout.

Decree modified.

(3) A. I. R. 1922 Lah. 275=3 Lah. 99.

** A. I. R. 1926 Lahore 658

SHADI LAL, C. J.

Fazal Din—Plaintiff—Petitioner,

v.

Dial Singh and *others*—Defendants—Respondents.

Civil Revision No. 631 of 1925, Decided on 12th June 1926, from an order of the Dist: J., Gujranwala, D/- 24th June 1925.

** *Civil P. C., S.* 104 (1) (*f*)—*Section contemplates only final orders—Order remitting award for re-consideration according to reference—Order is not final and no appeal lies.*

Section 104 (1) (f) contemplates only final orders and an order remitting an award to the arbitrators with the direction that they should make a fresh award in compliance with the agreement of reference does not amount to refusal to file an award under S. 104 (i) (f) and is not appealable.

Tek Chand and *Shuja-ud-din*—for Petitioner.

G. C. Narang—for Respondents.

Judgment.—On the 24th January, 1924, Fazal Din presented an application, under para. 20 of the Second Schedule to the Civil P. C. to the Subordinate Judge of Gujranwala asking to file an award made without the intervention of the Court. This application was contested by Dial Singh on various grounds, and the trial Judge held that the award was made, not by five arbitrators as required by the agreement of reference, but by only three, and could not, therefore be, enforced. The learned Judge accordingly remitted the award to the arbitrators with the direction that they should meet together and make a fresh award in compliance with the agreement of reference.

The question for determation is whether an appeal lay against the order of the Subordinate Judge. Now S. 104, sub-S. (1), Cl. (f), gives a right of appeal against an order filing or refusing to file an award in an arbitration without the intervention of the Court; and it seems to me that the Legislature enacting this provision contemplated that only the final order made on an application under para. 20 of the Second Schedule to the Civil. P. C. should be appealable. It is clear that the Court entertaining such an application can pass one of the two orders: (1) either it accepts the award, and in that case it makes an order directing it to be filed in Court; (2) or it declines for some reason recognized by law to accept the award, and it then passes an order refusing to file it. In either case, the proceedings before the Court come to an end and the application no longer remains pending.

Now, in the case before me the order of the Subordinate Judge did not put an end to the case. The application is still pending and I do not think that the Legislature contemplated that an intermediate order of that description should

be appealable. The matter is not free from difficulty, and the learned counsel on both sides have expressed their inability to cite any decided case having a bearing upon the question. I have, however, examined carefully the order passed by the Court of first instance and am not prepared to hold that it amounts to an order refusing to file an award within the meaning of Cl. (f) of S. 104, sub-S. (1) of the Civil P. C.

Mr. G. C. Narang for the respondents, however, contends that the Subordinate Judge had no right to remit for re-consideration an award made without the intervention of the Court, and that he should have made an order refusing to file the award. There is considerable force in this contention, but the only question before me is whether an appeal lay to the District Judge from the order of the Court of first instance, and on that point my answer is in the negative. Accordingly I accept the application for revision and set aside the order of the District Judge.

Application accepted.

A. I. R. 1926 Lahore 659

BROADWAY AND COLDSTREAM, JJ.

Natha Singh—Defendant—Appellant.

v.

Mohan Singh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 12 of 1925, Decided on 8th July 1926, from an order of the Dist. J., Gurdaspur, D/- 13th November 1924.

(a) *Civil P. C., S. 100—Finding as to ancestral nature of property based on conjectures can be set aside.*

A finding as to the ancestral nature of certain property based upon mere conjectures and presumption is liable to be set aside in second appeal : *A. I. R. 1924 L. 465, Foll.* [P. 660, C. 2]

(b) *Evidence Act, S. 114—Sons recorded as jointly owning land—Presumption that their father owned it cannot be raised.*

The mere fact that in the revenue records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that that person was the owner of the land.

Tek Chand and *Mehr Chand Mahajan*—for Appellant.

G. S. Salariya and *Anant Ram* for *C. H. Oertel*—for Respondents.

Judgment.—One Jiwan Singh had three sons : Charat Singh, Jaimal and Fateh Singh. Hira Singh and Mt. Singh Naraini, widow of Dula Singh, are the descendants of Charat Singh. They sold 862 kanals of land situated in Mouza Chhawala to Natha Singh for Rs. 1,500 on the 27th July 1915. Natha Singh is a descendant of Fateh Singh. On the 10th August 1915 Hira Singh executed a deed in which he recorded the fact that he had, some two years previously, adopted Gurdial Singh, the grandson of Natha Singh, and had appointed him his heir. On the 27th July 1921, Mahan Singh and Kher Singh, descendants of Jaimal Singh, instituted a suit asking for a declaration that the alienation by Hira Singh and Mt. Naraini, in favour of Natha Singh, would not affect their reversionary rights. On the 8th August 1921, all the descendants of Jaimal Singh, including those two above named, instituted a suit asking for a declaration that the adoption of Gurdial Singh by Hira Singh was invalid and would not affect their reversionary rights. Both suits were contested and among other pleas one plea raised was that the property was not ancestral and that, therefore, the suits were incompetent. The learned Subordinate Judge held that none of the lands was ancestral and dismissed both suits.

The plaintiffs thereupon preferred appeals to the learned District Judge who held that the lands in Mouza Chhawala were ancestral qua the plaintiffs and that the lands in Chak Sharif were not. The appeals were accordingly accepted so far as the suits related to the lands in Mouza Chhawala and both suits were remanded to the Court of first instance for the disposal of the remaining points at issue between the parties. Against these orders of remand Natha Singh and Gurdial Singh, through Natha Singh have preferred appeals to this Court through Mr. Tek Chand who has urged that the finding as to the property in Mouza Chhawala being ancestral is bad as being based on no evidence and as having been arrived at on mere conjectures and erroneous inferences drawn from the facts found. Mr. Salariya for the respondents in these two appeals raised the preliminary objection that the finding as to the ancestral nature of the land was one of fact which

could not be examined in second appeal. This objection will be dealt with in due course.

Now, what has been found by the learned District Judge is that Jiwan Singh was brought to this village of Chhawala by Mai Sada Kuar, widow of Sardar Gurbakhsh Singh Manwala "in order te improve cultivation and arrange for paying the land revenue." It has also been found that certain Gujars who were the owners of land had mortgaged their rights to some Brahmins from whom Jiwan Singh had purchased the mortgagee rights. It has also been found that Jiwan Singh had contracted with the Sikh Government for the payment of the entire revenue of this village Next, it was found that after the death of Jiwan Singh certain litigation took place in 1852 between the Gujars and Fateh Singh, son of Jiwan Singh. The Gujars claimed to be the proprietors of the entire village, while Fateh Singh claimed that his father, Jiwan Singh, had been brought there for cultivating and arranging for the payment of land revenue by Mai Sada Kuar and that he had subsequently acquired the mortgagee rights of the Brahmins. The matter was settled, apparently arbitrarily, by arbitrators, the result being that Fateh Singh was declared to be the owner of the lands in his possession and the Gujars the owners of the lands that they possessed. Subsequently Fateh Singh's brothers, Charat Singh and Jaimal Singh obtained one-third each of the land possessed by Fateh Singh after some litigation. It is on these facts which, of course, cannot be examined in second appeal, that the learned District Judge has came to the conclusion that Jiwan Singh must have been and, therefore, was, the owner of the land in suit. He says in his judgment as follows :

The plain fact is that Fateh Singh and subsequently Charat Singh and Jaimal Singh were recorded as owners of the land which they occupied, and they occupied it because their father Jiwan Singh before them had paid the land revenue and arranged its cultivation, two very important elements in ownership.

These elements are, no doubt, important, but neverthless do not constitute ownership in themselves. Having arrived at this conclusion the learned District audge held that the land in this village of Chhawala was ancestral. In *Basanti* v. *Kabul Singh* (1) a Division Bench of this Court held that a finding as to the ancestral nature of certain property based upon mere conjectures and presumption is liable to be set aside in second appeal. It seems to me that the present case is one in which this principle applies. The learned District Judge on certain findings of fact has assumed that Jiwan Singh was the owner of the land. This assumption is based on nothing but conjectures; indeed having regard to the facts as found by the learned District Judge the inferences justifiable would appear to be diametrically opposed to those drawn by him. I consider, therefore, that this is a case in which this Court can and should interfere.

I would, therefore, accept both these appeals; and, setting aside the orders of remand restore the decrees passed by the Court of first instance. The appellants are entitled to their costs throughout. In the appeal relating to the adoption the respondent filed certain cross-objections challenging the finding that the land in Chak Sharif was not ancestral. Mr. Salariya urged that in arriving at this finding the learned District Judge has referred to a document which has not yet been proved. This appears to be the case, but eliminating that document there is clearly no evidence to support the assertion that the land was ancestral. The mere fact that in the revenue records Jiwan Singh's sons are shown as jointly owning land in Chak Sharif is not sufficient to raise a certain presumption that Jiwan Singh was the owner of the said land.

The cross-objections are, therefore, dismissed.

Appeals accepted.

(1) A. I. R. 1924 Lah. 465.

A. I. R. 1926 Lahore 660

JAI LAL, J.

Jai Dev Singh -Defendant — Petitioner.

v.

Jai Singh and *another*—Plaintiffs—Respondents.

Civil Revision No. 186 of 1926, Decided on 18th June 1926, from the order of the Senior Sub-J., Rawalpindi, D/- 1st February 1926.

Civil P. C., S. 16 (d)—Suit for recovery of money due on a pro-note and for declaration that decretal amount is a charge on a certain property falls under the section.

A suit for recovery of a certain amount on a promissory note and also for declaration to the effect that the decretal amount is a charge on a certain property mortgaged as collateral security for the payment of the debt secured by the promissory note falls within the purview of S. 16 (d), 40 *Bom.* 337 *Foll.* [P 661 C 1]

M. S. Bhagat—fot Petitioner.

Judgment.—This is a petition for the revision of the order of the Senior Subordinate Judge of Rawalpindi, dated the 1st of February 1926, whereby he held that he had jurisdiction to try the suit. In the alternative it is prayed that under S. 24 of the Civil Procedure Code the suit be transferred to a competent Court in the District of Ambala. During the arguments the learned counsel stated that Ambala was mentioned owing to a mistake and that the petitioner intended to apply for the transfer of the suit to the district Simla. Notice was issued to the respondent, but they have not appeared before me.

The suit was for the recovery of Rs. 24,100 on a promissory note. It was alleged in the plaint that the defendants deposited the title-deeds of a house called Rose Cottage, situated in Simla by way of collateral security for the repayment of the loan secured by the promissory note. A decree for Rs. 24,100 against the defendant was prayed for, and also for a declaration to the effect that the decretal amount is a charge on the property mortgaged. The suit was instituted in the Court of the Senior Subordinate Judge at Rawalpindi. The defendant objected to the jurisdiction of the learned Judge, but the latter held that he had jurisdiction to try the suit. This view of the learned Judge appears to be wrong because it is a suit in which a prayer is made for a declaration of the lien on immovable property situated within the jurisdiction of the Senior Subordinate Judge of Simla. Such a suit falls within the purview of S. 16 (d) of the Civil Procedure Code see *Sitabai* v. *Lakshmibai* (1). I hold, therefore, that the Senior Subordinate Judge of Rawalpindi had no jurisdiction to try the suit as framed and consequently I accept this petition, set aside the order of the learned Judge and direct him to return the plaint to the plaintiff for being presented in the Court having jurisdiction to try the suit. The respondents will pay the costs of the petitioner in this Court.

Petition accepted

(1) [1916] 40 Bom. 337=32 I. C. 985=18 Bom. L. R. 67.

A. I. R. 1926 Lahore 661

HARRISON, J.

Bela Singh—Plaintiff—Appellant.

v.

Ganda Singh and *another*—Defendants—Respondents.

Second Appeal No. 1015 of 1926, Decided on 15th July 1926, from the decree of the Dist. J., Amritsar, D/-1st February 1926.

Civil P. C., O. 2, R. 2—First suit for interest alone though principal due — Second suit for principal is barred—T. P. Act S. 68.

Where the mortgagee could also claim principal in a suit for interest, a further suit for principal is barred under O. 2, R. 2. [P 662, C 1]

Nand Lal and *Kishore Chand* — for Appellant.

B. A. Cooper—for Respondents.

Judgment.—On the 12th April 1918 the defendants in this case mortgaged some land for Rs. 900 principal and undertook to pay interest at 12 per cent. Two suits for interest were instituted and decrees obtained; and in the third suit, instituted on the 16th April 1924, the plaintiff claimed interest coupled with possession or principal. It has been held by both the lower Courts that there was no condition regarding possession and as regards the the principal it has been held that the present suit is barred under O. 2, R 2, Civil Procedure Code, as the plaintiff could have sued for his principal at the same time as he sued on previous, occasion for interest. The admitting order was as follows:

Dr. Nand Lal states that he only claims interest and no possession or principal.

In spite of this he has confined his remarks to claiming principal and endeavouring to show that the case is not governed by *Kundanmal* v. *Allah Dad* (1). At the outset he admitted that at the time the previous suits for interest were instituted the principal could have

(1) [1910] 19 P. R. 1910 = 36 P. W. R. 1910= 5 I. C. 821=167 P. L. R. 1910.

also been claimed. He subsequently urged that because there was a penal clause, which has been held to be a clog on redemption by which a curious condition was made that the mortgagor was not entitled to raise money from elsewhere for the purpose of redemption for a period of five years, though he might redeem out of his own pocket, no suit for principal lay until the expiry of the five years, and this in spite of the fact that he admits that this clause must be ignored in reading the terms of the mortgage. Even if it were a valid clause, the fact that the second suit for interest was instituted more than five years after the execution of the deed would have deprived the argument of any possible force it might otherwise have had. His subsequent contention is in his own words, that

> as he could have instituted a suit at any time before the lapse of sixty years' limitation from a minute after the execution of the mortgage deed in any month of Chet.

Order 2, R. 2, does not apply and this he develops as meaning that where no period is fixed in a mortgage the mortgagee is not entitled to sue for his principal, nor I understand is the mortgagor entitled to sue for redemption until there has been some sort of offer and refusal. I am of opinion that both the lower Courts have taken a perfectly correct view of the case and that *Kundanmal* v. *Allah Dad* (1) applies, the test being whether, where admittedly a suit for interest was brought, a claim could also have been based on the same cause of action for the principal. I find that it could. As to the point specifically mentioned in the admitting order, no fruit can be gathered from a dead tree, and once the principal has ceased to be, in the sense that it cannot be realized, no interest can be realized from its corpse.

The appeal is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Lahore 662

HARRISON, J.

Butta Singh--Accused--Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 516 of 1926, Decided on 12th June 1926, reported by the S.-J., Attock, on 23rd March 1926.

(a) *Criminal P. C., S. 89—Applicant for restoration must prove both want of notice and that he had not absconded.*

It is only when the applicant for restoration of property shows both that he had not absconded and that he had not proper notice that the property can be restored.

*(b) *Criminal P. C., S. 89—Necessary facts within two years must be proved.*

It is not only necessary to make the petition, but also to prove the necessary facts within the period of two years : 15 *Bom. L. R.* 175, *Rel. on.* [P. 663, C. 1]

(c) *Criminal P. C., Ss. 530 and 439--Land wrongly attached under S. 88—High Court can interfere under inherent powers though not under S. 89, Criminal P. C.*

Where land has been attached under S. 88 without a warrant, the High Court would interfere under inherent powers to set right the irregularity though not according to S. 89.

Anant Ram Khosla--for Petitioner.

Muhammad Rafi--for the Crown.

Order.--This case has been reported by the Sessions Judge of Campbellpur who recommends that certain proceedings taken in the year 1922 under Ss. 87 and 88, Criminal P. C., should be quashed. The facts are that a case was pending against one Buta Singh from 1921 onwards. In 1922 proceedings were taken under Ss. 87 and 88, and in these proceedings there were certain irregularities. On the 28th March 1925 Buta Singh appeared and applied to Malik Muhammad Amir Khan, Honorary Magistrate, to have the property released which was still in the hands of the receiver. This application was dismissed as barred by time and the appeal to the District Magistrate was dismissed on the ground that it was barred by time from the date of the Magistrate's order. A petition for revision was accepted by the Sessions Judge and the District Magistrate then dismissed the appeal on the merits holding that it was barred by time under S. 89 of the Criminal P. C. The Sessions Judge has now forwarded the proceedings and pointed out the irregularities, the first of which is said to be that the terms of S. 87 were not strictly complied with in that 30 days' interval was not allowed and only one copy was duly published. As regards one copy more than 30 days were allowed ; as regards the second less ; and two were duly published and not one. The second irregularity is more serious. The warrant directed land in Ganda Kas to be attached. The Gir-

dawar, however, attached lands in Ganda Kas and Mallowali villages.

As to the first point it is clear that it cannot be urged as the applicant has not shown that he did not abscond; for it is only when he shows both that he had not absconded and that he had not proper notice that the property can be restored. Counsel contends that as the application was summarily dismissed it was impossible to prove that he had not absconded. This is so; but the terms of S. 89 are strict, and as held in *Nilkanth Ramchandra* v. *Kulkarni In re* (1) it is not only necessary to make the petition, but also to prove the necessary facts within the period of two years. The only point and a difficult one is whether I can interfere in the matter of the land wrongly attached in Mallowali village. In accordance with the strict terms of S. 89 I cannot, but I think under S. 530 (a) read with S. 439 as an act which is clearly illegal has been committed, and land has been attached regarding which no warrant was issued, it will not be right for me to overlook this grave irregularity, and in the exercise of my inherent power I release such part of the property as is situated in Mallowali.

For the rest the application is dismissed.

Application allowed in part.

(1) [1913] 15 Bom. L. R. 175=19 I. C. 333.

A. I. R. 1926 Lahore 663

SHADI LAL, C. J.

Ghulam Hussain—Petitioner.

v,

Mt. Hakam Bibi—Respondent.

Criminal Revision No. 604 of 1926, Decided on 25th June 1926, reported by the S. J., Sialkot, on 6th April 1926.

Criminal P. C., S. 488 (8) — *Marriage taking place within Magistrate's jurisdiction does not give him jurisdiction under Cl.* (8).

The mere fact that the marriage of the parties had taken place within the jurisdiction of a Magistrate is not sufficient to give the Magistrate jurisdiction under S. 488 (8).

[P 663, C 2, P 664, C 1]

Facts.—Mt. Hakim Bibi, wife of applicant, Ghulam Hussain, applied for maintenance under S. 488, Criminal P.C., on 23rd December 1924, in the Court of a Magistrate at Sialkot. Ghulam Hussain could not be served and was proceeded against ex parte and Mt Hakam Bibi was awarded Rs. 10 per mensem as maintenance by order dated 16th April 1925. Certain property of Ghulam Hussain was subsequently attached in execution of the maintenance order when, on 2nd November 1925, he applied for the order of maintenance being set aside. He alleged that Mt. Hakam Bibi had been abducted some years ago, that he brought a complaint in a Court at Gujranwala but could not proceed with it as Mt. Hakam Bibi could not be traced, that she was leading an adulterous life and hence the order passed under S. 488, Criminal P. C., was not justified. He further pleaded that the order was bad in law inasmuch as the Magistrate at Sialkot had no jurisdiction to entertain the application under Cl. (8) of S. 488, Criminal P. C., According to the latter clause proceedings may be taken:

against any person in any district where he resides, or is, or where he last resided with his wife.

In the present instance Ghulam Hussain was residing in the Gujranwala district at the time the application under S. 488, Criminal P. C., was made and he had also last resided with his wife in the same district. The Magistrate at Sialkot had, therefore, no jurisdiction to pass the maintenance order. Finally the applicant expressed his willingness to take back Mt. Hakam Bibi to his house. Mt. Hakam Bibi, however, refused to go with him on the ground that he had ill-treated her and turned her out. The lower Court did not deal with the question of jurisdiction but held that Mt. Hakam Bibi had sufficient justification for refusing to live with Ghulam Hussain. Ghulam Hussain's application for the setting aside of the maintenance order was accordingly dismissed and he filed the present application.

Grounds.—The first question for consideration is that of jurisdiction. The application of Mt. Hakam Bibi dated 23rd December 1924, shows that Ghulam Husesain was residing at that time in Chak Ram Das in the Gujranwala district. There are no allegations in the application to show that the Sialkot Courts had jurisdiction to entertain the application. It was, no doubt, alleged that Hakam Bibi's marriage with Ghulam

Hussain had taken place in the Sialkot district. But this is not sufficient to give jurisdiction under Cl. (8) of S. 488, Criminal P. C.

Counsel for the respondent was unable to cite any authority in support of his contention that the mere fact that the marriage took place in this district was sufficient to confer jurisdiction. I am therefore of opinion that the maintenance order passed ex parte by the Magistrate at Sialkot on 16th April 1925 was without jurisdiction and is, therefore, liable to be set aside on this ground.

On merits also, I do not think that the Magistrate was justified in holding that Mt. Hakam Bibi had shown good reasons for refusing to live with Ghulam Hussain. Ghulam Hussain has produced evidence to the effect that he filed a complaint of abduction in a Court at Gujranwala in the year 1920 and that he could not proceed with it as the whereabouts of Mt. Hakam Bibi as well as the offender in that case could not be traced. Ghulam Hussain was only able to produce a copy of the entry in a register of Gujranwala Criminal Courts in support of his allegation as the record of the case had been destroyed. I do not see why his oral evidence, coupled with the entry, should not be held to be reliable.

Under the circumstances it cannot, therefore, be said that the complainant had neglected his wife for a long period and, therefore, she was justified in refusing to live with him. Mt. Hakam Bibi's own statements have not been consistent. In the original application she only alleged that she had been ill-treated and turned out by Ghulam Hussain. In the present proceedings on Ghulam Hussain's application she stated that Ghulam Hussain had illicit connexion with her sister-in-law and, therefore, she left his house. She has given no good reasons for keeping silent for so many years and has also expressed her willingness to be divorced. In view of these facts it seems likely that Mt. Hakam Bibi has applied for maintenance merely in order to bring pressure upon her husband and get a divorce.

For the above reasons, I submit the records to the High Court with the recommendation that the ex-parte order of maintenance dated 16th April 1925 passed against the applicant, should be set aside.

Order.—For the reasons recorded by the learned Sessions Judge I hold that the Magistrate had no jurisdiction to pass the maintenance order against the petitioner Ghulam Hussain. Accordingly I accept the recommendation and quash the order of maintenance made on the 16th April 1925.

Order quashed.

A. I. R. 1926 Lahore 664

ZAFAR ALI, J.

Mohammad Din and *others*—Defendants—Petitioners.

v.

Chandu Ram and *others*—Plaintiffs—Respondents.

Civil Revision No. 424 of 1925, Decided on 15th June 1926, from an order of the Dist. J., Dera Ghazi Khan, D/- 23rd January 1925.

(a) *Civil P. C., S. 152—Costs by pro forma defendants.*

Court has inherent power to correct an error in judgment that a certain party being pro forma defendant was not liable to pay costs.

(b) *Civil P. C., S. 152—Appeal.*

Order under S. 152 is not appealable.

Devi Dayal and *N. C. Mehra*—for Petitioners.

Amar Nath Chona—for Respondents.

Judgment. — The plaintiffs were mortgagees of the share of Defendants Nos. 1 to 4 in a joint holding and sued for possession thereof. As stated by plaintiffs' counsel the Defendants Nos. 5 to 8 were impleaded only because they were co-sharers in the holding. After recording this statement of the plaintiffs' counsel, the trial Court (Subordinate Judge, Dera Ghazi Khan) made a note below it that the Defendants Nos. 5 to 8 were pro forma defendants, and the plaintiffs' counsel put his signature below that note. They were, as a matter of fact, in no way concerned in the dispute between the plaintiffs and the Defendants Nos. 1 to 4 and so they did not evince any interest in the litigation. It was thus patent on the record that they were merely pro forma defendants and were not responsible to the plaintiffs in

any respect. The plaintiffs' suit was eventually decreed with costs. But the Subordinate Judge failed to note in his judgment that the Defendants Nos. 5 to 8 were not liable to pay plaintiffs' costs. The result of this omlssion was that the plaintiffs proceeded to attach certain property of Defendants Nos. 5 to 8 to recover the costs. This evidently was an abuse of the process of Court.

Defendants Nos. 5 to 8 then made an application under Ss. 152 and 153 of the Civil P. C., inviting the attention of the Subordinate Judge to the mistake in the judgment arising from an accidental omission and praying for correction thereof. The Subordinate Judge evidently failed to apply his mind to the application, and not realizing its purport refused it on the ground that the defendants should apply for a review of the judgment and decree. The Defendants Nos. 5 to 8 then applied for a review of the order refusing the application and then succeeded in making it clear to the Subordinate Judge that there was a mistake in the judgment which required correction. But the Subordinate Judge was so obsessed with the idea that the correction involved a review of the judgment that he levied from the petitioners the Court-fee payable on an application for review of judgment and then corrected the mistake. The plaintiffs then appealed to the District Judge who set aside the Subordinate Judge's order holding :

(1) that the question whether Defendants Nos. 5 to 8 were pro forma defendants was a debatable one ;

(2) that the application for review of the order refusing the application under Ss. 152 and 153 was, as a matter of fact, an application for review of the original judgment ; and

(3) that the order passed on the application for review was bad in law as it had been made without notice of the application to Defendants Nos. 1 to 4.

(1) and (2) are clearly erroneous ; (3) is technically correct ; but the order being after all one under S. 152 was not appealable. The Subordinate Judge has inherent power to make that correction and should have made it on the first application. The fact that he made the correction on the second application could not have the effect of excluding it from the category of a correction under S. 152.

I, therefore, accept this application for revision, set aside the order of the District Judge and restore that of the trial Court. The plaintiffs to pay the petitioners' costs throughout.

Application accepted.

A. I. R. 1926 Lahore 665

SHADI LAL, C. J.

Chhajju Mal—Defendant—Petitioner.

v.

Tarloki Nath—Plaintiff—Respondent,

Civil Revision Petition No. 154 of 1926 Decided on 12th June 1926, from an order of the Senior Sub-J., Amritsar, D/- 22nd January 1926.

Civil P. C., O. 32, R. 7—Agreement to refer to arbitration on behalf of minor—Express sanction is necessary—Award set aside by minor—Minor cannot retain benefit under arbitration.

An agreement by a next friend or a guardian ad litem to refer any matter in controversy in a suit to arbitration is an agreement within the meaning of R. 7, and express sanction of the Court is necessary in order to bind the minor, and therefore where the award is set aside on the ground that the agreement to refer was not entered with express sanction of the Court, the minor cannot retain the benefit which has accrued to him under the arbitration proceedings.

[P 665 C 2 ; P 666 C 1]

Judgment.—During the pendency of an action brought by the plaintiff, Tarloki Nath, against his uncle for the rendition of accounts, the parties made an application asking the Court to refer their dispute to the arbitration of Lala Sarb Dayal. The plaintiff was a minor, and the application was signed on his behalf by his mother who acted as his next friend. The Court accepted the application and made an order of reference accordingly.

On the 28th August 1925, the arbitrator made his award, but it has been set aside at the instance of the minor on the ground that no express sanction of the Court was obtained by his next friend to enter into the agreement to refer the dispute to arbitration. The question whether an agreement by a next friend or a guardian ad litem to refer any matter in controversy in a suit to arbitration is an agreement within the meaning of O. 32, R. 7 of the

Civil P. C., is a debatable one, but the Punjab Chief Court has answered the question in the affirmative and has held that the express sanction of the Court is necessary in order to bind the minor. I am not, therefore, prepared to hold that the order of the Subordinate Judge setting aside the award can be interfered with on revision.

The plaintiff cannot, however, retain the benefit which has accrued to him under the arbitration proceedings. It appears that during the course of the proceedings the defendant deposited Rs. 5,615 in the Punjab National Bank to the credit of the plaintiff, and also sold certain outstandings to the plaintiff for Rs. 2,500 and delivered the books relating to those outstandings. When the award is set aside, the defendant is entitled to restitution in integrum. This reasonable request of the defendant has been rejected by the learned Subordinate Judge on the specious argument that the defendant had admitted before the arbitrator his liability to pay Rs. 5,615 to the plaintiff. Now, a party to a litigation may, in order to put an end to the dispute, be prepared to make certain admissions, but if the arrangement, which alone constituted the reason for the admissions, fails, he is entitled to ask the Court to restore him to his original position.

The order of the lower Court is wholly unjust and cannot be sustained. Accordingly I accept the application for revision and cancel the sale of the outstandings in favour of the plaintiff and direct the return of the books to the defendant. I further declare that the defendant shall be entitled to recover from the Bank Rs. 5,615 deposited by him during the arbitration proceedings. Parties shall bear their own costs in this Court.

Application accepted.

A. I. R. 1926 Lahore 666

JAI LAL, J.

Gian Chand — Judgment-debtor—Petitioner.

v.

Sunder Das and *another*—Respondents.

Civil Revision Petition No. 730 of 1925, Decided on 17th May 1926, from an order of the Small Cause Court J., Amritsar, D/- 25th August 1925.

(*a*) *Civil P. C., O. 21, R. 16—Transferee.*

There is no express provision of the law under which a transferee of a decree can be certified as such by the Court ; 38 *All.* 289. *Dist.* [P 666, C 2]

(*b*) *Civil P. C., O. 21, R. 16—Objection by judgment-debtor that transferee is his benamidar must be decided by Court.*

When an objection is taken by the judgment-debtor that the ostensibie transferee of the decree is really a benamidar on his behalf and is not, therefore, competent to execute the decree it is the duty of the Court to adjudicate upon this objection : 4 *L. W.* 534, *Rel. on.* [P 667, C 1]

Bishan Nath—for Petitioner.

Din Dayal Kapur for *Anant Ram*—for Respondents.

Judgment.—A decree was passed in favour of the firm known as Daya Ram-Sohan Lal against the firm known as Karam Chand-Gian Chand. This decree was purchased by Sunder Das. There is apparently another firm which is called Sunder Das-Gian Chand, which is owned by Sunder Das and Gian Chand, the last named being also a partner in the judgment-debtor firm. Sunder Das applied for the execution of the decree An objection was raised by Gian Chand that Sunder Das, though nominally the purchaser of the decree, is really a benami holder for the firm of Sunder Das-Gian Chand and that, therefore, he was not competent to execute the decree by virtue of the prohibition contained in in O. 21, R. 16 of the Civil P. C. The learned Judge of the Small Cause Court, Amritsar, has dismissed Gian Chand's objection and has ordered the execution of the decree to proceed against him at the instance of Sunder Das. The ground for his decision, as given in the judgment, is that Sunder Das has already been certified by the Court as the transferee of the decree and that the sale deed being in his favour alone the Court is not concerned with the question as to whether the purchase-money came from Sunder Das's own pocket or joint funds of Sunder Das and the judgment-debtor.

The learned Judge has not made it clear under what circumstances Sunder Das was certified as the purchaser of the decree. Counsel for the respondent has not been able to give me any information on that point. No express provision of the law has been cited before me under which a transferee of a decree can be certified as such by the Court. The learned counsel for the respondent

relied upon *Taj Singh* v. *Jagan Lal* (1) In that case the transferee of the decree applied for the execution of the decree against the judgment-debtor. No objection having been taken to his right to execute the decree the Court proceeded with the execution thereof. Later another application for execution was filed by the transferee and the judgment-debtor objected to his right to execute the decree. It was held that the conduct of the judgment-debtor in not objecting to the execution of the decree at the instance of the transferee on the previous occasion precluded him from raising the objection. That case is clearly distinguishable from the one before me. It has not been shown that in this case the right of the transferee to execute the decree has been recognized by the Court on an application for execution being made by him and after notice to the judgment-debtor.

Regarding the second ground of the decision of the learned Judge it is sufficient to remark that when an objection is taken by the judgment-debtor that the ostensible transferee of the decree is really a benamidar on his behalf and is not, therefore, competent to execute the decree it is the duty of the Court to adjudicate upon this objection. This the learned Judge has declined to do. *Mohammad Rowther* v. *Pichai Rowther* (2) supports the contention of the petitioner.

I accept this petition, set aside the order of the learned Judge of the Small Cause Court, and remit the case to him with directions to proceed with the case in accordance with law with due regard to the remarks herein made. Costs of these proceedings will abide the result.

Petition accepted.

(1) [1916] 38 All. 289=33 I. C. 234=14 A. L. J. 370.
(2) [1916] 4 L. W. 534=35 I. C. 624.

A. I. R. 1926 Lahore 667

SHADI LAL, C. J.

Demello—Accused—Petitioner.

v.

Mrs. Demello—Complainant—Respondent.

Criminal Revision No. 600 of 1926, Decided on 25th June 1926, reported by the S. J., Ambala, on 3rd April 1926.

(a) *Criminal P.C., S. 342—Summons case.*

Section 342 is applicable to a summons case as well as to a warrant case : *A. I. R.* 1923 *Cal.* 164 and *A. I. R.* 1925 *Cal.* 480, *Foll.* [P. 667, C. 2]

(b) *Criminal P. C., S. 342—Non-compliance with the section vitiates trial.*

Non-compliance with the provisions of S. 342, amounts to illegality vitiating the trial : *A.I.R.* 1924 *Lah.* 104, *Rel. on.*

Grounds.—This a petition for revision of the order of the Magistrate, 1st Class, Ambala Cantonment, ordering the petitioner, a guard in the East Indian Railway, to pay Rs. 75 a month as separate maintenance to his wife, the respondent, under S. 488, Criminal P. C.

In this petition it is objected that the Magistrate failed to comply with the provisions of Cl. (3) of S. 488, Criminal P. C., inasmuch as the Magistrate failed to inquire from the respondent if she was willing to live with the petitioner when the latter at the beginning of the case, offered to maintain her. On 23rd October 1925, Mr. Demello had expressed in Court his willingness to keep her. This omission of the Magistrate to ask the wife if she is willing to live with her husband and to consider the grounds of her refusal (if any) would make any order of maintenance illegal : vide *Subbaya* v. *Ambamma* (1).

Another objection raised is that after the close of the prosecution evidence on 2nd December 1925, the Magistrate omitted to examine the petitioner thus contravening the provisions of S. 342, Criminal P. C. This contention appears correct. There has been an infringement of the statutory requirements by non-compliance with S. 342 of the Criminal P. C., and therefore, following *Allu* v. *Emperor* (2) the trial is not only irregular but illegal and not cured by S. 537. Criminal P. C.: vide also *Emperor* v. *Nabu* (3).

Section 342, Criminal P.C., is applicable to a summons case as well as to a warrant case *Surendra Lal Saha* v. *Issamuddi* (4) and *Gulzari Lal* v. *Emperor* (5). This illegality vitiates the trial.

A further objection is raised that the lower Court has contravened the provisions of Ss. 242 and 243 by cross-examining the accused at length. Ss. 242 and

(1) [1909] 9 Cr. L.J. 501=2 I.C. 155.
(2) A. I. R. 1924 Lah. 104=4 Lah. 376.
(3) A. I. R. 1926 Sind 1.
(4) A. I. R. 1925 Cal. 480=51 Cal. 933.
(5) A. I. R. 1923 Cal. 164=49 Cal. 1075.

243 only require the particulars of the accusation to be stated to the accused and the latter to be asked if he has any cause to show why he should not be convicted. It will be seen that he was practically cross-examined, 14 questions being put to him at the very commencement of the proceedings before a single witness had been examined. The procedure of the Magistrate in thus questioning the accused, although improper and irregular, does not necessarily vitiate the trial.

As regards ground No. 6, it appears that after the close of the defence the lower Court allowed a Will to be filed on behalf of Mrs. Demello without examining the accused or giving him any opportunity to rebut this piece of evidence. This Will, however, has not been exhibited nor has it been proved. It should be removed from the file and returned to the petitioner. It has not been referred to in the judgment nor does it appear for what purpose it was put in. The other objections raised also do not effect the validity of the trial.

For the above reasons I am constrained to accept the petition for revision and submit the case to the High Court with a recommendation that the order of the Magistrate should be set aside and the case remanded so as to enable the Magistrate to comply with the provisions of S. 488 (3) and 342, Criminal P. C., and to dispose of the case according to law.

Order.—While I am not prepared to endorse all the reasons recorded by the learned Sessions Judge in support of his opinion that the trial of the case by the Magistrate was illegal, I consider that the omission of the Magistrate to examine the accused, as required by S. 342, Criminal P.C., vitiated the order granting maintenance. Accordingly I accept the recommendation made by the Sessions Judge, and, setting aside the order of the Maglstrate, direct him to try the case in accordance with law.

Order set aside.

A. I. R. 1926 Lahore 668

HARRISON AND DALIP SINGH, JJ.

Debi Sahai and *another*—Defendants—Appellants.

v.

Ramji Lal and *another*—Plaintiffs—Respondents.

Second Appeal No. 146 of 1922, Decided on 29th June 1926, from a decree of the Addl. Dist. J., Rohtak, D/- 26th October 1921.

(a) *Civil P. C., S. 11—Prior declaratory suit when plaintiffs' title by adverse possession not matured—Subsequent suit on basis of adverse possession is not barred.*

Where at the time of a declaratory suit the plaintiff his not acquired title by adverse possession, has subsequent declaratory suit on the basis of adverse possession is not barred by res judicata. [P. 669, C. 1]

(b) *Civil P. C., O. 21, R. 36—Rule applies only to person holding exclusive possession and not bound by decree—Case of joint holding is covered by R. 35.*

Rule 36 applies only to a case where the property is in exclusive possession of a person not bound by the decree and entitled to remain in possession. It does not apply to a case of a joint holding which is covered by R. 35.

[P, 669, C. 2]

Shamair Chand—for Appellants.

I. C. Chopra—for Respondents.

Judgment.—In 1892 Jhabar, father of one of the plaintiffs-respondents Mansa, mortgaged 2/8ths share of a joint holding with the defendants-appellants. In 1897 there was a second mortgage of 1/8th share of the joint holding by Jhabar in favour of the defendants-appellants. Both mortgages contained clauses of conditional sale. In 1900 before the Land Alienation Act came into force, two decrees for foreclosure were obtained by the defendants-appellants on these mortgages. The decrees were executed against Mansa plaintiff-respondent, son of Jhabar. On the 4th of July 1905 possessson was delivered to the defendants appellants of 1/8th share. Mansa was summoned but refused to come. The Girdawar's report shows that joint possession (*dakhal mushtarkah taur par*) was given to the defendants-appellants. On the 30th of July 1905, possession was given of the 2/8ths share (*mushtarkah dakhal diya gaya*). Mansa was informed of this. The mortgages mentioned the shamilat rights in the land. The decree was silent about the shamilat rights. In 1909 the defendants-appel-

fants applied for amendment. Notice was issued to Mansa, and on the 20th of December 1909 the decrees were amended. Mansa was present.

The defendants-appellants next applied for possession of shamilat rights and got possession on the 10th of October 1911. Mansa was absent though served. Two mutations were sanctioned on the 11th of November 1911. Mansa seems to have been present. In 1907 an application was made for partition. Mansa objected and was ordered to bring a civil suit. On the 25th of January 1911 Mansa brought a civll suit 'asking for a declaration that he was owner of half the land. The 'Revenue Assistant, sitting as a civil Court, dismissed the suit on the 29th of May 1911. There was no appeal. The plaintiff admitted in his plaint that the defendants-appellants had obtained possession (*dakhal hasil kar liya hai*). Ramji Lal, the other co-sharer and now a plaintiff-respondent, was a defendant in the suit. In it he stated that the suit did not concern him as his half share was separately possessed by him.

In October 1920 the present plaintiffs-respondents brought a suit for a declaration that they alone were owners of the joint holding in equal shares. The trial Court decreed the suit holding that possession under the decree was only symbolically given to the defendants-appallants, and as the conditions required by S. 264 of the old Civil P. Code, corresponding to O. 21, R. 36, of the present Code had not been complied with, and as the defendants admitted that no actual possession had been given them, therefore, no actual possession at all had been given to them, that the plaintiffs-respondents had acquired title by adverse possession since the decree and, therefore, the plaintiffs were sole owners of the joint holding and were entitled to possession. The learned District Judge dismissed the defendants-appellants' appeal.

On second appeal counsel for the defendants-appellants has contended : firstly, that the dismissal of the declaratory suit of Mansa in 1911 makes the present suit res judicata by virtue of Explanation 4 of S. 11. This contention has no force. At that date the decree may not have been capable of execution, but Mansa had not accquired a title by adverse possession and, therefore, could not have based his suit on any such ground. We, therefore, overrule this contention.

Next, counsel has argued that the Courts are mistaken in holding that S. 264 of the old Procedure Code applied to the facts of the case. It seems to us that this contention is correct. S. 264 of the Code applied only to a case where the property was in exclusive possession of a person not bound by the decree and entitled to remain in possession. It did not apply to a case of a joint holding which was covered by S. 263. The difficulty arising in a case of a joint holding in applying S. 263 has now been remedied by the Legislature by amending the corresponding order and rule namely, O. 21, R. 35. The report of Girdawar shows clearly that such possession as the circumstances of the case made possible was given to the defendants-appellants. In fact the Girdawar's report shows that joint possession was given to the defendants-appellants on both decrees. It is true that one of the defendants admitted in Court that he had never really held possession " because he himself does not plough land, " but we do not consider that the defendant by this meant that he never got joint possession actually, All that he meant to say was that he himself did not plough the land and, therefore, might be said never to have been in actual physical possession of the land in the sense of ploughing it himself. We hold, therefore, that S. 263 applied and that joint possession of the 3/8ths share of tbe joint holding was given to the defendants-appellants. Now, if the defendants-appellants once become co-sharers in the land there is nothing to show that they ever lost that possession or that the possessession of their co-sharers became adverse to them. Various rulings have been cited by the learned counsel for the appellant, but it is unnecessary to consider these rulings in view of the finding to which we have come as regards the delivery of possession to the defendants-appellants.

We, therefore, accept the appeal and dismiss the plaintiffs' suit with costs throughout. Ramji Lal will pay his own costs only and Mansa shall pay both his own and those of the defendants-appellants throughout.

Appeal accepted.

* A. I. R. 1926 Lahore 670

HARRISON AND DALIP SINGH, JJ.

Firm Nathu Mal-Manohar Lal—Plaintiffs—Appellants.

v.

Firm Lachmi Narain-Gauri Shanker—Defendants—Respondents.

First Appeal No. 340 of 1924, Decided on 12th May 1926, from a decree of the 1st Cl. Sub.-J., Delhi, D/- 26th November 1923.

* (a) *Civil P. C., S. 11—Provisions are exhaustive.*

The provisions of S. 11 are exhaustive and therefore the general principles of res judicata cannot be extended to cases which are within the terms of S. 11: 29 *Cal.* 707 (*P. C.*), *Rel. on.* [P. 671 C. 1]

(b) *Interpretation of statutes—A Code is exhaustive of matters dealt with.*

It is of the essence of a Code to be exhaustive on matters with which it deals: 29 *Cal.* 707 (*P. C.*), *Foll.* [P. 671 C. 1]

Sardha Ram and *Mehar Chand Mahajan*—for Appellants.

Tek Chand and *Jagan Nath Bhandari*—for Respondents.

Judgment.—The firm of Nathu Mal-Manohar Lal, plaintiff-appellants, bought from the firm of Lachmi Narain-Gauri Shankar, defendants-respondents, seven bales of chocolate chintz No. 1062 of the office of Goardhan Dass-Ram Gopal on the 20th of August 1918. The same firm also purchased from the same defendants twelve bales of zephyr prints on the 27th of August 1918. The due date of both these contracts was the 7th of October 1918. On the 11th of October 1918 the defendants gave a notice to the plaintiff firm regarding both contracts asking them to pay for and take delivery of the goods, otherwise they would be auctioned within ten days. The plaintiffs gave no reply; but on the 20th of October 1918 they sent Rs. 2,500 to the defendants. On the 1st of November 1918, a further sum of Rs. 1,650 was sent. On the 20th November 1918 Rs. 1,000 were also sent to the defendants. The defendants auctioned the zephyr prints on the 24th of December 1918. The chocolate chintz were auctioned on 31st December 1918.

The present defendants brought a suit on the 3rd of January 1919 about the zephyr prints. They allowed the present plaintiffs a credit of Rs. 5,150 to wards the zephyr prints contract and they sued for the balance, namely Rs. 3,173-14-3, after adding the sum obtained in the re-sale. That suit was tried by the Subordinate Judge, Second Class, and was dismissed. It was held that the present plaintiffs had paid Rs. 5,150 towards the chocolate chintz and not towards the zephyr contract and that, therefore, the present defendants were not entitled to charge the Rs. 5,150 to that contract. It was also held that there had been no sale and that there had been no extension of the due date by mutual agreement between the parties. The appeal to the District Judge was dismissed by him and the appeal to the High Court was also dismissed.

The plaintiffs have now brought the present suit against the defendants alleging that they themselves were always ready and willing to perform the contract regarding the chocolate chintz; that they had paid Rs. 5,150 to the defendants towards this contract; that they sent a cheque for Rs. 10,125 to the auctioneers and were willing to pay any further sum found due on this contract; that the defendants refused to deliver the goods and, therefore, they were entitled to the return of Rs. 5,150 principal, Rs. 891 on account of interest up to date of suit and 7 annas on account of two notices, the total claim being Rs. 6,042-3-6. The defendants, in their written statement, again pleaded that the sum of Rs. 5,150 had been paid towards the price of zephyr prints and that in any event, as the plaintiffs had not appropriated the sum to either contract at the time of payment, the defendants were entitled to so appropriate it. Various other pleas were also raised into which it is unnecessary to enter. The learned Subordinate Judge dismissed the suit holding that the defendants were legally entitled to appropriate the sum of Rs. 5,150 to the zephyr prints contract and that the plaintiffs had failed to prove that they had intimated the appropriation of this sum to the chocolate contract. He also held that the decision in the previous case was not res judicata.

The plaintiffs have appealed and their counsel has contended before us: firstly, that the question as to whether the sum of Rs 5,150 was appropriated to the

chocolate contract is res judicata between the parties. It is conceded that S. 11 of the Civil P. C. does not in terms apply ; but it is contended that S. 11 is not exhaustive and on general principles the matter is res iudicata between the parties. The short answer to this question is that the general principles of res judicata cannot be extended to cases which are within the terms of S. 11. S. 11 distinctly provides that in the case of two suits the matter is only res judicata if, inter alia, the Court trying the former suit was competent to try the present suit. The general principles of res judicata cannot, therefore, apply where the Code itself has defined the conditions under which res judicata will arise. As held by their Lordships of the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (1), it is of the essence of a Code to be exhaustive on matters with which it deals and that S. 13, now S. 11, of the Civil P. C. has made it essential for the first Court to be competent to try the subsequent suit, we, therefore, repel this contention. (The judgment then examined the evidence and continued). The plaintiffs have failed to prove that Rs. 5,150 were appropriated by them at the time of payment to the chocolate chintz or that they intimated the same to the defendants. The defendants were, therefore, entitled to appropriate the payments to the zephyr contracts. It follows, therefore, that the tender by cheque of Rs. 10,125 was not a tender of the proper amount due on the chocolate contract and, therefore, the plaintiffs have not shown that they were ready and willing to take the goods. It becomes, therefore, unnecessary to enter into any of the other points raised in this appeal. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1902] 29 Cal. 707=29 I. A. 196=6 C. W. N. 825=8 Sar. 323 (P. C.).

A. I. R. 1926 Lahore 671

BROADWAY, J.

Fattu and *another*—Pltffs—Appellants.

v.

Nur Mohammad and *others*—Defendants—Respondents.

Second Appeal No. 598 of 1926, Decided on 3rd June 1926, from a decree of the Dist. J., Ludhiana, D/- 21st November 1925.

Custom (Punjab)—Widow in possession of ancestral property can alienate to pay son's just debts.

A widow in possession of ancestral property can alienate it to pay off the just debts of her deceased son : 4 *P. R.* 1913, *Dist.*

R. C. Soni and *Zafrulla Khan*—for Appellants.

Ghulam Mohi-ud-Din—for Respondents.

Judgment.—One Mt. Tabo sold certain land on the 4th July 1923. The collaterals of her deceased husband instituted a suit asking for a declaration that the alienation would not affect their reversionary rights as it had been made without consideration and necessity, and in the alternative, praying to be allowed to take possession of the land as pre-emptors. The alienees claimed that the sale had been made for necessity and consideration and that the plaintiffs had lost any right to pre-empt that they might have had owing to the fact that prior to the sale the notice required by the Pre-emption Act had been issued. The trial Court found that the entire consideration had passed but that necessity for Rs. 109 only had been proved, and granted the plaintiffs a decree declaring that the alienation would not be binding upon them beyond the sum of Rs. 109, which they had to pay to take possession when succession opened out. The alienees appealed and the learned District Judge came to the conclusion that necessity for the entire amount had been established and, therefore, dismissed the suit with costs throughout. Against this order the plaintiffs have come up to this Court in second appeal through Mr. Zafrulla Khan and I have heard Mr. Ghulam Mohi-ud-Din for the respondents.

So far as the actual items themselves are concerned only two were challenged before me. The first one was a sum of Rs. 115, and the second a sum of Rs. 292. It was urged that there was no evidence to support these amounts and that the decision arrived at by the lower appellate Court was, therefore, not binding on the Court. Mr. Ghulam Mohi-ud-Din for the respondents has pointed out that there is evidence which, if believed, would warrant the conclusion arrived at and I must, therefore, hold that there is no force in this contention.

It is next urged that the entier sale was without necessity inasmuch as the

property was ancestral and as the debts which had been paid off were debts incurred by the alienor's son and had not been made a charge on the property. Mt. Tabo was under no legal obligation to pay her son's debts and, therefore, there could be no necessity for this sale. Reference was made to *Jagdip Singh* v. *Bawa Narain Singh* (1), *Miker* v. *Chhaju Ram* (2) and *Bhambul Devi* v. *Narain Singh* (3) and certain other authorities which are not reported in the authorized reports, one of these, a decision of my own in which I gave effect to the proposition now contended for.

There are, however, other Division Bench authorities which appear to take the view that a widow is empowered to pay off the just debts incurred by her husband, and in order to raise the funds for their payment to alienate ancestral property in her possession. The matter is not free from difficulty as it may well be argued that all that was laid down in *Jaydip Singh* v. *Bawa Narain Singh* (1), was that once ancestral property comes into the hands of reversioners it cannot be followed in their hands for the payment of debts incurred by the last male owner but not charged on the property itself. I am also inclined to think that the question is to some extent one of custom; for, although Mr. Zafrulla Khan stated that his clients admitted that Mt. Tabo was empowered to alienate the property of her deceased son for necessary purposes, the question involved in this case was whether the purposes for which this alienation had been made could be regarded as falling within the meaning of necessity. The weight of authority appears to be in favour of the view taken by the lower appellate Court, and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) [1912] 4 P. R. 1913=173 P. L. R. 1912=15 I. C. 866=160 P. W. R. 1912.
(2) [1919] 17 P. R. 1919=49 I. C. 281=6 P. W. R. 1919 (F. B.).
(3) [1915] 39 P. R. 1915=103 P. W. R. 1915=29 I. C. 572=8 P. L. R. 1916.

A. I. R. 1926 Lahore 672

HARRISON AND DALIP SINGH, JJ.

Lakhu Ram and *others*—Plaintiffs—Appellants.

v.

Wali—Defendant—Respondent.

Second Appeal No. 2914 of 1922, Decided on 29th June 1926, from the decree of the Dist. J., Lyallpur, D/- 24th August 1922.

Practice—Appellate Court—Two inferences possible—One chosen by lower Court should be accepted.

Where two inferences can be drawn in the construction of a document, the one chosen by the lower Court should be accepted: 46 *I. C.* 794 and 21 *Bom.* 91, *Foll.*

H. D. Bhalla—for Appellants.

Muhammad Iqbal—for Respondent.

Judgment.—The only question in this second appeal is whether the District Judge has placed the right interpretation upon certain words which occur in a sale deed executed in the year 1894, by which the father of the plaintiff purchased a large area of khewat land together with the shamilat deh muzkur. The whole difficulty in the case has arisen from the insertion of this word "muzkur." There is both shamilat deh and shamilat patti in the village, and in 1915 the shamilat patti was partitioned and one-half of the whole fell to the defendant, the son of the vendor. It was not until 1920 that the present suit was launched. The contention is that the word "shamilat" includes both the shamilat deh and shamilat patti, the rival interpretation being that the word "shamilat" means "shamilat deh." We know very little of the subsequent history of the village and neither side can tell us whether the shamilat deh was partitioned and what its area was.

Taking everything into account we are not prepared to say that the view taken by the District Judge was wrong and where two inferences can be drawn, we accept the alternative chosen by him as laid down in *Madho Rao* v. *Govind Bhat* (1) and *Raja Ram* v. *Ganesh Hari* (2). We therefore dismiss the appeal: and, under the peculiar circumstances of the case we leave the parties to bear their own costs throughout.

Appeal dismissed.

(1) [1918] 46 I. C. 794.
(2) [1897] 21 Bom. 91.

A. I. R. 1926 Lahore 673

FFORDE AND CAMPBELL, JJ.

Kundan and *others*—Plaintiffs—Appellants.

v.

Secretary of State for India and *others*—Defendants—Respondents.

Second Appeal No. 1205 & 1278 of 1922. Decided on 11th May 1926, from a decree of the Dist. J., Ambala, D/- 6th February 1922.

(a) *Custom—Punjab—Widow's estate—Although there are no relations of her husband, she takes only a widow's estate—In the absence of custom personal law will apply and Crown can impeach unauthorised alienation by her.*

Under Customary Law absence of a Hindu widow's husband's blood relations does not make her position essentially different from what it would be under her personal law, (23 *I. C.* 127) *not Foll.*) and in the absence of any special custom with regard to the nature of the estate she takes, Hindu law will apply. Therefore Crown will have the power to impeach any unauthorized alienation made by her during her life time. 8 *M. I. A.* 529 (*P. C.*) *Ref.* [P 675 C 2]

(b) *Custom—Punjab—Crown is not party to a custom.*

Crown is no party to custom and custom cannot affect its rights and privileges in any way. [P 674 C 1]

Nanak Chand—for Appellants.

C. H. Cardon Noad—for Respondents.

Judgment.—One Ram Saran died about 1908 and his widow, Mt. Indi, succeeded to possession of his landed estate. In 1909 this woman executed a document which was registered and which stated that her husband's land had been gifted to his ancestors by the ancestors of Girdhar and others, that Girdhar and others had paid off certain debts due by her husband ; and that in consideration of those facts she declared that they would succeed to the land after her death and undertook not to alienate it. Mt. Indi remarried in March, 1914. She reported the fact to the Revenue Authorities stating that she had lost her rights in Ram Saran's estate by so doing and asking that the estate should be mutated in the revenue records in the name of one Ran Singh whom she alleged to be a relative of Ram Saran and his heir. The upshot, however, of the mutation proceedings was that the Assistant Collector entered the land as having escheated to Government on the termination of Mt. Indi's estate.

This was in July 1915. In September 1915 Mt. Indi executed in favour of Ran Singh and registered a formal deed of gift of the land calling him her husband's collateral. Two suits were then brought against the the Secretary of State for possession of the land, one by Girdhar and others and the other by Ran Singh. Mt. Indi was joined as a defendant in each suit and the plaintiff in each was made a defendant in the other. Both suits have been dismissed and the dismissals have been upheld on appeal. Both unsuccessful plaintiffs have come to this Court on second appeal and this judgment will deal with the two appeals, No. 1205 of 1922 by Girdhar and others and No. 1278 of 1922 by Ran Singh. Mt. Indi has died since their institution.

No. 1205 can be disposed of very shortly Girdhar and others brought forward the document of 1909 and asserted : firstly, that the land had been gifted by their ancestors and, therefore, reverted to them and secondly, that they had paid off Rs. 400 of debts due from Ram Saran. They claimed that in these circumstances Mt. Indi was entitled to declare them heirs after her remarriage or death. The trial Court held that they had failed to prove the gift by their ancestors and had made no attempt to prove any payment of debts. The second finding was not contested in appeal to the District Judge, nor is it challenged in the memorandum of appeal to this Court. We have refused to listen to any argument attacking it. The first finding was affirmed by the District Judge and is one of fact which cannot be interfered with in second appeal. In the memorandum of second appeal the appellants ask for a decree on the ground that as proprietors of the village of the same *got* as Ram Saran they have a reversionary right superior to Government. This is a new point taken neither in the plaint nor in the appeal to the District Court, aud we decline to allow it to be raised now. The suit was based simply and solely on the document of 1909.

The learned District Judge has given these appellants a certificate under S. 41 (3) Punjab Courts Act, propounding as a question of custom

whether there is any custom by which the Crown is not competent to object to a disposition or grant of property made by the widow of the last male owner.

This does not help them in any way. In the first place, the certificate should not have been granted because

so far from the evidence regarding this so called custom being conflicting and uncertain there is no evidence about it on the record at all. Secondly, there is no question in this case of the Crown objecting to any disposition by Mt. Indi. The Crown is in possession of the property in suit and it is the task of the plaintiffs to show that they have a better title under which they can turn the Crown out. Thirdly, the Crown is no party to custom and custom cannot affect its rights and privileges in any way. The appeal of Girdhar and others must fail.

Ran Singh (the appellant in No. 1278) based his suit on the allegations (a) that Mt. Indi by her re-marriage had forfeited all rights to hold her first husband's property, and (b), that he (Ran Singh) being a near relative of Ram Saran was entitled to succeed as heir. This claim has been finally disposed of by the lower appellate Court's finding of fact that Ran Singh was no relation of Ram Saran. In second appeal his case is that Mt. Indi did not forfeit her estate by re-marriage, that it was an absolute estate, and that the gift to him of September 1915, was a vaild one. This is based upon para. 5 of the plaint which was in the following terms :

> Mt. Indi, Defendant No. 2, on 3rd September, 1915, also executed and completed a deed of gift of the disputed land in favour of the plaintiffs who was a collateral. For this reason too the plaintiff is entitled to the land.

We are asked to interpret this as an alternative claim, in the event of the plaintiff not being held to be a relative of Ram Saran, that Mt. Indi did not lose her estate on re-marriage as asserted at the commencement of the plaint, and that her gift after marriage to the plaintiff, a stranger, was one which she was competent to make. To do so appears to be stretching the meaning of words somewhat unduly, but since the learned District Judge has allowed this attitude to be taken before him and has granted the certificate to be described presently, we proceed to deal with the contention.

The learned District Judge held that Mt. Indi's rights ceased on her re-marriage, that any person entitled to succeed on her death could succeed on her re-marriage, that the Secretary of State was better entitled to do so than Ran Singh and that the gift was a nullity because it was made after re-marriage. He, nevertheless, under S. 41 (3) of the Punjab Courts Act, granted Ran Singh a certificate

> that there is a question regarding validity of a custom involved viz., whether the Crown can object to the alienation by gift made by a widow after her re-marriage to a stranger in favour of a person who is not a collateral of her husband.

This certificate again is defective. The Crown never objected to the gift. The Crown was in possession when the gift was made and has since resisted attempts at ouster by the donee. The real question at issue is whether, in the circumstances of the case, by custom Mt. Indi became full owner on Ram Saran's death and whether she remained so after re-marriage. The learned District Judge considered this matter doubtful, but he had no right to give the certificate certifying that the evidence regarding it is conflicting and uncertain because there is no evidence. It is conceded by Mr. Sheo Narain for the appellant that under Hindu Law (including, necessarily, S. 2 of the Hindu Widows' Re-marriage Act) Mt. Indi acquired a limited estate for life on the death of Ram Saran and lost it entirely on re-marriage, and that, as pointed out by their Lordships of the Judicial Committee in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (1) the non-existence of any blood relations of Ram Saran (a fact alleged by both parties) made not the slightest difference to the limited nature of her life-interest and to the restrictions on her powers of alienation. He argued, however, that under custom the estate of a widow, where there are no relations of the deceased husband, is a full estate unaffected by re-marriage. The only authority cited in support of this proposition is a dictum delivered obiter in *Allah Ditta* v. *Gauhra* (2) that a widow's estate is a limited one, but limited only for the benefit of the reversioners, and that, when there are none, she is to all intents and purposes a full owner.

We are unable to read this observation as a considered pronouncement intended to be authoritative that a Hindu widow governed by customary rules is a full owner when her deceased husband has left no relatives, and that her position

(1) [1859-61] 8 M. I. A. 529=2 W. R. 61=1 Suther 476=1 Sar. 820 (P. C.).
(2) [1914] 3 P. R. 1914=23 I. C. 127=129 P. L. R. 1914.

is essentially different from what it would be under her personal law. Had this been the case, the learned Judges would not have used the words "to all intents and purposes," and obviously the intents and purposes must vary with the particular circumstances of every particular case. For instance, in the present case, the Crown has intervened and is actually in possession in pursuance of its claim to escheat. In *Allah Ditta* v. *Gauhra* (2) the contest was between a relation of the widow herself who secured possession after her death and the village proprietors who were held to have to prove any title to the reversion. The effect of a claim by the Crown was never remotely contemplated.

Moreover, there are other dicta to the contrary by Division Benches of this Court. One is *Dalipa* v. *Dallu* (3) :

So far as we are aware it has never been suggested that the life-interest in an estate which custom grants to a widow is in any way wider than the interest which she takes under Hindu Law.

Another is in *Diyal Kaur* v. *Mehtab Kaur* (4) :

There is no ground for supposing that a widow who holds a life interest in an estate under custom has any wider power of alienation than a widow who holds a similar estate under Hindu Law.

A third was delivered in *Gobinda* v. *Nandu* (5), expressing approval of what is quoted above from *Diyal Kaur* v. *Mehtab Kaur* (4) and the head-note of the report states that the Judges have laid down that

the estate of a widow under Customary Law is subject to the same restriction as that of a widow under Hindu Law.

We are asked to disregard these observations because each of the three dealt with a situation where the last male owner had left behind him female relatives or male relatives through females who under Hindu Law would have been entitled to succeed as bandhus. It is pressed upon us that the remarks must inevitably have been inspired by the facts of the particular cases with which the Judges were dealing. If we are to take this view, precisely the same criticism applies to Mr. Sheo Narain's own case, *Allah Ditta* v. *Gauhra* (2), and it must go out too.

This leaves us with no evidence at all regarding the position of Mt. Indi in respect of Ram Saran's estate under custom, and in accordance with S. 5 of the Punjab Laws Act the rule of decision which we must adopt is Hindu Law. Under that law not only is the gift to Ran Singh after the second marriage invalid, but the Crown would have had the power to impeach an unauthorized alienation by Mt. Indi before her re-marriage : *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (1), already referred to.

Indeed a reference to S. 5 of the Punjab Laws Act makes it quite clear that *Allah Ditta* v. *Gauhra* (2) does not state a correct general rule and that the correct rule is this : The nature of a Hindu widow's estate in the Punjab is to be determined by what the evidence before the Court proves to be the custom applicable to the parties concerned. If there is no proof of a customary rule the question is to be decided in accordance with Hindu Law, subject to any modification of that law by custom which may be proved. Ran Singh's appeal fails also, and both appeals are dismissed without costs.

Appeals dismissed.

(3) [1921] 4 L. L. J. 336.
(4) [1921] 3 L. L. J. 458.
(5) A. I. R. 1922 Lah. 217=5 Lah. 450.

A. I. R. 1926 Lahore 675

MARTINEAU, J.

Santosh Singh and *others*—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 1550 of 1925, Decided on 22nd January 1926, from an order of the S. J., Rawalpindi, D/- 8th September 1925.

Criminal P. C., S. 106—*Security cannot be demanded for keeping peace on conviction under Penal Code, S.* 452.

The offence under S. 452 is not one involving breach of the peace end security cannot be demanded for keeping the peace under S. 106, Criminal P. C.: 2 *Lah.* 279, *Rel. on.*

[P. 675, C. 2, P. 676, C. 1]

Mukand Lal Puri—for Petitioners.

Des Raj Sawhney—for the Crown.

Judgment.—There is no sufficient reason for interfering with the convictions, but I set aside the orders passed under S. 106, Criminal P. C., as being illegal inasmuch as the offence under S. 452, Indian Penal Code, of which petitioners have been convicted is not one involv-

ing breach of the peace: see *Abdulla* v. *Emperor* (1). I decline to interfere with the sentence of fine imposed on Dayal Singh. With regard to the remaining four petitioners, as they are on bail and have undergone the sentences of imprisonment imposed on them except for a period of three or four days, it is unnecessary to recommit them to jail and I accordingly reduce the sentence imposed on each of them to the period of imprisonment which he has already undergone.

Sentence reduced.

(1) [1921] 2 Lah. 279=63 I. C. 869.

A. I. R, 1926 Lahore 676

JAI LAL, J.

Zaman Ali Shah and *another*—Plaintiffs—Appellants.

v.

Rura and *others* — Defendants—Respondents.

Second Appeal No. 389 of 1926, Decided on 10th June 1926, from a decree of the Dist. J., Jullundur, D/- 17th November 1925.

(a) *Bengal Land Redemption and Foreclosure Regulation* (17 *of* 1806)—*Bona fide purchaser*—*Limitation Act, Art.* 134.

A purchaser from a mortgagee with conditional sale who does not enquire as to whether the mortgagee had acquired fnll proprietary rights by proceeding under the Regulation is not a bona fide purchaser. [P 676 C 2]

(b) *Limitation Aet, Arts.* 134 *and* 148—*Art.* 134 *applies to bona fide purchasers.*

Article 134 applies only to bona fide purchasers and to other purchasers Art. 148 applies; *A. I. R.* 1924 *Lah.* 468, *Foll.* [P 677 C 1]

Badri Das—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Judgment.—The suit out of which this second appeal arises was for possession by redemption of mortgaged property. There was condition in the deed that if the mortgage be not redeemed within two years then the mortgagee would become the absolute owner of the property mortgaged. The mortgage was created in 1894. In 1900 the mortgagee sold this property to the defendant. The plaintiff is a purchaser of the equity of redemption from the original mortgagors under a sale-deed executed in 1923. The only question debated before me is that of limitation.

On behalf of the defendants it is contended that Art. 134 of the Indian Limitation Act governs the case. The plaintiffs on the other hand claim that the ordinary pericd for a suit for redemption, i. e., 60 years under Art. 148 applies. It appears that proceedings were taken by the mortgagee under Regulation XVII of 1806. These, according to the learned District Judge, were not valid owing to certain defects in procedure. This finding is not challenged before me by either party. The District Judge has held that Art. 134 applies, because in his opinion the defendant, the transferee of the property,

satisfied himself that under the terms of the mortgage-deed his vendor could acquire an absolute right in the property as owner and also that it may be taken that he further satisfied himself that the original mortgagee took steps prescribed by law to become the full owner.

He consequently held that transferee had every reasonable ground for believing that his alienor had power to convey an absolute interest in the property.

The learned counsel for the appellants contends that the sale in favour of the defendants was not of the proprietary rights in the property in suit, but of mortgagee rights. In this contention I do not agree. Though the deed is somewhat vague, still I hold that what was intended to be sold was proprietary rights in the property. It was recited in the deed that there was a condition of bai bilwafa in the mortgage-deed but, that the mortgagors had not redeemed the mortgage and further that according to the terms of the deed bai balwafa had come into operation and the mortgagors had no interest left in the property and, therefore, all the interest of the vendor was sold to the vendee. I consider that the above clearly indicates that the proprietary rights were sold.

The facts recited above also show that it was brought to the notice of the vendee that there was a condition of bai bilwafa. No mention was made of the proceedings under Regulation XVII of 1806. There was, therefore, all the greater reason why the vendee should have satisfied herself that his vendor had acquired full proprietary rights by taking the necessary legal steps. It cannot be assumed, as the learned District Judge has done, that the vendee did so

If the vendee had made proper enquiries he would have discovered that the bai bilwafa proceedings were defective. He cannot, therefore be held to have acted in good faith as that term is defined in the Indian Limitation Act.

The next question is whether Art. 134 governs the case of the purchaser in good faith only. In this connexion reliance was placed by the learned counsel for the appellants on *Sri Ram* v. *Matwala Ram* (1). This case was affirmed on a Letters Patent appeal by a Division Bench of this Court, *Wazir Chand* v. *Nathu Ram* (2). In that case it has been held that Art. 134 applies only to bona fide purchasers and that to other purchasers Art. 148 applies. A large number of authorities are cited in support of this view. I must follow the previous judgments of this Court.

The consequence is that this appeal is accepted and the plaintiffs' suit decreed with costs throughout.

Appeal accepted.

(1) A. I. R. 1923 Lah. 219.
(2) A. I. R. 1924 Lah. 468.

A. I. R. 1926 Lahore 677 (1)

ADDISON, J.

Wali Muhammad — Convict — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 538 of 1926, Decided on 3rd July 1926, from an order of the 1st Cl. Mag., Ambala, D/- 23rd April 1926.

Penal Code, S. 363—Consent of minor is no defence — But accused should not be severely punished if other circumstances justify.

Although consent of the person kidnapped is no defence to a charge under S. 363 where the accused and the girl are neighbours and for this reason become fond of each other and when her marriage was about to take place the accused decided to take her away and she agreed:

Held: that it is not a bad case of kidnapping though technically it amounts to such and that the accused should not be punished severely.

[P 677 C 2]

Ghulam Mohi-ud-din for *Abdul Qadir* —for Appellant.

Ram Lal—for Opposite Party.

Judgment.—Wali Muhammad whose age, according to the Civil Surgeon, Ambala, is 15 or 17 years has been convicted under S. 363, Indian Penal Code, for kidnapping Mt. Banti aged just over 14 years from lawful guardianship, and has been sentenced to five years' rigorous imprisonment. He has appealed. The case against the appellant is quite clear. There is no doubt that the girl was a consenting party and had already some weeks before gone off with the appellant. She again disappeared with him on the night before her marriage was to take place and they were caught together on the road to Kasauli. The evidence is ample to establish that the girl's age is between 14 and 15 and that the appellant kidnapped her though she was undoubtedly a consenting party and wished to go with him. The appellant, therefore, was properly convicted under S. 363, Indian Penal Code.

In my opinion, however, the sentence is very excessive. The girl has now been married and I think that the Magistrate has taken an unduly severe view of the case. The appellant and the girl were neighbours and for this reason became fond of each other and when her marraiage was about to take place the appellant decided to take her away and she agreed. She may even have asked him to do so. This is, therefore, not a bad case of kidnapping though technically it amounts to such. At the same time the appellant has to be shown that the law must be respected and this youthful escapade cannot be altogether condoned. Taking all these things into consideration and especially the age of the appellant, I accept the appeal to the extent of reducing his sentence to six months' rigorous imprisonment.

Sentence reduced.

A. I. R. 1926 Lahore 677 (2)

JAI LAL, J.

Jowala Ram and *another*—Appellants.

v.

Mt. Chandan and *others*—Respondents.

Second Appeal No. 492 of 1925, Decided on 17th June 1926, from a decree of the Addl. J., Montgomery, D/- 26th November 1924.

Hindu Law—Gift—Deed not specifying shares nor laying conditions as to future enjoyment—Donees members of joint family—Joint tenancy is not created.

Where the deed of gift does not specify the shares of the donees, and beyond stating that the land is gifted to the two donees who are members of the joint Hindu family, does not in any way lay down any conditions as to the future enjoyment of the property :

Held : that the gift does not create a joint tenancy so as to entitle one donee to succeed to the rights of the other by right of survivorship on the death of the latter : *Case Law considered.* [P 678, C 1]

Badri Nath for *Mehr Chand*—for Appellants.

Badri Das—for Respondents.

Judgment.—The only question involved in this second appeal is whether a gift of the property in suit in favour of Jangi Singh and Darbara Singh, two brothers, who have been held to be governed by the Hindu Law, was to them jointly so as to entitle the one to take the share of the other by survivorship on the latter's death or as tenants-in-common The gift was made by Mt. Gujri, their maternal grandmother. The deed of gift does not specify the shares of the donees and beyond stating that the land in suit is gifted to the two donees does not in any way lay down any conditions as to the future enjoyment of the property. It may be assumed for the purposes of this case that Jhangi Singh and Darbara Singh were members of a joint family at the time of the gift.

The learned District Judge following *Rampiari* v. *Krishna Piari* (1) and *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (2). has held that the gift did not create a joint tenancy so as to entitle one donee to succeed to the rights of the other by right of survivorship on the death of the latter. This view of the learned District Judge, in my opinion. is correct. It is supported by previous authority. Reference may be made to *Yethirajulu Naidu* v. *Mukunthu Naidu* (3) ; the relevant remarks are made at page 373 [28 *Mad*] to *Gordhandas* v. *Bai Ramcoover* (4) and to some observations that are made at page 128. [*P. R.* 1909] in *Munni* v. *Umrao Singh* (5). Mulla at page 379 of the Principles of Hindu Law is of the same opinion. There is, therefore, a preponderance of authority in support of the view of the learned District Judge. Counsel for the appellants cited *Bitti Bibi* v. *Jai Gopal Singh* (6). In that case, however, there was a condition against alienation by the donees of the property gifted to them, and that condition indicated an intention on the part of the donor to create a right of survivorship between them.

I dismiss this appeal with costs.

Appeal dismissed.

(1) A. I. R. 1921 All. 50=43 All. 600.
(2) [1896] 23 Cal. 670=23 I. A. 37=7 Sar. 13 (P. C.).
(3) [1905] 28 Mad. 363=15 M. L. J. 299.
(4) [1902] 26 Bom. 449=3 Bom. L. R. 857.
(5) [1909] 39 P. R. 1909=55 P. W. R. 1909=1 I. C. 720=59 P. L. R. 1909.
(6) [1913] 20 I. C. 756.

A. I. R. 1926 Lahore 678

JAI LAL, J.

Nur Muhammad and *another*—Plaintiffs—Appellants.

v.

Buta and *others*—Defendants—Respondents.

Second Appeal No. 466 of 1926, Decided on 13th May 1926, from a decree of the Dist. J., Jullundur, D/- 26th November 1925.

Adverse possession—Near heirs, having rights to land, alive—Adverse possession against reversioners of last male holder does not begin in their lifetime

Reversioners of the last male holder have no locus standi to sue for possession of land during the lifetime of nearer heirs having a right to inherit and therefore adverse possession against such reversioners does not begin so long as such heirs are alive : 82 *P. R.* 1918 and 18 *P. R.* 1895, *Rel. on.* [P 679, C 1]

Aziz Ahmad—for Appellants.

M. A. Ghani and *Fakir Chand*—for Respondents.

Judgment.—A pedigree is attached to the judgment of the learned District Judge. From this it appears that the plaintiffs-appellants claimed as reversioners to the estate of Umra. Umra made a gift of this land to his daughter, Mt. Fatti, and from Mt. Fatti either by means of a gift or ordinary inheritance the land in suit went to Mt. Sairan. Mt. Sairan having re-married lost her rights in the land, which was taken possession of by the defendants, Buta and Asmat Ullah, sons of Akbar. The suit by the plaintiffs is that Buta and Asmat

Ullah, sons of Akbar, have no title to the land as they are no relatives of Mt. Fatti, and, therefore, on the extinction of the heirs of Mt. Fatti the gifted land reverted to the reversioners of Umra. The status of the plaintiffs as reversioners of Umra is not contested before me, but it is urged that the suit is barred by limitation and this is the only point which was urged before the District Judge who held the suit to be so barred. It may be mentioned that Mt. Fatti had a son named Buta who apparently was a dumb person. He died within twelve years of the institution of this suit. The plaintiffs claim that during the lifetime of Buta they had no locus standi to institute a suit for possession and consequently limitation began to run against them on the death of Buta.

On behalf of the respondents it is contended that the limitation began on the marriage of Mt. Sairan which admittedly was more than twelve years before the institution of the suit, and that Asmat Ullah and Buta, sons of Akbar, have been in adverse possession of the land since the re-marriage of Mt. Sairan. In my opinion this appeal must be accepted. *Tani* v. *Tara Chand* (1) and *Roda* v. *Harnam* (2) support the contention of the appellants that their cause of action accrued on the death of Buta, son of Fatti, and that they had no locus standi to institute a suit for possession in the lifetime of Buta. The possession of Asmat Ullah and Buta, sons of Akbar, cannot be held to be adverse to the reversioners of Umra so long as any of the heirs of Mt. Fatti were alive as they and not the reversioners would be entitled to the possession of the land gifted. I hold, therefore, that the suit was not barred by limitation and consequently that the plaintiffs were entitled to the decree claimed.

One Asmat Ullah, son of Sabu was impleaded as a defendant on the ground that he also claimed to be entitled to the property in suit. In his written statement, however, Asmat Ullah, son of Sabu, definitely stated that he had no claim to or interest in the land. His counsel contends before me that in the presence of Asmat Ullah, son of Sabu, the plaintiffs have no locus standi to institute this suit. It is alleged that Mt. Fatti was the mother of Asmat Ullah. This point has nowhere been raised before this in these proceedings. In my opinion, the learned counsel is not entitled to raise it here specially in view of the distinct disclaimer by Asmat Ullah, son of Sabu, of any interest in the land in suit. I have already stated that the only point raised before the District Judge was one of limitation. I might mention that the objection as to the locus standi of the plaintiffs was not raised by the counsel who appeared before me for the sons of Akbar but by the counsel for Asmat Ullah, son of Sabu, and I am unable to see that he had any right to contest the plaintiffs' suit after his disclaimer in the first Court.

The result of my decision on the question of limitation is that this appeal is accepted and the plaintiffs' suit is decreed with costs throughout against Buta and Asmat Ullah, sons of Akbar. Asmat Ullah son of Sabu will bear his own costs throughout.

Appeal accepted.

(1) [1918] 82 P. R. 1918=109 P. L. R. 1918 47 I. C. 373=160 P. W. R. 1918.
(2) [1895] 18 P. R. 1895 (F. B.).

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* A. I. R. 1926 Lahore 679

CAMPBELL, J.

Wazir Singh—Objector—Appellant.

v.

Janki Das and *others*—Respondents.

Misc. Second Appeal No. 2053 of 1925, Decided on 28th April 1924, from an order of the Dist. J., Ambala, D/- 15th April 1925.

(a) *Civil P. C., O. 41, R. 20—Action taken under R. 20—Question of limitation does not arise.*

The Law of Limitation has no application when action is taken under O. 41, R. 20 : 79 *P.R.* 1914 and 3 *P. R.* 1915, *Foll.* [P 680, C 2]

* (b) *Provincial Insolvency Act* (1920), *Ss. 4 and 24—Court can try liability of a person to be adjudicated insolvent and question of title raised by him together.*

Section 4 is very comprehensive in its term and it is not illegal for a Court to try together the two questions (a) whether A has committed an act of insolvency and (b) whether the property in respect of which the act is alleged to have been committed belongs to A or B.
[P 680, C 2; P 681, C 1]

M. M. Tufail—for Appellant.
Shamair Chand—for Respondents.

Judgment.—In 1921 certain persons alleging themselves to be creditors applied for five others to be adjudicated insolvents. These five were Mangal Sain, Uggar Sain, Bashambar Dass, Kalyan Rai and Wazir Singh. Tho act of insolvency alleged was the execution of a deed of mortgage conveying certain property including six shops and a house No. 2871. When the respondents to the petition appeared in Court, Wazir Singh made a statement that he was not joint or a partner with the executants of the mortgage-deed, namely, Mangal Sain and Uggar Sain, that a divided half of the house No. 2871 was his property and that also the six shops Nos. 2890 to 2894 and 3369 were his exclusive property. He repudiated liability for any debts contracted by Mangal Sain and his sons Uggar Sain, Bashambar Das and Kalyan Rai. The creditors insisted that the mortgage-deed signed by Mangal Sain and Uggar Sain was a transfer made by some members of the firm on behalf of the whole firm and that Wazir Singh was a member of the firm, and liable for the acts of Mangal Sain and Uggar Sain.

On the 18th January 1922, the following issues were framed by the Insolvency Court :

(1) Are all the creditors mentioned in the petition of insolvency partners of the Firm Mahonar Lal-Uggar Sain ? Onus on the creditors.

(2) Has Wazir Singh committed an act of insolvency ? Onus on the creditors.

(3) Is Wazir Singh sole owner of the six shops Nos. 2890 to 2894 and 3369 and half houss No. 2871 ? Onus on Wazir Singh.

For two years successive dates were given for evidence in the suit ; but no evidence was produced by any party. On 4th February 1925, the Court recorded an order, that since no evidence was produced the decision on each of the above issues was against the party on whom the onus was placed. The Court then proceeded to decide that only Uggar Sain should be adjudicated an insolvent and rejected the petition against the others with costs. The Civil Nazir was appointed Receiver and was directed to "take hold of all the property at once." On this Wazir Singh appealed to the District Judge against the decision on Issue No. 3, representing that it was necessary neither to strike it nor to decide it and that he was ready to produce evidence upon it.

The learned District Judge dismissed his appeal : firstly, because the Receive had not been impleaded as a respondent until the date of decision and the appeal was time-barred against him ; and, secondly, because the appellant had ample opportunity for producing evidence. The contention that the issue in question was unnecessary is not mentioned in the learned District Judge's judgment, but this ground has been pressed in second appeal before me.

On the findings of the learned District Judge the first is wrong and the second is correct. If he had dismissed the appeal because the Receiver had not been made a party, the situation might have been different. As it was on the verbal application of the appellant, he recorded an order to the following effect :

I make the Receiver a party. Now the question of limitation arises. On this point arguments shall be heard.

It has been ruled many times and in this Province in *Shahab Din* v. *Miran Bakhsh* (1) and *Shib Nath* v. *Alliance Bank of Simla* (2) that the Law of Limitation has no application when action is taken under O. 41, R. 20, and O. 41, R. 20 was manifestly the provision of law under which the District Judge acted. He could have refused to make the Receiver party and possibly might have dismissed the appeal because he was not a party under O. 41, R. 20, and then dismiss the appeal against him as time barred.

There is no doubt that Wazir Singh had ample opportunity for producing evidence. It has been contended that he was entitled to wait until the creditors had produced evidence that they were entitled to the order of adjudication against him and that the finding on the third issue is contradictory on the 1st and 2nd. But I see no inconsistency. It is true that S. 24 of the Provincial Insolvency Act appears to contemplate that the Court's first inquiry should be into the question whether the creditor of the debtor is entitled to present the petition and whether the debtor has committed the act of insolvency alleged against him but S. 4 of the same Act, which confers upon the Court full powers to decide all questions of title arising in any case of insolvency is very comprehensive in its terms. What the Court has done in the

(1) [1914] 79 P. R. 1914=268 P.L. R. 1914=25 I. C. 549=169 P. W. R. 1914.

(2) [1915] 3 P. R. 1915=215 P. L. R. 1914=25 I. C. 480=110 P. W. R. 1914.

present case is to try side by side with the question of liability of Wazir Singh to be adjudicated an insolvent another question of title raised by him. Wazir Singh said in effect when he came into Court :

> I have committed no act of insolvency, the persons who committed what is alleged to be the act of insolvency have nothing to do with me and the property in respect of which the alleged act of insolvency has been committed is mine and does not belong to those persons at all.

I can find nothing in the Act on which it can be held to be illegal for a Court to try together the two questions (a) whether A has committed an act of insolvency and (b) whether the property in respect of which the act is alleged to have ben committed belongs to A or B and as I have already stated. Wazir Singh had more than sufficient opportunity of proving that the buildings were his exclusive property. I find no ground for interference and I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 681

BROADWAY, J.

Abdul Majid Khan—Plaintiff—Appellant.

v.

Imam Din—Defendant—Respondent.

Second Appeal No. 500 of 1926, Decided on 3rd June 1926, from a decree of the Dist. J., Jullunder, D/- 12th November 1925.

Specific Relief Act, S. 53—Defendant constructingspout leading water in the plaintiff's land—Injunction can be granted.

An injunction can be granted to the plaintiff where the defendant has constructed a waterspout or parnala leading water on to the plaintiff's land unauthorisedly even though his action does not amount to a nuisance: (1904) *A. C.* 179, *Dist.* [P. 682, C. 1]

Badri Das—for Appellant.

K. J. Rustomji—for Respondent.

Judgment.—The suit out of which this appeal has arisen was instituted by Hakim Abdul Majid against Imam Din. In the plaint it was averred that the plaintiff was the owner of a house in front of which there was a thara or platform on to which the door of the plaintiff's house opened that the northern wall of the defendant's house adjoined the said thara and that in 1922 the defendant had opened two windows and ventilators in the said northern wall and constructed a parnala or water-spout which conveyed from his house on to the said thara. The plaintiff asked for a perpetual injunction directing the defendant to close the windows and ventilator and remove the parnala.

The plaintiffs suit was dismissed on the 2nd February 1924, but on appeal was remanded for re-decision by an order dated the 8th July, 1924. The same Subordinate Judge heard the case on remand and held that the plaintiff was the owner of the thara in front of his house : that the window and ventilators had recently been opened by the defendant in his northern wall but that the opening of these windows and ventilators had not in any way interfered with the plaintiff's right of privacy and that the making of the parnala had caused no damage to the plaintiff. The suit was accordingly dismissed. An appeal by the plaintiff was unsuccessful, the learned District Judge holding that the defendant was perfectly entitled to open his windows and ventilators in his own wall and that the plaintiff had no right to stop him. So far as the parnala was concerned it was held that its existence did not amount to such a nuisance as would entitle the plaintiff to the injunction asked for.

Against this decision the plaintiff has come up to this Court in second appeal through Mr. Badri Das who has admitted that so far as the ventilators are concerned the injunctiou prayed for was rightly refused but that declaration should have been granted to the plaintiff te the effect that the defendant had no easement qua these ventilators and windows and that, therefore, the plaintiff could block them if he so chose. This matter was not very seriously pressed and I see no reason to interfere with the decision arrived at by the Courts below. It has been found as a fact that the opening of these windows and ventilators does not in any way interfere with the privacy of the plaintiff.

The second question, however, is more important. Mr. Rustomji, on behalf of the defendant-respondent, has referred to

Colls v. *Home and Colonial Stores, Ltd.* (1) and has urged that before an injunction such as is prayed for in this case can be granted, it must bs established as a fact that the action of the defendant amounts to a nuisance. Now the decision referred to deals entirely with cases relating to the obstruction of ancient lights and the principle underlying that decision is that

> light like air is the common property of all. or, to speak more accurately, it is the common right of all to enjoy it but it is the exclusive property of none.

In the present case by building the parnala or water-spout, which results in a flow of water passing from the house of the defendant on to the land to the plaintiff, the defendant has definitely placed a burden on the plaintiff's house a burden which, if allowed to exist, would in the course of twenty years ripen into an easement which could not be interfered with by the plaintiff and the plaintiff's property would thus become the servient tenement qua the defendant's house. It is is perfectly clear that the thara on to which this water now flows is the property of the plaintiff and lies immediately in front of his house and that the door of the plaintiff's house opens on to it. In these circumstances I am of opinion that the plaintiff was entitled to the relief he asks qua this parnala.

I, therefere, accept this appeal to the extent that I allow the plaintiff a decree for an injunction directing the defendant to remove the parnala complained of. As both parties have succeeded in part they will pay their own costs in this Court.

Appeal accepted.

(1) [1904] A. C. 179=73 L. J. Ch. 484=90 L.T. 687=53 W.R. 30=20 T.L.R. 475.

A. I. R. 1926 Lahore 682

JAI LAL, J.

Bhowani Mal and *others*—Decree-holders—Appellants.

v.

Allah Wasaya — Judgment-debtor—Respondent.

Miscellaneous Second Appeal No. 394 of 1926, Decided on 27th May 1926, from an order of the Dist. J., Multan, D/- 13th November 1925.

Civil P. C., S. 72—Decree sent for execution to Collector—Collector reporting his inability to act —Executing Court should not file execution application but should proceed with the execution.

Where a decree has been sent for execution to Collector under S. 72 and he reports his inability to act, the Court should not file the execution application. But it is the duty of the Executing Court to proceed with the execution of the decree in accordance with law. [P. 682, C. 2]

Anant Ram—for Appellants.

Judgment.—The appellant has a decree against the respondent for Rs. 1,991 recoverable from three items of immovable property specified in the decree. In execution of that decree he applied for the attachment of the property and also for the arrest of the judgment-debtor. The case was sent to the Collector presumably under S. 72, Civil P. C. The Collector made calculations of the income of two items of the property and found that it will work out as Rs. 514-0-8 for 20 years. He therefere, offered a lease of these two lands to the decree-holder for 20 years in full satisfaction of the decree. In other words he proposed that the decree-holder should accept Rs. 514-0-8 in full satisfaction of a decree for Rs. 1,991. The offer the decree-holder naturally declined to accept The Collector, therefore, reported to the Court that he was unable to do anything.

The Execution Court thereupon declined to preceed further and filed the application for execution. The learned District Judge has held that the Collector did not refuse to act but merely expressed his inability to act. I am unable to discover any difference between the two. Be that as it may, the Collector has not intervened and consequently it is the duty of the Executing Courts to proceed with the Execution of the decree. I accept this appeal and remand the case to the Subordinate Judge with directions to proceed with the execution of the decree in accordance with law. No order as to costs of this appeal.

Appeal accepted.

A. I. R. 1926 Lahore 683 (1)

FFORDE, J.

Ismail and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision No. 468 of 1926, Decided on 7th May 1926, reported by the S. J., Ludhiana, on 19th March 1926.

(a) *Criminal P. C., S. 342—Non-compliance amounts to illegality vitiating trial.*

Omission to examine the accused after recording further prosecution evidence amounts to an illegality vitiating trial. [P 683 C 1]

(b) *Penal Code, S. 379—Removal of property under bona fide assertion of right is not theft.*

The removal of property under a bona fide assertion of right does not constitute theft, even though the claim be one which is not valid in law. Where such a claim is raised, the Court has no right to convict unless upon the whole of the evidence it comes to the conclusion that the claim set up is not a genuine one. [P 683 C 2]

Order.—This matter comes before me under S. 438 of the Criminal P. C., upon a report of the Sessions Judge of Ludhiana recommending that certain sentences imposed upon the petitioners be set aside. The petitioners, Azim and Karim, are occupancy tenants of certain land of which Jhandoo is the landlord. Azim and Karim are brothers and Ismail, Farid and Aziz are the sons of Azim. Jhandoo launched a complaint against the five petitioners under S. 379 of the Indian Penal Code charging them with having cut trees upon the lands which they occupied as tenants, without his, the landlord's permission. The petitioners admitted having cut the trees but alleged that they were entitled in law to do so.

The trial was obviously conducted with grave illegality. for the Magistrate having closed the defence evidence on the 17th November, visited the site where the trees had been cut on the 22nd of November and there and then took the evidence of two further witnesses a Patwari and a Zaildar. Having taken this evidence, he fixed a date for hearing arguments, and after having heard the arguments, he pronounced his judgment convicting all five persons. Having taken this further prosecution evidence at the stage at which he did, the trial Magistrate did not question accused persons as required by S. 342 of the Criminal P. C. This is obviously an illegality.

Moreover, the trial Magistrate does not appear to have considered whether or not the claim of the accused that they were lawfully entitled to cut the trees in question was a bona fide one. It is well established that the removal of property under a bona fide assertion of right does not constitute theft, even though the claim be one which is not valid in law. Where such a claim is raised, the Court has no right to convict unless upon the whole of the evidence it comes to the conclusion that the claim set up is not a genuine one. This matter was not decided by the trial Court nor has it been dealt with in any way by the District Magistrate to whom an appeal was brought. Both the trial and the appellate Judges appear to have thought that, as the accused, being occupancy tenants, had only restricted rights in the trees growing on land which they held as such tenants, the removal of the trees, being in excess of their rights, amounted to the offence of theft. In this view the Courts were clearly wrong.

I must, accordingly, accept this revision, set aside the conviction and sentence in each case and order that the fines, if they have already been paid, be refunded.

Revision accepted.

A. I. R. 1926 Lahore 683 (2)

HARRISON, J.

Khazan Chand and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revision Petition No. 395 of 1926, Decided on 14th May 1926, from an order of the Dist. Mag., Ludhiana, D/- 30th January 1926.

Criminal P. C., S. 107—Opposite side likely to commit breach—Nature of act inducing breach is only to be seen.

Where the anticipated breach is to be committed by the other side, the only point to be seen is whether the act which brings about that breach is wrongful in itself : 32 *All.* 571, *Foll.* [P 684 C 1]

Tek Chand—for Petitioners.

Judgment.—Two men, Khazan Chand and Garja Singh, were put on security under S. 107, Criminal P. C., by Sardar Sahib Sardar Amar Singh and their

appeals have been dismissed by the District Magistrate. They have applied for revision and the facts are simple enough. These two men are Rahtia Aryas being the sons of Rahtia Sikhs, that is to say, they are Chamars. Khazan Chand is practising as a Hakim and the Hindu witnesses for the defence have stated that all classes including Brahmins take medicine from him. Garja Singh is a fitter in a mill. They claimed a right to draw water from a certain public well situated in Khanna town in the Ludhiana District and a section of the population objected. A year ago the Deputy Commissioner by an executive order directed them to obtain the water they required by means of a jhiwar, who was to be maintained at their expense. After two months this jhiwar refused to continue working and the trouble began afresh and it is stated by several witnesses that there is likely to be a breach of peace, the Rahtias being the victims, of those who disapprove of their taking water from this public well.

The District Magistrate says in his order that, had they been prepared to give an undertaking not to draw water from this well, he would have accepted their appeal. Where, as in this case, the anticipated breach is to be committed by the other side the only point to be seen is whether the act which brings about that breach is wrongful in itself as laid down in *Mohammad Yakub* v. *Emperor* (1) and many subsequent rulings, and this view is in accordance with the clear wording of the section. It is not even alleged that it is a wrongful act for these Chamars to draw water from a public well as opposed to one which has been built for or dedicated to the use of any particular religion or class of the population. Indeed one of the witnesses—a Muhammadan named Imdad Hussain—says that if a sweeper turns Muhammadan there is no objection to his drawing water from such a public well. Fifteen defence witnesses all Hindus of the upper classes appeared and stated that the majority of the population did not object. It is clear, therefore, that the objectors form a section, large or small, of the population of this town but do not constitute the whole and even if they did it would not affect the question materially. So long as these Chamars are doing a lawful act there can be no reason for putting them on security and it would appear to be more reasonable to take proceedings against those who are expected to commit the breach of the peace and offer violence to law-abiding citizens.

I accept the application for revision and set aside the order demanding security.

Application accepted.

(1) [1910] 32 All. 571=7 A. L. J. 649=6 I. C. 454=11 Cr. L. J. 355.

A. I. R. 1926 Lahore 684

ADDISON, J.

Fazal Ahmad—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 603 of 1926, Decided on 3rd July 1926, from an order of the 1st Cl. Mag. Rawalpindi, D/- 8th February 1926.

Criminal P. C., S. 342—Accused not examined at the close of prosecution evidence—Note by Magistrate that accused does not wish to add is not proper compliance.

Examination of the accused, after some of the prosecution witnesses but not at the close of the prosecution evidence, with a note by Magistrate that the accused does not wish to add to his previous statement, is not a proper compliance with the mandatory provisions of S. 342.

[P. 685, C. 1]

Ram Lal—for the Crown.

Judgment.—Fazal Ahmad has been sentenced to five years' rigorous imprisonment under S. 394, Indian Penal Code, for causing hurt in attempting to commit robbery and has appealed through jail.

The case has been tried in an unsatisfactory manner. The Magistrate has noted in his judgment that the complainant, Karam Bakhsh, was injured with a knife or dagger carried by the appellant. He did not describe his injuries and the Doctor who examined him was not called as a witness. In this connexion I might note, however, that on the naksha mazrubi the Doctor has writtan that the injuries of Karam Bakhsh were caused by a blunt weapon. This Doctor was obviously a necessary witness. Further the appellant was examined after two of the prosecution witnesses were examined and was not examined under S. 342,

Criminal P. C., when the rest of the prosecution witnesses had been examined. There is a note by the Magistrate dated the 23rd January 1926, that the appellant did not wish to add to his previous statement. This, however, was not a proper compliance with the mandatory terms of S. 342 of the Criminal P. C.

That being the case and also seeing that the whole trial has been conducted, in an unsatisfactory fashion, I accept the appeal, set aside the conviction of the appellant and direct that he be re-tried by another Magistrate according to law. In the meantime he should be transferred to the judicial lock up.

Re-trial ordered.

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* A. I. R. 1926 Lahore 685

COLDSTREAM, J.

Gujar Mal—Decree-holder—Appellant,

v.

Narain Singh — Judgment-debtor—Respondent.

Second Appeal No. 247 of 1926, Decided on 7th June 1926, from an order of the Dist., J., Jullundur, D/- 21st October 1925.

(a) *Limitation Act, Art.* 181—*Art.* 181 *governs an application under S.* 144, *Civil P. C.—Civil P. C., S.* 144.

An application for restitution under S. 144 is not an application for execution but a miscellaneous application, and Art. 181 governs it. 67 *P. R.* 1918, *Foll.* [P 686 C 1]

* (b) *Civil P. C., S.* 144—*Section is mandatory —Refusal to order restitution on equitable considerations arising from events subsequent to decree is not warranted.*

S. 144 of the Civil P. C. is mandatory and a Court proceeding under it is bound, when a decree has been reversed, to cause such restitution to be made as will, so far as may be, place the parties in their previous position. There is nothing in the law to justify refusal to order restitution on merely equitable considerations arising out of events subsequent to the decree. [P 687 C 1]

* (c) *Civil P. C., S.* 151—*Restitution can be ordered under S.* 151 *apart from S.* 144.

Apart from the mandatory nature of S. 144, S. 151 gives power to order restitution: 43 *Bom.* 235, *Dist.*

There is no legal warrant for the view that if complete restitution all round of the positions occupied by all parties cannot be effected, then no order should be passed under S. 151 ordering restitution "so far as may be," such as would have of necessity to be passed were the case governed by S. 144. [P 687 C 2]

Tirath Ram and *Gulla Ram*—for Appellant.

Bishan Nath—for Respondent.

Judgment.—On the 19th April 1906, Narain Singh mortgaged some property to Ram Lok and Brij Lal. On the 4th March 1916, Ram Lok and Brij Lal got a decree ex parte against Narain Singh. In execution the mortgaged property was auctioned and was bought by Mangal Singh and Harnam Das and the money due upon the decree was paid to Ram Lok. In 1920 Narain Singh applied to have the ex-parte decree set aside and succeeded in having it set aside by an order dated 7th July 1921. The mortgagees petitioned the High Court for revision but their petition was rejected. The suit by the mortgagee proceeded. It was dismissed on the 14th February 1922 on side issues, the Subordinate Judge holding that the mortgage had ceased to exist, that the order setting aside the ex-parte decree did not affect the auction-purchasers who were no parties to it, and that the plaintiffs had no locus standi to prosecute the case against the auction-purchasers. It was noted in the judgment that the plaintiffs themselves were reluctant to prosecute the case as they had already realized their money.

On the 10th April 1923, Narain Singh applied under S. 144 of the Civil P. C., for restitution by return to him of the property in possession of the auction-purchasers. The application was rejected and on appeal the District Judge on 8th October 1924, confirmed the rejection holding that S. 144, Civil P. C., did not apply to a case when an ex-parte decree had been set aside by the Court that granted the decree and that the result of granting the application would not be to place the parties in the position they would have occupied but for the ex-parte decree. On the 18th October 1924 Narain Singh applied under the same S. 144 for an order compelling Ram Lok and Gujar Mal (Brij Lal's successor) to return to him the money recovered in execution by sale of the mortgaged property, and on the 6th March 1925, the order prayed for was passed. Ram Lok died, Gujar Mal appealed to the District Judge, who on the 21st October 1925, held that there was authority for applying S. 144, Civil P. C., to a case where

an ex-parte decree had been set aside and that the order of the lower Court was just and equitable. He remarked in his judgment that it was futile for Narain Singh to have had the suit dismissed if the decree-holder was allowed to retain the fruits of the decree which had been cancelled. The property was sold and the decree-holder has got the money and it is only right that he should restore it to Narain Singh against whom the second suit was dismissed.

Against this appellate order of the District Judge the present second appeal has been filed by Gujar Mal and it is contended before me by Mr. Tirath Ram (1) that S. 144 does not apply in the circumstances of the case; (2) that the application for restitution was barred by time; (3) that the District Judge was wrong in holding that the mortgagees' suit was ultimately dismissed upon the merits; and (4) that the order of restitution is inequitable.

I take first the plea of limitation (which was raised in both the lower Courts). It is argued by Mr. Tirath Ram that time ran from 7th July 1921, when the ex-parte decree was set aside, that Art. 181 and not Art. 182 of the First Schedule to the Limitation Act governs an application under S. 144 of the Civil P. C., that the second application of 18th October 1924 (which is the only one with which we are concerned) was in no sense a mere continuation of the proceedings initiated by the first application of 10th April 1923, and that the second application having been made more than three years after the ex-parte decree was set aside was barred by limitation. *Ram Singh* v. *Sham Parshad* (1), which cites a Lower Burma ruling *Asha Bibi* v. *Nuruddin* (2), is authority for the view that an application for restitution for which provision is made in S. 144 is not an application for execution but a miscellaneous application. The same view was taken by the Allahabad High Court in *Hanifunnissa* v. *Chunni Lal* (3). To me it seems clear from the wording of the articles themselves that Art. 181 is the one applicable, that is to say, that for the present application to be in time it had to be made within three years of the date when the right to make the application accrued. I do not think that the second application can properly be regarded as merely a continuation of first (as is contended by Mr. Bishan Nath for the respondent). The facts in the case last cited on which Mr. Bishan Nath relies appear to be distinguishable from those in the case before me.

In the Allahabad case it appears that the first application sought relief by way of execution proceedings against the same respondent as was proceeded against in the second application which was held by the Court to be virtually a continuation of the first. But in the present case Narain Singh applied in his first application for no relief against the mortgagees. All he asked for was possession of his property sold: see District Judge's order of 8th October 1924. Those proceedings were therefore not the same as those initiated by the application of 18th October 1924, which was for return of the decree money. The provisions of Art. 182 allowing extension of time from one application to another are peculiar and nothing like them is found in Art. 181, and the mere fact that a second application (not covered by Art. 182) is in substance the same as the previous one (the proceedings upon which have terminated by an order) does not, I think bring the second application within time merely because the first was in time. It is obvious that S. 14 (2) of the Limitation Act to which Mr. Bishan Nath next refers is not applicable, for the relief claimed in the two applications is not the same. It follows then that if time began to run on 7th July 1921 the application of 18th October 1924, was barred by limitation. But it seems to me clear that even if time did begin to run on that date, there was a fresh beginning altogether on a new cause of action when the mortgage suit decreed ex-parte in March 1916, was ultimately dismissed on 14th February 1922. It was the decision of 14th February 1922, that reversed the decree of March 1916. The application under consideration was made within three years of that date and was within limitation.

Mr. Tirath Ram's contention that S. 144 does not apply in the circumstances is based on the assumption that Narain Singh had no cause of auction to

(1) [1918] 67 P. R. 1918=36 P. W. R. 1918=44 I. C. 301=15 P. L. R. 1918.
(2) [1915] 8 Bur. L. T. 165=30 I. C. 680=8 L. B. R. 262.
(3) [1921] 19 A. L. J. 549=63 I. C. 184.

ask for restitution other than the order setting aside the ex parte decree. Whether S. 144 does cover a case where an ex-parte decree has been set aside by the Court that passed it is a question on which the decisions have not been uniform. In *Sabrayudu* v. *Seshasani* (4), the Madras High Court has taken the view that the section applies in all cases where a decree is varied or reversed, a view adopted by the Bombay High Court in *Shiv Bai Babya Swami* v. *Yesucheoo Nayakin* (5). An opposite opinion was held by the Patna High Court in *Chintanam Singh* v. *Chuni Sahu* (6). In view, however, of the fact that Narain Singh could, and did, base his application on the reversal of the ex-parte decree by the decision of 14th February 1922, the question of the applicability of S. 144 to a case where an ex-parte decree has been set aside by the Court that passed it is immaterial There is, in my opinion, no doubt that S. 144 does apply to the present case,

Section 144 of the Civil P. C. is mandatory and a Court proceeding under it is bound, when a decree has been reversed, to cause such restitution to be made as will, so far as may be, place the parties in their previous position. There is nothing in the law so far as I am aware to justify refusal to order restitution on merely equitable considerations arising out of events subsequent to the decree. The order appealed against, therefore, appears to be unimpeachable on the merits. The fact that all the parties cannot be put back in their original positions because the mortgaged property has passed to bona fide purchasers, and the fact that the ground on which the mortgage suit was ultimately dismissed were perhaps improper, do not affect the case. So far as it was able to do so the Court was bound to undo the results of the ex-parte decree.

But apart from the mandatory nature of S. 144, and assuming that the orders appealed against were passed not under the provisions of that section but in the exercise of inherent jurisdiction under S. 151 (which section undoubtedly gives power to order restitution vide *Shivbai Babya Swami* v. *Yesucheoo Nayakin* (5), and the rulings cited in Mulla's Commentary on S. 144 at page 312, 7th Edition) I am unable to hold that the order was improper and calls for interference.

Mr. Tirath Ram argues that the order places Narain Singh in a more favourable position vis a vis the mortgagees than he occupied before the ex-parte decree was passed inasmuch as before the passing of that decree there existed a recoverable claim against him for the mortgage-money which claim is now barred by limitation while, on the other hand, the mortgagees are worse off than they were before the decree not only in having no legal means of recovering their debt but also because they have lost their security which has passed irrevocably to the auction-purchaser. Secondly, Mr. Tirath Ram contends that the learned District Judge would not have allowed the restitution order to stand had he noticed that the mortgage suit was dismissed not as he states in his judgment, on the merits, but on the peculiar (and, according to Mr. Tirath Ram, improper) ground that the mortgage had been annihilated by the execution proceedings.

I find no legal warrant for the view that if complete restitution all round of the positions occupied by all parties cannot be effected (as in this case owing to the security having been lost by the mortgagees) then no order should be passed under S. 151 ordering restitution "so far as may be," such as would have of necessity to be passed were the case governed by S. 144. Nor do I find in the circumstances justification for interference with the District Judge's order on grounds of equity. It is true that Narain Singh in the mortgage suit admitted the execution of the mortgage and did not expressly deny the debt. But the debt is presumably still there, though its recovery by legal process may possibly be barred for one reason or another. The dismissal of the mortgagees' suit may have been on inadequate grounds. If it was, then the mortgagees had their remedy by way of appeal. Possibly it was still open to them to get a decree for the recovery of the money due in spite of the fact that their security was not available. But they rested content with the dismissal of

(4) [1917] 40 Mad. 299=30 M. L. J. 366=3 L. W. 236=33 I. C. 739=(1916) 1 M. W. N. 155.
(5) [1919] 43 Bom. 235=48 I. C. 130=20 Bom. L. R. 925.
(6) [1916] 1 Pat. L. J. 43=34 I. C. 747=3 Pat. L. W. 95

their suit careless of the possibility of restitution proceedings and I do not think that it is open to them now to object to restitution on the ground, put forward, here, that the suit was dimissed for improper reasons or dismissed partially in view of the fact that the debt had been actually recovered by the mortgagees.

For all these reasons I dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Lahore 688

HARRISON AND JAI LAL, JJ.

Mohammad Aslam Khan and *others*—Defendants—Appellants.

v.

Jaban Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 735 of 1922, Decided on 11th March 1926, from the decree of the Dist. J., Attock D/- 31st January 1922.

Custom (Punjab)—Gift—Sonless Awan of Tallagang has unrestricted power of gifting ancestral property to daughter or her issue.

A sonless Awan of Tallagang Thasil of Attock District has unrestricted power of gifting his property ancestral or non-ancestral, to a daughter or the issue of such daughter. 15 *P. R.* 1907 : 5 *P. R.* 1914 ; 72 *P. R.* 1915, *Disappr.* 56 *P. R.* 1915 ; 53 *P. R.* 1899 ; 88 *P. R.* 1911 and 100 *P. R.* 1912, *Appr.* *A. I. R.* 1924 *Lah.* 452, *Foll.* [P 688 C 1 & 2]

Nanak Chand—for Appellants.

H. D. Bhalla—for Respondents.

Judgment.—The only question to be decided in these two appeals is whether a sonless Awan of the Tallagang Tahsil of Attock District has an unrestricted power of alienation of his ancestral property in favour of his daughter. The District Judge has decided the point in favour of the contesting reversioners and has reversed the finding of the trial Court on this point. The authorities have been well reviewed by the trial Court and the chief reason given by the District Judge for coming to a different conclusion is that *Lal Khan* v. *Nura* (1) in his opinion suggests that an Awan can only make an alienation of ancestral property with the consent of the reversioners, and it appears to him that the Riwaj-i-am compiled by Mr, Talbot when the Tallagang Thasil was in the Jhelum District supports this view.

So far as the Riwaj-i-am is concerned support can be found for both views. The concerning paragraph No. 105 is to the effect that a sonless Awan has full power of alienation and in an earlier passage in answer to question No. 89 it is stated that an ancestral property cannot be given without the consent of the reversioners up to the 4th degree. We are of opinion that this Riwaj-i-am cannot be relied upon one way or the other and on going through the authorities we find that the whole portion has been most ably and carefully analysed in *Amir Ali* v. *Mt. Boggo* (2) by Johnstone, J, He quotes all the authorities up to that time and also the various instances which had occurred and his conclusion is in favour of an unrestricted right of alienation. So also the authority *Mt. Rakhi* v. *Baza* (3) which decided that an Awan of Tallagang had no power of making a will disposing of his ancestral property, recited as a well established proposition that a sonless Awan had unrestricted power to make such gift.

Counsel for the respondent has attached great weight to *Amir Ali* v. *Mt. Baggo* (2), a Gujrat case, in which a gift to a resident daughter was maintained and that to a non-resident daughter was set aside and he also relied on the general view taken in *Yakub Khan* v. *Fateh Khan* (4) and *Lal Khan* v. *Nura Khan* (1). As against these authorities there appears to us a great weight of authority in support of the contentions of the appellants, and we need only quote *Nur Ahmad* v. *Ghulam Husain* (5), *Devi Dass* v. *Bhakra* (6), *Khuda Bakhsh* v. *Waham Ali* (7) and *Nur Khan* v. *Sarfraz* (8).

We find it fully established that a sonless Awan of Tallagang Thasil of Attock District has an unrestricted power of gifting his property, ancestral or non-ancestral to a daughter or the issue of such daughter.

We accept both appeals with costs.

Appeals accepted,

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(1) [1914] 72 P. R. 1914=25 I. C. 556=233 P L. R. 1914.

(2) [1908] 15 P. R. 1907=4 P. L. R. 1908=35 P. W. R. 1907.

(3) A. I. R, 1924 Lah. 452.

(4) [1914] 5 P. R. 1914=20 I. C. 14=253 P. L. R. 1913.

(5) [1915] 56 P. R. 1915=51 P. L. R. 1916=30 I. C. 90=135 P. W R. 1915.

(6) [1899] 53 P. R. 1899.

(7) [1911] 88 P. R. 1911=144 P. L. R. 1911=10 I. C. 36=116 P. W. R. 1911.

(8) [1912] 100 P. R. 1912=249 P. L. R. 1912 =16 I. C. 21=238 P. W. R. 1912.

A. I. R. 1926 Lahore 689 (1)

SHADI LAL, C. J.

Joti Sarup—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 762 of 1926, Decided on 25th June 1926, reported by the S. J., Karnal, on 3rd May 1926.

Criminal P. C., S. 107—No overt act—Expression of opinion by some witnesses is insufficient to prove danager of breach.

Where the accused is not shown to have committed any overt act, the mere expression of opinion by some witnesses that there is an apprehension of a breach of the peace and that the parties should be bound down is certainly insufficient to prove that there is really any danger of breach of the peace being committed by the accused : 1 *P. L. T.* 681 and 32 *All.* 571, [P 689, C 2] *Foll.*

Manohar Lal—for Petitioner.

Facts. — The applicant, Joti Sarup, was bound over under S. 107, Criminal P. C., by order of the Sub-Divisional Magistrate of Kaithal and made to execute a bond of Rs. 500 with one surety for like amount to keep the peace for one year. He appealed to the District Judge, but the appeal was dismissed by order dated 13th March 1926. He has now applied to this Court for revision.

Grounds.—The applicant has been bound down on a record of evidence which is very poor indeed. There are only three prosecution witnesses (one of whom is Ram Kishen of the opposite party who has also been bound down by the Magistrate) and two lambardars. Their evidence is simply to the effect that there is a dispute between the parties about a gurdwara and that there is an apprehension of breach of the peace. Not a single overt act of the applicant has been proved or even hinted at. On the contrary from the applicant's statement it appears that he is in possession of the gurdwara and the opposite party wish to oust him from it. In *Lachmi Singh* v. *Emperor* (1) it was held that where one party is clearly in possession of property and another party wants to take forcible possession of it, there is no dispute as to possession of the property within the meaning of S. 145 of the Criminal P. C., and the appropriate course is to initiate proceedings under S. 107 of the Code but that an order uuder S. 107 can only be passed when there is a finding that the persons sought to be bound down are guilty of wrongful acts committed or sought to be committed by them and that this can only be proved by overt acts against each individual. Note 72 on page 119 of the Criminal P. C., by Atulchandra and Nripendrakumar Gupta shows that to bind down a person under S. 107 it is not enough to show that there is a great probability of a breach of the peaco, but that the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace : see also *Mohammad Yakub* v. *Emperor* (2). So far as I can see the mere expression of opinion by two witnesses that there is an apprehension of a breach of the peace and that the parties should be bound down is certainly insufficient to prove that there is really any danger of breach of the peace being committed by the applicant. The fact that the police reported against Ram Kishan and Ala Singh only (see their report dated 6th July 1925, is also an indication of the fact that there is no apprehension of breach of the peace so far as Joti Sarup is concerned.

It is, therefore, recommended that the order against the applicant may be quashed.

Order.—For the reasons recorded by the learned Sessions Judge I set aside the order of the Magistrate directing the accused to furnish security under S. 107, Criminal P. C.

Order set aside.

(1) (1920) Pat. L. T. 681=59 I. C. 374.

(2) [1910] 32 All. 571=7 A. L. J. 649=6 I. C. 454=11 Cr. L. J. 355.

A. I. R. 1926 Lahore 689 (2)

JAI LAL, J.

Chirag Din and *others* — Plaintiffs — Appellants.

v.

Samanda and *others* — Defendants—Respondents.

Second Appeal No. 2720 of 1925, Decided on 2nd July 1926, from a decree of the Addl. Dist. J., Lahore, D/- 19th May 1925.

Civil P. C., O. 41, R. 20—R. 20 applies to cases of admittedly necessary parties and can be applied on appellants' application for addition.

Rule 20 does not only apply to cases where there is any doubt as to a party being a necessary party, but also applies to persons who are admittedly necessary parties; so also it not only applies to cases where the Court itself discovers the defect as to the nonjoinder of the parties, but also to cases where the appellant applies for the addition of a party. [P 690 C 2]

Hukam Chand—for Appellants.

Daulat Ram—for Respondents.

Judgment.—A preliminary objection is taken on behalf of the respondents that the appeal is barred by time as the full Court-fee stamp was paid after the period of limitation. It appears that after the institution of the suit, but before the presentation of an appeal to the District Judge, the amount of Court-fee to be paid on the memorandum of appeal was raised by the Punjab Legislative Council. The appellants, however, paid the same Court-fee as was paid by the plaintiffs when instituting the suit. No objection was taken to this on behalf of the defendants-respondents. The appeal was dismissed by the District Judge and an appeal was preferred to this Court, but the defendants' paid the same stamp as in the Court of the District Judge, and on its being pointed out to the appellants it was made good by them in respect of the Court-fee paid here and in the District Judge's Court within the time fixed by the office; but then the ordinary period of limitation had expired. As no objection was taken by the respondents in the Court of the District Judge and as the mistake was an accidental one I extend the time for filing the appeal in this Court to the date when the deficiency in the Court-fee stamp was made good by the appellants and proceed to hear the appeal on the merits.

The suit was for possession of land. During the pendency of the suit Shahab-ud-Din, one of the defendants, died and his son Hira, was duly brought on the record as his legal representative. The necessary correction was in the plaint. The suit was finally dismissed, but in the decree-sheet, which was prepared in the trial Court, the name of Shahab-ud-Din was still shown as a defendant and not that of Hira. The plaintiffs preferred an appeal against the decree of the trial Court and named Shahab-ud-Din as one of the respondents. This appeal was filed in April 1924. Nearly a year later the appellants discovered their mistake and applied that Hira, son of Shahab-ud-Din, be made a respondent. The learned District Judge refused this prayer on the ground that O. 41, R. 20, did not apply to the case. In his opinion that rule only applies where there is any doubt as to a party being a necessary party. This view of the learned District Judge is manifestly wrong. Order 41, R. 20, provides that where any person who was a party to the suit in the Court from whose decree the appeal is preferred has not been made a party to the appeal, and it appears to the Court that such person is interested in the result of the appeal, the Court may adjourn the hearing to a future date to be fixed by the Court and direct that such person may be made a respondent. This rule does not exclude its applicability to persons who were necessary parties to the appeal. The case was not one for action under O. 22, because Hira had already been brought on the record. He had not been a party to the appeal though admittedly he was a necessary party. Counsel for the respondents urges that O. 41, R. 20, applies to cases where the Court itself discovers the defect as to the nonjoinder of the parties and not to cases where, as in this case, the appellant applies for the addition of a party. There is no force in this contention. The case cited by the learned counsel, *Raushan Ram* v. *Sheran Khan* (1), is a clear authority against him. In the present case I find that the omission to implead Hira was due to a mistake in the decree-sheet prepared by the trial Court. It has not been shown that there was anything in the judgment of the trial Court to give the counsel who filed the appeal notice of the death of Shahab-ud-Din. I hold, therefore, that this was a fit case in which the District Judge should have exercised his discretion under O. 41 R. 20, Civil P. C.

I accept this appeal and remand the case to the learned District Judge with direction to add Hira, son of Shahab-ud-Din' as respondent in the appeal and to proceed with the same in accordance with the law.

No question of the appeal being barred by time owing to the omission of Hira arises in this case.

(1) [1920] 2 L. L. J. 5=57 I. C. 259.

The Court-fee on the memorandum of appeal will be refunded to the appellants, and the other costs will abide the result of the appeal.

Appeal accepted.

A. I. R. 1926 Lahore 691

SHADI LAL, C. J., AND COLDSTREAM, J.

Ghauns—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 281 of 1926, Decided on 3rd June 1926, from an order of the S. J., Gurdaspur, D/- 26th February 1926.

(a) *Criminal Trial—Circumstantial evidence, to justify conviction must be incompatible with accused's innocence.*

In order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [P. 691, C. 2]

(b) *Criminal P. C., S. 423—Conviction under S. 302, Penal Code—High Court will not alter it to one relating to property.*

In appeal High Court is not justified in altering the conviction under S. 302, I. P. C., to a conviction under one of the sections dealing with offences against property: *A. I. R.* 1925 *P. C.* 130, *Dist.*; *A. I. R.* 1924 *Lah.* 109, *Foll.* [P. 691, C. 2]

Mehr Chand Mahajan—for Appellant.

C. H. Carden Noad—for the Crown.

Judgment.—The appellant, Ghauns a Rajput of Jhanda Langha in the Gurdaspur District, has been convicted of the murder of one Mt. Hassan Bibi, of the same village; and has been sentenced under S. 302, Indian Penal Code, to the penalty of death. The prisoner, who is a bachelor of about 25 years of age, is said to have made improper overtures to Mt. Hassan Bibi in the beginning of October 1925, but when summoned before a panchayat of the village he begged her husband to pardon him. On the 24th October 1925, Mt. Hassan Bibi left her house during the absence of her husband and went to her sugercane field. The husband returned to the house in the afternoon and finding his wife absent he searched for her in the village, and ultimately found her corpse lying in the field. The medical witness, who conducted the post mortem examination, found five injuries on the body and declared that death was due to throttling.

Now, there is no eye-witness of the affair, and the case for the prosecution depends entirely upon circumstantial evidence. The two circumstances, which have been proved by the prosecutien, are these: (1) On the afternoon in question the prisoner, Ghauns, was seen working in his field, and Mt. Hassan Bibi was at that time in her own sugercane field at a distance of about 30 or 35 karams; (2) on the 27th October he dug out from beneath a shisham tree five ear-rings, and also gave information which led to the recovery of two bangles from Mohna, goldsmith. These ornaments have been proved to be the property of the deceased.

Now it has been repeatedly laid down that in order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. We do not think that the circumstances proved in this case exclude every reasonable hypothesis other than that the death of the woman was caused by the appellant. They are not incompatible with the theory that the prisoner stole the ornaments after she had been killed by some other person and when she was lying in the field. Be that as it may, we are not prepared to hold that the evidence in this case necessarily points to the conclusion that the murder was committed by the appellant.

Nor do we think that we would be justified in altering the conviction under S. 302 to a conviction under one of the sections dealing with offences against property. In this connexion it is only necessary to refer to the judgment in *Wallu* v. *Emperor* (1) which is on all fours with the present case. The observations of their Lordships of the Privy Council in *Begu* v. *Emperor* (2) must be read with the facts of that particular case and are not intended to lay down any rule of general application. Whether the appellant should be tried on another charge is a question which must be decided by the District Magistrate. We offer no opinion on the question beyond saying that the present order of acquittal

(1) A. I. R. 1924 Lah. 109=4 Lah. 373.
(2) A. I. R. 1925 P. C. 130=6 Lah. 226.

on the charge of murder should not be taken as precluding the prosecution of the prisoner for an offence relating to property.

For the aforesaid reasons we accept the appeal and setting aside the conviction and the sentence, direct that the accused be released forthwith.

Conviction set aside.

A. I. R. 1926 Lahore 692 (1)

BROADWAY AND ADDISON, JJ.

Chandu Mal—Plaintiff—Appellant.

v.

Mahmud Hassan—Defendant—Respondent.

Second Appeal No. 2775 of 1922, Decided on 29th June 1926, from a decree of the Dist. J., Delhi, D/- 10th August 1922.

Evidence Act, S. 102—Execution of document admitted—Onus is on executant to prove that its terms were not understood.

Where the execution of a document is admitted, the onus is on the executant to prove that he did not understand its terms, even if he is an illiterate person. [P 692, C 2]

Shamair Chand—for Appellant.

Judgment.—This second appeal has arisen out of a suit brought by one Chandu Mal, a Hindu money-lender, against Mahmad Hassan, described as an illiterate Muhammadan. Mahmud Hassan is said to have executed a mortgage on the 2nd of March 1914, in favour of Chandu Mal, the mortgage-money being Rs. 300. It was stipulated in the mortgage-bond that the money would be re-payable with interest at the rate of 24 per cent. with half-yearly rests, i. e., compound interest calculated half yearly. The suit was brought on the 1st of March 1921, Chandu Mal claiming a sum of Rs. 1,308. The delendant admitted the execution of the bond, but stated that he was not told that the interest was to be compound interest. He further pleaded that in March 1916 a settlement had been arrived at by a panchayat and that on payment of a sum of Rs. 100 the entire amount would be liquidated. The Courts below have found that the defendant did not understand the bargain properly, that the rate the interest was exceptionally high and that the circumstances were such as to justify a presumption that the plaintiff was in a position to dominate the will of the defendant and used that position to obtain an unfair advantage.

It has been urged before us that when Mahmud Hassan admitted the execution of the bond the onus rested on him to prove his allegation that he was not told that the interest was to be compound. As a matter of fact no evidence has been led by him in support of this allegation. The conclusion arrived at by the Courts below as to the defendant not having understood the bargain appears to me based on pure conjecture, there being no evidence to support it; nor are there any special circumstances which wonld justify the opinion arrived at. Again, as to the question of undue influence, it is to be noted that Mahmud Hassan never pleaded the same.

In the circumstances I would accept the appeal and grant the plaintiff a decree as prayed in his plaint, i. e., a decree for Rs. 1,308 with future interest from the date of decree till realization at the rate of 6 per cent. per annum. He will be entitled to get his interest from the date of suit till date of decree at the rate of 24 per cent. per annum with half-yearly rests. The appellant will be entitled to his costs throughout.

Appeal accepted.

A. I. R. 1926 Lahore 692 (2)

JAI LAL, J.

Rikhi Kesh—Petitioner.

v.

Mela Ram—Respondent.

Civil Petition No. 222 of 1926, Decided on 12th June 1926, for stay of the suit till decision of Civil Appeal No. 1974 of 1925.

Civil P. C., S. 10—Same matter in issue in suit in another Court and appeal in High Court between same parties — High Court can order stay.

In a suit where the matter in issue is also in issue in an appeal pending in High Court through previous suit between the same parties, High Court is competent to order stay of suit under S. 10: *Lah. L. P. A. 351 of 1925, Foll.* [P 693, C 1]

Dev Raj Sawhney—for Petitioner.

Moti Sagar and *Har Prasad*—for Respondent.

Order.—This is an application under S. 10 of the Civil C., for stay of proceedings in a suit fd in the Court of the Subordinate Judgof Amritsar by the respondent againstne petitioner. It is admitted that the ues involved in suit have already beencided in a suit for partition which ha been disposed of by the Senior Subordiate Judge of Amritsar, and that a firs ppeal in that case is pending in ths Court. In that appeal the question involved in the suit will directly arise O the merits, therefore, there is no dcbt that an order under S. 10 of the Civl P. C, to stay proceedings in the suit wich is now pending in the Court o thSubordinate Judge at Amritsar is necessry.

The only question whether such an order should be passe by the Court in which the suit is pding, or whether this Court is compete to pass the order. As I have already stad an appeal from the decree in which t question in issue has already been decid is pending in this Court. Judgmenin *Miss R. Buckley* v. *K. S. Sheikh Mammad Naqi* (1) is an authority in suort of the contention of the petitioneriat this Court is competent to pass sucan order. Consequently I order that e suit be stayed pending the decision (Appeal No. 1974 of 1925 by this Cour No order as to costs.

Stay ordered.

(1) Letters Patent App No. 351 of 1925 Decided on 16th Janu 1926.

A. I. R. 1926 Lhore 693

CAMPBELL AND DAP SINGH, JJ.

Ichhar Singh and *anr*—Defendants.—Appellants.

v.

Natha and *another*—Plaintiffs—Respondents.

Second Appeal No. 58 of 1922, Decided on 7th July 1926 from the decree of the Dist. J., Lyallpu - 3rd January 1922.

(a) *Hindu Law—Alienat—Legal necessity—Creditor need not see to thepplication of the money.*

The creditor has only enquire into the necessity for the advan and if he acts honestly he is not bound to to the application of the money : 6 *M. I.* 393 (*P. C.*), *Foll.* [P 694 C 1]

(b) *Hindu Law—Guardianship—Mother is legal guardian in absence of father.*

Under Hindu Law in the absence of any custom to the contrary, the mother is a de jure guardian of the minor after the death of the father. [P 694 C 1]

(c) *Limitation Act, S. 5—Extension.*

Where an appeal is filed a day later, through oversight of the counsel's clerk, time may be extended under S. 5. [P 693 C 2]

Shamair Chand—for Appellants.

Campbell, J.—The plaintiffs, who are two brothers sued for possession of one square of land and to recover mesne profits thereof. They alleged that after the death of their father, their mother mortgaged the square in question by a registered deed dated the 27th of March 1913 for Rs. 1,000 to the father of the defendants fixing six years as the period for redemption. The plaintiffs claimed that the mortgage was inoperative against them and they claimed mesne profits on the ground that the mortgagees' possession was unlawful as against them. The defendants pleaded ratification of the mortgage by Plaintiff No. 1 after attaining majority and that the mortgage having been made for the benefit of the minors was binding on them and that the plaintiffs were not entitled to mesne prefits. They also raised some formal pleas which it is now unnecessary to enter into.

The first question to be decided in the case is the question of limitation. The appeal should have been filed on the 10th of April 1922, but was actually filed on the 11th April 1922. It appears from an affidavit by the clerk of Mr. Shamair Chand, counsel for the appellants, that Mr. Shamair Chand gave him two cases on the 8th of April with oral instructions to put in this appeal on the 10th and a revision on the 11th. By an oversight Mr. Shamair Chand entered the revision on the 10th and the appeal on the 11th in his diary. The result was that the clerk put in the appeal on the 11th following the diary and not the oral instructions. In the circumstances of this case we think that time may be extended under S. 5 of the Limitation Act. We accordingly extend it.

On the merits the mortgage was made up of three items of consideration. Rs. 705-10-0 was the amount paid to enable the plaintiffs to acquire proprietary title from the Government in these squares. The Courts below have held that this amo

was duly paid and have allowed it as being for necessity.

The second item, namely, Rs. 281-10-0 was held by the Courts to have been paid before the Sub-Registrar. Both Courts, however, held that mere enquiries by an alienee of the existence of a debt cannot exonerate him in cases in which he is dealing with a female guardian of minors. They held that in such a case it was the alienee's duty to see that the amount advanced had been duly disbursed for the benefit of the minors. With this statement of law we are unable to concur. It was ruled by the Privy Council in *Hanoomanpersaud* v. *Mussummat Babooee Munraj* (1), that the creditor had only to enquire into the necessity for the advance and that if he acted honestly he was not bound to see to the application of the money, see Mulla's Hindu Law, para. 440. The learned District Judge seems also to have been under the impression that the widow was only a de facto guardian. Under Hindu Law, in the absence of any custom to the contrary, and none seems to have been alleged or proved in this case, the mother would be a de jure guardian of the minors after the death of the father. The third item of Rs. 10 was for the expenses of the mortgage and for registration and need not be discussed.

We remand the case under O. 41, R. 25 of the Civil P. C., for a decision on the question whether in view of the evidence led in the case the father of the defendant made reasonable enquiries into the necessity for the loan qua the item of Rs. 284-10-0 and whether he acted honestly in advancing the sum. The return will be made by the District Judge within three months and the parties will have fifteen days for any objections that they make. The learned District Judge has further held that the terms of the mortgage were unreasonable, and there was no necessity to borrow at the rate and terms contained in the mortgage. We do not think it necessary to enter into discussion of this question at present before a finding is arrived at on the point on which the case is being remanded.

Case remanded.

(1) [1854-57] 6 M. I. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P. C.).

A. I. R. 1926 Lahore 694

HARRISON AND DALIP SINGH, JJ.

Chanan Din and *another*—Plaintiffs—Appellants.

v.

Mt. Taban and *other*—Defendants—Respondants.

Second Appeal No. 228 of 1922, Decided on 28th June 1926, from a decree of the Addl. Dist. J., Lahore, D/- 6th June 1922.

Ejectment—Trespasser building upon another's land without believing bon fide that land belongs to him is not entitled to compensation but is entitled to remove the material.

The principle of English Law *quicquid plantatur solo solo cedit* applies to India, but does not apply either to lessee or to trespassers.

Where therefore a trespasser erects a building on another's land without bona fide belief as to the land belonging to him, the trespasser, on being evicted by the owner, cannot receive compensation for the building, but is entitled only to remve it: 2 *Pat. L. J.* 600; 21 *All.* 496 and 20 *Bom.* 298 *Foll.* [P695 C 1]

Khurshaid Zaman and *Anant Ram Khosla*—for Appellants.

Niaz Mohammad—for Respondents.

Judgment.—The plaintiffs in this case sued for one-third share in certain property left by Mt. Imam Bibi their mother's sister. This property falls into three portions, and the plaintiffs have been given a decree for one-third share in Nos. 2 and 3 only, conditional on their paying compensation to the respondents for the value of building erected by them after the death of Mt. Imam Bibi and a small sum of Rs. 23 on account of their share of the mortgage-money paid off by one Nur Din, Defendant No. 2. The suit regarding the first portion was dismissed it being found that this property had belonged to the husband and not to the father of Mt. Imam Bibi.

On second appeal two points have been agitated (1) that a decree should have also been given for the portion No. 1, and (2) that the plaintiffs should have been allowed to retain the buildings without payment of any compensation at all, or, this was not remitted, the defendants almost should have been allowed to remove their material. As to the first point much arguments have been addressed to us as to the admissibility and value of a certain document, on which the defendants rely, and which has been held to rebut the oral evidence

produced by the plaintiffs. The question involved is difficult, and it is necessary for us to decide it, for on going through th record as a measure of precaution we fin that the plaintiffs have wholly and lam ntably failed to establish any sort of title to any portion of No. 1. There is th no case for the defendants to meet a no evi o rebut regarding this poion.

As to the sec oint, the appellants rely on tocking ata Iron & Steel Co. (1), a ring wh ays down that the princip of Eng Law *quicquid plant-atur* so solo c it applies to India. S. 109 the Tra fer of Property Act, and Be Ram v. undan Lal (2) make it quite lear tha the principle does not apply t lessees, and *Premji Jivan Bhati* v. *Haji Dassum Jana Ahmed* (3) shows that in he same way and on the same ground it does not apply to trespassers either. The ultim te position, taken by the plintiff-app ants is, we think, sound and reaso le, namely, that the defendants are entitled to remove their material. e matter have urged that they acte fide belief that they were entitl property, but this beli ble to show y could possibly hav ted or how extreme view of their ri ken such an absence of the rights of , and the We find, therefore, that e plaintiffs. are entitled to a decree for possession of one-third share of the property, decreed by the District Judge, subject to payment of Rs. 23 as a share of the mortgage-money before taking possession, and the defendents are entitled to remove their material at any time up to 1st November 1926.

The cross-objections are dismissed with costs.

The appellants and respondents will bear their own costs.

Appeal partly accepted.

(1) [191 2 P. W. 133=2 P. L. J. 600=41 I. C 75=(1917) P. H. C. C. 273.
(2) [189 21 All. 496=26 I. A. 58=7 Sar. C.).
(3) [189 20 Bom. 298.

A. I. R. 1926 Lahore 695

HARRISON, J.

Thakar Singh—Accused—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 606 of 1926, Decided on 13th July 1926, from the order of the Dist. Mag., Jhang, D/- 4th January 1926.

Criminal P. C., S. 107—Co-sharer making lawful improvements on joint property—Other co-sharers objecting—Order under S. 107 cannot be passed.

When a co-sharer exercises his lawful rights in improving the joint property in spite of the objection of his co-sharers, he cannot be bound over under S. 107 on the ground that his action is likely to cause a breach of the peace; 19 *Cal.* 253, (*P. C.*) *Rel. on.* [P. 696, C. 1]

Shamair Chand—for Petitioner,

Judgment.—Thakar Singh has been bound over under S. 107, Criminal P. C., and his appeal has been dismissed by the District Magistrate, Jhang. The ground on which security was demanded from him was that he wished to substitute and proceeded to endeavour to substitute an iron Persian wheel for the wooden one on a well jointly owned by him and his two brothers. It has been found by the District Magistrate that the result of the substitution would be an increase of Rs. 100 in the rental capacity of Thakar Singh's share of the land watered by the well. Thakar Singh has definitely stated that he asks for no contribution from his brothers and does not wish either of them to pay for his share in the improvement. He has been put on security on the ground that his persistence in trying to improve the joint property is likely to lead to a breach of the peace, it being probable that such breach will be committed by the brothers.

The only question under the circumstances is whether Thakar Singh is exercising his lawful rights in improving the property in this way, and if so, such persons as obstruct him in the exercise of his lawful rights and cause danger to the peace, and not he, should be put on security. The rights of co-owners are clearly laid down by the Privy Council in *Lachmeswar Singh* v. *Manowar Hassein* (1), and although that case deals

(1) [1892] 19 Cal. 253=19 I. A. 48=6 S. 133 (P.C.).

with injunctions the principle laid down governs this also. I find that Thakar Singh is entitled to improve the property, in spite of his brothers' objections, by substituting a superior for an inferior Persian wheel; and this being so, the order demanding security from him is unjustified.

I accept the application for revision and set aside the order demanding security.

Application allowed.

A. I. R. 1926 Lahore 696

ADDISON, J.

Chiranji Lal and *others*—Objectors—Appellants.

v.

Munshi and *another*—Insolvent—Respondents.

Miscellaneous First Appeal No. 2373 of 1925, Decided on 20th February 1926, from an order of the Dist. J., Karnal, D/- 4th July 1925.

Civil P. C., O. 1, R. 1—Appeal by claimant of property sold by Receiver as belonging to insolvent—Receiver is a necessary party.

The Receiver is a necessary party to an appeal by a claimant whose claim with regard to a property sold by the Receiver as belonging to an insolvent has been dismissed.

Sundar Das—for Appellants.

Shamair Chand—for Respondents.

Judgment.—This appeal is closely connected with Appeal No. 2374 of 1925. In this case a house and shop were sold by the Receiver in insolvency as belonging to the insolvent Munshi and M. Sardhi. Certain collaterals, Chiranji Lal, etc., came before the District Judge and claimed that the property was theirs, having been purchased by them from one Sirkha Jat. They relied upon an entry in a bahi which was not produced. The District Judge disbelieved the evidence and dismissed the application.

Against this decision Chiranji Lal, etc., have appealed and have joined as respondents the two insolvents. Rughnath, a creditor and the auction purchaser and Girdhari, one of the other creditors, have not been made parties. For reasons given in my judgment in the connected suit the appeal must be dismissed with costs as incompetent as the Official Receiver who represents the insolvents' estate has not been made a party to it. Without him no decree can be no final adjudication of the matter as the insolvents' estate is vested in him and the money is with him.

Appeal dismissed.

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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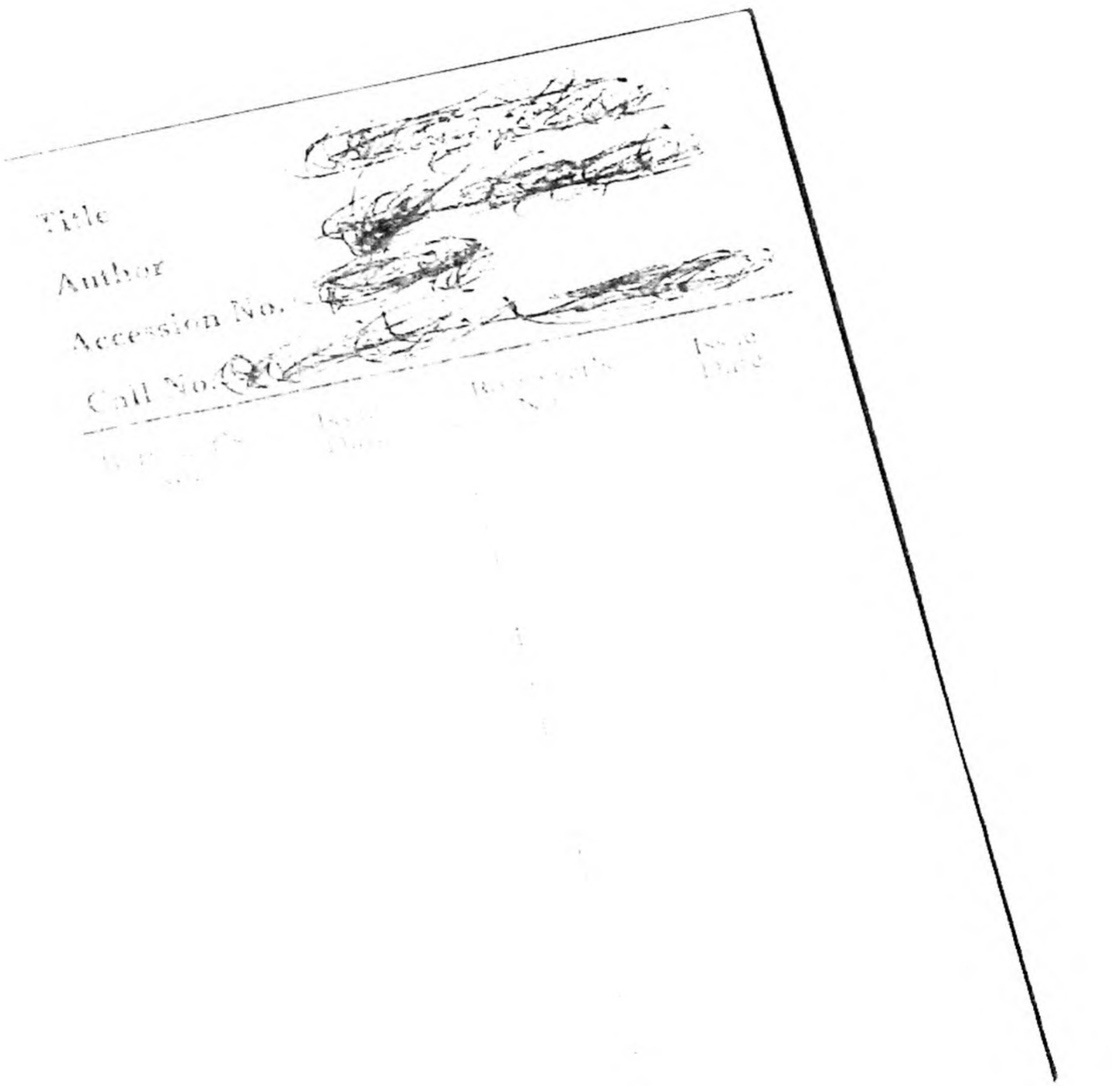
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